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AIDS: SOCIAL MEANINGS AND LEGAL RAMIFICATIONS

Janet L. Dolgin*

INTRODUCTION

Acquired Immune Deficiency Syndrome (AIDS) is already overdetermined. 1 A mysterious disease, its origins murky, its cure unknown, its prognosis fatal, AIDS enters a universe where health has become tantamount to salvation. 2 AIDS presents a major challenge to the medical and legal establishments, not simply because it is deadly but because it calls into question society's assumptions about health and disease. Consequently, the reactions of law and medicine to disease must be reformulated.

The average AIDS patient dies within thirteen to eighteen months of diagnosis, 3 and during that time, there is little beyond good nursing care that can be provided to relieve suffering or improve the likelihood of cure. 4 Medicine's primary contribution to combating AIDS has been the identification of the causative virus 5 and the consequent development of a test for AIDS antibodies. 6 Few

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1. To call AIDS overdetermined is to say that it is a symbol as well as a disease and that it is a symbol which bears a heavy baggage of meanings. Freud used the term overdetermination to refer to the representation of a large number of dream-thoughts in one image and to the transference of psychical value from a central image to other, apparently trivial, images. S. Freud, The Interpretation of Dreams 342-43 (5th printing 1968).


4. See id. at 20.

5. Researchers at the National Institutes of Health in Washington, D.C. called the AIDS virus human T-lymphotropic virus type III (HTLV-III), and French researchers at the Pasteur Institute in Paris called it lymphadenopathy-associated virus (LAV). Food and Drug Administration, Dep't of Health & Human Servs., 15 FDA Drug Bull. 27 (1985).

6. The test, an enzyme-linked immunosorbent assay (ELISA or EIA), detects the presence of antibodies to the AIDS antigen. Id. See also AIDS: What Is To Be Done?, Harper's Magazine, Oct. 1985, at 39, 41 [hereinafter cited as AIDS Forum] (the test does not detect the disease, but only the antibodies formed when someone has been exposed to the virus).
definitive conclusions can be drawn from a positive test for AIDS antibodies. The prognosis for the individual and the risk such an individual poses to others remain uncertain.

Judges and legislators have already faced a number of dilemmas posed by AIDS which necessitate the delineation of a concrete boundary between the state's responsibility to protect public health and the individual's right to be protected from governmental intrusion. The legal dilemmas are exacerbated because decisions must be made in the absence of adequate medical knowledge about the cause, epidemiology or treatment of the disease. Moreover, judicial and legislative decisions are being made in a context in which fears about the disease, and metaphors originating from it, are powerful and work to cloud legal categorizations and preclude objective evaluations.

The promulgation and interpretation of rules and regulations related to AIDS demands awareness of the most recent medical knowledge and sensitivity to popular conceptions of the disease. As medical knowledge about AIDS grows, governmental justifications for regulating behavior will shift. In order to separate medical knowledge from fear and scientific discourse from panic inspired by media or sustained by people's images of AIDS patients, it is necessary to examine the assumptions through which AIDS is understood and interpreted in the society.

(statement of Dr. Mathilde Krim made during a forum among a group of public health officials, physicians, scientists, and medical historians sponsored by Harper's Magazine).


8. See, e.g., Hyland Therapeutics v. Superior Court, No. H001204, H000728 (Cal. Ct. App. Dec. 10, 1985) (available Feb. 12, 1986, on LEXIS, States library, Cal. file) (language of California Health and Safety Code precludes holding blood product manufacturers strictly liable for death of hemophiliac who contracted AIDS following treatment with blood products); South Fla. Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798 (Fla. Dist. Ct. App. 1985) (privacy interest of blood donors and society's interest in strong volunteer blood donation program precludes respondent from obtaining names of donors who might have been responsible for donating blood that transmitted AIDS to respondent blood donee); LaRocca v. Dalsheim, 120 Misc. 2d 697, 467 N.Y.S.2d 302 (Sup. Ct. 1983) (court refuses to issue an injunction against creating an AIDS center at Downstate Correctional Facility in Fishkill, finding State had no such plan, and refuses to grant petitioners' request that all movement in or out of the facility be stopped until examinations be conducted for AIDS).

9. See infra notes 30-53 and accompanying text.

10. See, e.g., Afraids, The New Republic, Oct. 14, 1985, at 7. Afraids is an acronym for Acute Fear Regarding AIDS, so named because the disease has spawned a second epidemic of hysteria, ostracism, discrimination, and violence. Id.
I. Society's Understanding of AIDS

The human body has frequently served as a source of metaphors about society. The boundaries of the body provide useful models in many cultures for considering and explaining the boundaries of the social order.

A. The Symbolism of Disease

The English anthropologist Mary Douglas argues that in order to understand rituals throughout the world involving excreta, breast milk, saliva and other products of the body, it is necessary "to see in the body a symbol of society, and to see the powers and dangers credited to social structure reproduced in small on the human body." Correlatively, disorders in society may be analogized to disorders in the body. Certain diseases provide extensive metaphors about social processes and interactions. Cancer and tuberculosis have been two such diseases.

Metaphors built around a disease and describing social processes play back into conceptions of the disease and of people diagnosed as having it. Cancer is used to describe "the biggest enemy, the furthest goal." "Cancer," writes Susan Sontag, "is now in the service of a simplistic view of the world that can turn paranoid." Tumors are designated malignant, and describing someone or something as cancerous is "an incitement to violence." The disease is comprehended through the use of social metaphors (e.g. militaristic metaphors), but with use such metaphors may lose their analogic quality and become "reality." To continue with the example of cancer as metaphor and metaphor as cancer, the disease, originally analogized to war, comes to be understood as war. As such, cancer itself can become the central symbol in a metaphor used to

12. Id. at 115.
15. S. SONTAG, supra note 13, at 69.
16. Id.
17. Id. at 84.
18. Id. at 64. Cancer "invades." There is a "war on cancer." Cancer cells "colonize." Effective therapy is "radical." Patients are "bombarded" with toxic rays during radiotherapy. Id. at 64-67.
describe other social processes. These doubly refurbished metaphors may then be applied again to the disease, reinforcing the “reality” that cancer is war. 19

Mysterious and serious diseases like tuberculosis in the nineteenth and early twentieth centuries, cancer in the mid-twentieth century, 20 and AIDS today, are especially apt to be a source and object for metaphor. 21 The meanings that attend such diseases frequently impose responsibility and implicate morality and notions of pollution. Frequently in history, contact with someone suffering from a serious disease for which there was no known cause or certain cure has been feared as a source of moral pollution. This was true of tuberculosis, now known to be infectious, and of cancer, known not to be contagious. 22 It was true of the plague, which devastated Europe before bacterial infection was understood, and of leprosy; in the Middle Ages, lepers were denied civil rights and social acknowledgment through rigid rules, but such rules were frequently cancelled on special religious occasions such as Christmas and the Pentecost. 23 And it is true of AIDS.

In the West, notions of pollution are closely linked with morality. 24 Carriers of pollution are considered responsible for their own plight. 25 The moral correlates of disease vary with the symptoms of each particular disease and with the social patterns, fears and conflicts of the larger society. Tuberculosis was associated with an over-abundance of passion; cancer has been linked with the opposite state, the repression of emotional life. 26 In both cases, behavior was thought to cause disease. 27

20. S. SONTAG, supra note 13, at 5.
21. Syphilis, although horrible, did not generate a world of metaphor, even before the discovery of antibiotics, because the cause of the disease was clear. See id. at 59-60.
22. Id. at 6-7.
24. See M. DOUGLAS, supra note 11, at 129-39. In the West, unlike other social orders such as traditional caste India, purity and pollution are encompassed by, understood through, and are usually less significant than notions of good and evil. Id.
26. See id. at 20-23.
27. The apparent contradiction between disease as contagion, the result of contact, and disease as a response to personal imbalance is often mitigated when claims about causation are examined in context. The two sorts of explanations represent variant fears and have different referents. Those who are sick can communicate their disease, their pollution, through contact with others who are well. But each individual already so diseased may be seen as responsible.
B. The Metaphors and Symbolism of AIDS

AIDS is what Susan Sontag would label a "master illness." It is serious, novel, uncertain, and affects specific sociologically defined groups more than others. AIDS, like cancer and tuberculosis before it, is "used to propose new, critical standards of individual health, and to express a sense of dissatisfaction with society as such."  

1. Metaphors of Causation. — Popular conceptions of AIDS, in large part stimulated by media reports, stress both a theory of causation based on contagion and a theory of causation based on personal morality. AIDS is conceived to be the result of individual excesses and imbalance and to be dangerously contagious.

The association of AIDS in the United States with "high-risk groups," defined by behavior rather than by passive factors such as genetics or environment, encourages the notion that those who suffer from the disease bear responsibility. Labelled "divine retribution" and the "gay plague," AIDS is linked with homosexual promiscuity and illegal drug use. More generally, the disease is associated with the defiance of both normal family life and socially approved forms of sexuality. In addition to the delineated high-risk groups,
prostitution may be a conduit of AIDS, and some male AIDS patients not identified with a risk group report a personal history of frequenting prostitutes. In the American imagination, prostitution sits between, and serves both, normality and marginality. Prostitution is illegal and morally suspect, but our culture tolerates prostitution as permissible for heterosexual men.

The popular belief that AIDS victims cause their own illness coexists with the fear, verging on panic, that AIDS will enter the general population. The sense of "them" and "us" has been encouraged by responses of the federal government to AIDS. In April 1985, Margaret Heckler, then Secretary of Health and Human Services, speaking at an international conference on AIDS sponsored by the United States Public Health Service and the World Health Organization, announced that the government hoped to find a cure for AIDS "before it spreads into the general population."

Evidence now available indicates that AIDS is transmissible sexually and through the blood but probably cannot be spread through casual contact such as kissing, sharing silverware or sitting next to an AIDS patient on the bus. Yet, people fear contact with AIDS patients and with persons in risk groups. These fears are fueled by the media. Tabloids specialize in lurid stories about "innocent" AIDS victims. In July 1985, Life Magazine carried a cover story on AIDS, announcing that "Now No One is Safe from

35. See Allen, Epidemiology of Acquired Immune Deficiency Syndrome and Infection: Human T-Lymphotropic Virus/Lympho-Neoplasia-Associated Virus (HTLV-II/LAV), in AIDS: LEGAL ASPECTS OF A MEDICAL CRISIS 15, 20 (1985). Prostitutes may become infected with AIDS as a result of drug use or through sexual contact with men carrying the AIDS antibody. The importance of prostitution in transmitting the AIDS virus in the United States is still undefined. Id. at 20.


37. See Bazell, Waking Up to AIDS, THE NEW REPUBLIC, May 13, 1985, at 17, 18. But see AIDS Forum, supra note 6, at 43 (concentrating on gay and bisexual men obscures fact that AIDS has been present in the general population from the beginning).

38. See AIDS Forum, supra note 6, at 43 (statement of Dr. Mathilde Krim, chair of the board of trustees of the AIDS Medical Foundation); Allen, supra note 35, at 21.

39. See, e.g., Seligmann, Hager & Raine, AIDS: The Saliva Scare, NEWSWEEK, Oct. 22, 1984, at 103. Newsweek, reporting that AIDS does not seem to be transmissible through saliva, provided the crucial information in a sentence which appeared to belie the point: "Though most experts believe that transmission of AIDS through saliva is an unlikely route, the epidemic continues to rage, with more than 6,000 cases reported in the United States since 1981." Id. at 103.

40. Reactions vary, but fear of AIDS has affected schools, offices, the military, and people simply travelling in public places. Roman Catholic parishioners attending mass expressed concern about being asked to share wine from a communion cup. N.Y. Times, Dec. 8, 1985, § 1A, at 46, col. 1.
AIDS.” 41 In fact, all of the AIDS patients featured in the story were members of identified risk groups (e.g., a child who had had a blood transfusion, a hemophiliac) or had had sexual relations with individuals in risk groups. The reality reported in this story — that only specific behaviors and activities appear to cause AIDS — conflicts with the headline’s proclamation that “no one is safe from AIDS.” 42

Fears of contracting AIDS, a disease that can be communicated through a limited number of specific channels, are augmented and generalized through the population by the production, largely media-inspired, of associated images and fears. These include the belief that homosexuality is polluting and immoral, that drug abusers endanger the public through criminal activity and, more generally, that people with AIDS have offended the moral order. 43 The boundary between Self and Other 44 is doubly threatened. Middle Americans identify AIDS with groups to which they do not belong but which portend moral or physical danger. 45 This identification engenders and sustains the association of AIDS with a threatening Other. Conceptions of AIDS suggest a return to an understanding of disease, largely absent in the United States since World War II, linking disease with morality, rather than with germs or physical processes in the body. When disease is thought to exist outside the body, in the moral as well as the physical universe, social relationships are implicated. Understandings of disease can provide new ways to name or redefine the character of social boundaries and the relations between Self and Other.

Antibiotics and technological medicine have attenuated the power of disease to represent good and evil and to provide metaphors for the relationships that exist between various groups within the so-

41. The New Victims, LIFE, July 1985, at cover, 12.
42. Id.
43. See supra notes 30-36 and accompanying text.
44. People generally conceive of themselves as sharing parts of their identities with some people, and as being unlike other people. The concepts of Self and Other are basic to ideologies, and a group which shares an identity will share an ideology, at least implicitly. Dolgin, Kemnitzer & Schneider, As People Express Their Lives, So They Are, in SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS, supra note 20, at 39-40. See generally J.P. SARTRE, CRITIQUE OF DIALECTICAL REASON (1976). People in different societies have developed different notions of Self and Other. These conceptions are reflected in a society’s “systems of law, religion, customs, social structures and mentality.” Mauss, A CATEGORY OF THE HUMAN MIND: THE NOTION OF PERSON; THE NOTION OF SELF, in THE CATEGORY OF THE PERSON 1, 3 (M. Carrithers, S. Collins, & S. Lukes eds. 1985).
45. See Bazell, supra note 37, at 19 (pondering whether middle Americans would resist immunizing their children if an AIDS vaccine did exist because the disease evokes images of “the bathhouses, leather bars, and shooting galleries of New York and San Francisco”).
ciety. Popular conceptions of cancer are an exception, but in the last decade even cancer has decreasing importance as a metaphor, as a result of the development of new forms of treatment which offer the hope and, frequently, the reality of cure.\textsuperscript{46} Noncontagious diseases, including arthritis, hypertension, cancer and diabetes, may be taken to imply some truth about their victims, or may be used as metaphoric representations of some aspect of the world. Such truths and metaphors, however, tend to be individualistic. They are not linked to notions of relationships or, correlatively, to notions of the boundaries between Self and Other.\textsuperscript{47} Most contagious diseases, including tuberculosis, polio, and measles, are now curable or preventable and thus have minimal metaphoric value. Even those illnesses which continue to carry multiple, metaphoric meanings are seldom used to comment on relationship, or on the way people understand themselves as people and relate to other groups of people. Disease and health are now primarily conceived of as individual phenomena and processes. Absolved by modern medicine, the sick-role no longer has moral correlates.\textsuperscript{48} Medical cures have been appropriated as a kind of salvation through technology.\textsuperscript{49}

AIDS upsets such morally neutral, individualized conceptions of disease and provides a ground for the creation of metaphors that characterize certain relationships between the individual and the group in our society.\textsuperscript{50} AIDS is always deadly and cannot be controlled medically.\textsuperscript{51} Identification of the AIDS virus may offer hope that a vaccine to prevent AIDS or an antiviral agent to cure it may be found but does not guarantee that end.\textsuperscript{52} Gayling Gee, the head nurse at the San Francisco General Hospital AIDS clinic, one of the best in the country, testifying before a congressional subcommittee in July 1985, asserted that her clinic was "offering patients the best

\textsuperscript{46}. S. SONTAG, \textit{supra} note 13, at 86-87.

\textsuperscript{47}. Ivan Illich calls these diseases the "modern epidemics." Although "epidemic" in geography, these diseases differ from other, earlier epidemic diseases in that they are perceived as individual phenomena rather than as communicable ills. See I. ILLICH, \textit{MEDICAL NEMESIS} 16-20 (1976).


\textsuperscript{49}. \textit{See} I. ILLICH, \textit{supra} note 47, at 113-14.

\textsuperscript{50}. \textit{See} \textit{supra} text accompanying notes 28-49.


\textsuperscript{52}. \textit{See} AIDS Forum, \textit{supra} note 6, at 45 (listing three serious obstacles to development of effective vaccine or treatment for AIDS).
that medicine now has to offer them, and we are offering them nothing."³

2. The Sociology of AIDS. — AIDS describes a terrible illness, and almost at once, connotes marginality within the social order. The disease has come to define and encompass those who suffer from it. AIDS is perceived as opaque, threatening and contagious, and these characteristics are imputed to AIDS patients. The characteristics through which the disease and individuals sick with it are understood are being generalized to the groups qua groups with which AIDS is linked, the so-called risk groups. This process of symbolic generalization, facilitated by panic, has obvious sociological ramifications.⁴

The reality of the disease is used to reinforce and justify stereotypical notions about people marginal to mainstream patterns and about homosexuals in particular. Presently, a diagnosis of AIDS can become a "diagnosis" of social marginality. The military, for example, has tried to use positive test results for AIDS antibodies to discharge individuals on the grounds that they are homosexuals.⁵ AIDS magnifies the stigma already attached to individuals belonging to risk groups and can be used to justify more pervasive discrimination.

In other societies, terrifying illnesses were linked with marginal social groups which then became scapegoats. In the Middle Ages, plague epidemics were linked with fringe groups that were not fully integrated into the community. Initial accusations by commonfolk against the nobility were transformed, through the nobility's initiative, into accusations against Jews, tens of thousands of whom were killed or burned in the fourteenth century.⁶ Where no Jews could be

53. Leishman, supra note 3, at 34.

54. See Afraids, supra note 10, at 7 (AIDS victims often lose jobs and apartments, are thrown out of school, are discharged by the military, and denied ambulance and hospital services.).

55. See AIDS Forum, supra note 6, at 47 (statement of Mervyn F. Silverman). A homosexual in the military can be discharged. The usual procedure involves bringing the person who is thought to be homosexual before an administrative discharge board that can recommend discharge honorably or less than honorably. Someone with AIDS must be retired and placed on disability, rather than discharged, in order to obtain access to military hospitals. Therefore, the manner in which an AIDS patient leaves the military is significant. See Friedman & Stamey, Military, in AIDS LEGAL GUIDE: A PROFESSIONAL RESOURCE ON AIDS-RELATED LEGAL ISSUES AND DISCRIMINATION 50-51 (Lambda Legal Defense and Education Fund, Inc. 1984). Communications from patients to physicians in the military are not privileged. MIL. R. EVID. 501(d). Reports of sexual history, by AIDS patients in the military to physicians, have been used in discharge hearings. Friedman & Stamey, supra, at 52.

found, gravediggers, beggars or cripples served as scapegoats. The epidemiological pattern that AIDS presents in the United States suggests a set of accusations which, appearing to be grounded in fact, are as irrational as the accusations that were made during the epidemics of the fourteenth century. Fear of AIDS reinforces fear of marginality which, in turn, leads to redefinitions of the disease.

III. THE MEANING OF AIDS AND THE LAW'S RESPONSE

In order for the legal system to deal wisely with the difficulties AIDS presents, judges and lawmakers must be cognizant of the metaphorical value that AIDS carries, the associations it evokes and the dangers that these understandings can pose to legal decision and interpretation.

A. Legal Dilemmas Posed by AIDS

AIDS raises legal questions, of constitutional dimensions, in three broad areas. The answers to these questions can affect the public, and the lives of individuals with the disease.

First, questions involving the treatment, including the possible isolation, of AIDS patients, of individuals testing positive for AIDS antibodies and of people in risk groups, may set the government's power and need to protect public health against the individual's right to liberty. A continuum of possible governmental responses, imposing increasing restrictions on liberty, can be outlined. At the lower end of the continuum, restrictions could be placed on the operation of homosexual bathhouses; in several cities, this has already been done. Further along the continuum, AIDS patients could be barred from public places, including schools and offices. The most extreme imposition would involve a quarantine of AIDS patients.

57. Id. at 61.

58. AIDS presents a different epidemiological pattern in Africa than in the United States. In Central Africa, at least as many women as men test positive for AIDS antibodies and the sexual spread of the disease appears to occur almost solely through heterosexual activity. See AIDS Forum, supra note 6, at 43 (statement of Anne Giudici Fettner); 100 Questions, supra note 31, at 8.


60. Once discussed only by “a handful of gay-baiting crackpots” as a legitimate means...
Second, the right of the individual to privacy\textsuperscript{61} can be affected by state responses to AIDS. For instance, individuals could be forcibly examined or asked to submit to AIDS testing. Again, possible governmental responses fall on a continuum. Testing could be voluntary or mandatory. It could be required in certain contexts (e.g., when donating blood) but not in others (e.g., when applying for health insurance). Also at issue is the level of confidentiality that will be applied to positive test results.

Third, a number of questions surround the rights of AIDS patients to equal treatment\textsuperscript{62} in matters such as health insurance, hos-
pital care, ambulance service, public benefits and housing. 63

B. Notions of Disease and the Government's Power to Protect Public Health

To identify a serious disease as an epidemic — a disease that is pervasive within a locality, that is probably contagious and that may spread rapidly — is to justify the state's power to impose regulations. The question remains as to which regulations are permissible.

As a social event, an epidemic disease collectivizes and thereby makes it appear that a community has been created from previously unrelated individuals and that the members of this community share one reality. 64 It creates new boundaries between Self and Other and, like the Cold War or a nuclear accident, grips everyone. An epidemic is an event existing apart from the underlying disease. Any medical response to an epidemic as a collective event — invariably a political response — requires the support and intervention of the state. 65

1. Past Efforts to Contain Epidemic Diseases. — For centuries local and state authorities promulgated restrictions deemed appropriate to contain epidemic diseases. In the Middle Ages, maritime quarantines were imposed against ships and travelers coming from areas affected by the plague. 66 In fourteenth century Venice, a council of three supervised the isolation of all suspected goods and people at an island in the lagoon, and in the same century, in Milan, victims of the plague were taken to a field to recover or die. 67

When syphilis appeared in Europe at the end of the fifteenth century, several cities expelled prostitutes. Others, such as Faenza,

63. A fourth area of legal questions relating to AIDS asks what effects AIDS can or should have on the rights of homosexuals, including the legal right to practice homosexuality. AIDS has been said to justify sodomy statutes. See supra note 61. Cf. Hardwick v. Bowers, 760 F.2d 1202 (11th Cir.), rev'd, 106 S. Ct. 2841 (1986) (holding that Georgia sodomy statute infringed on plaintiff's right to privacy, protected by the ninth and fourteenth amendments, and remanding the case to the district court in order for the state to demonstrate a compelling state interest to justify the regulation).

64. See J.P. SARTRE, supra note 20, at 256-69.

65. Writing of eighteenth century France, Michel Foucault stated that control of epidemics was possible only when supplemented by police action "to supervise the location of mines and cemeteries, to get as many corpses as possible cremated instead of buried, to control the sale of bread, wine, and meat, to supervise the running of abattoirs and dye works, and to prohibit unhealthy housing." M. FOUCAULT, supra note 2, at 25 (footnote omitted).

66. See H. WAIN, supra note 56, at 68.

67. See G. ROSEN, supra note 23, at 62. Medieval cities did not have organized public health systems but city councils, frequently aided by guild officials, supervised and protected public health. Id. at 71-72.
required prostitutes to be examined and deprived of the right to work if found to be ill. In Rome, barbers were prohibited from accepting clients with syphilis and in Venice, all syphilitics were required to accept treatment at the Hospital for Incurables.

Before the development of the nation-state, the regulation of health and disease remained a local undertaking. By the eighteenth century, health was discussed as a national responsibility to be affected through the creation of medical police, involving a public health policy and its actualization through an administrative apparatus.

The character of national public health administrations was profoundly altered by the development, in the late nineteenth century, of the science of bacteriology. Scientific knowledge about the nature of infectious disease and the modes of its communication facilitated the enactment of specific rules regarding quarantine and sanitation. In particular, after the discoveries of Louis Pasteur, Robert Koch, and others regarding the cause of infectious disease, control of disease and protection of health became rational concerns. Governmental regulations could be based on knowledge which justified, even mandated, such action. Further, concrete benefits began to accrue as a result of public health measures.

People have come to expect that regulation of health matters will be based on demonstrated theories of causation and proven forms of treatment. This assumption is upset by AIDS to the extent that scientific theory and medical fact do not suggest a substantial likelihood that proposed regulations will succeed.

2. The Power of Government to Safeguard Public Health in the United States. — In the United States, regulation of public health is part of the police power, impliedly reserved to the states through the

68. Id. at 97.
69. Id. at 98.
70. See G. Rosen, Cameralism and the Concept of Medical Police, in FROM MEDICAL POLICE TO SOCIAL MEDICINE: ESSAYS ON THE HISTORY OF HEALTH CARE 120 (1974).
71. See G. Rosen, supra note 23, at 319-36.
72. Louis Pasteur, born in 1822 in France, developed the science of bacteriology and thereby established the germ theory of disease. H. Wain, supra note 56, at 227-42.
73. Robert Koch, born in 1843 in Germany and called the "father of the bacillus," showed that anthrax was caused by an identifiable organism (the anthrax bacillus), developed methods for growing and preserving bacteria, developed four rules for proving that a particular organism caused a specific disease, and isolated a number of other deadly disease-causing organisms including the tubercle bacillus. H. Wain, supra note 56, at 243-49.
74. See G. Rosen, supra note 23, at 338-42.
tenth amendment. In addition, the federal government has significant power to regulate foreign and interstate commerce and is empowered to collect taxes and to use this money for the public welfare. The limits of government to intervene in matters of health are reached when intervention is not commensurate with the need.

States and localities began to establish boards of health by the middle nineteenth century. Following Koch's isolation of the organism that causes tuberculosis, the New York City Health Department concluded that the disease was communicable and preventable. To control the spread of tuberculosis, the Department began requiring public medical institutions, and then private doctors, to report the names of tuberculosis patients. The federal government generally left most public health matters to state and local governments until the 1930's. Congress did, however, establish the National Board of Health in 1879, and expanded the Marine Hospital Service into the United States Public Health Service in the early twentieth century. During the 1918 swine flue epidemic, Congress recruited doctors and nurses and set up a system of morbidity reporting.

In 1905, the Supreme Court, declaring constitutional a Massachusetts statute mandating vaccination, sanctioned the authority of a state to use its police power to effect "reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." Justice Harlan, writing for the Court in Jacobson v. Massachusetts, recognized the importance of the liberty interest involved but asserted that such interest must yield in the face of the state's right "to secure the general comfort, health,

75. U.S. Const. amend. X. The tenth amendment reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." See Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) ("[T]he 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 . . . safety."); Morgenstern, The Role of the Federal Government In Protecting Citizens From Communicable Diseases, 47 U. Cin. L. Rev. 537, 544-45 (1978).
76. U.S. Const. art. I, § 8, cl. 3.
77. U.S. Const. art. I, § 8, cl. 1.
78. See P. Starr, The Social Transformation of American Medicine 184 (1982). The first such board of health was established in Louisiana in 1855; then, in 1866, the Metropolitan Board of Health was set up in New York City, and in 1869, a board of health was established in Massachusetts. Id.
79. Id. at 187.
80. Id. at 240; Morgenstern, supra note 75, at 541-43.
82. 197 U.S. 11 (1905).
and prosperity,” so long as the state does not act arbitrarily or oppressively.44

In dicta, the Court in *Jacobson* recognized the right of a state to impose even more stringent measures than compulsory vaccination, including quarantine, as a means of protecting public health.65 Courts deciding the quarantine issue have been guided by the social, medical and legal peculiarities of each case. In 1922, the Illinois Supreme Court permitted the quarantine of a Chicago boardinghouse keeper carrying the typhoid bacillus.86 The court, quoting from treatises on public health, and relying on the scientific theory of typhoid fever transmissibility, stressed the medical rationale as clear legitimation for the quarantine regulation.87

In *Jew Ho v. Williamson,* the circuit court, declaring a San Francisco quarantine unconstitutional, based its decision in part on the fact that the boundaries of the imposed quarantine, affecting residents of Chinatown, were carefully delineated to exclude houses that did not belong to Chinese people. This, said the court, was an “administration of a law ‘with an evil eye and an unequal hand.’”89 Other courts have addressed issues concerning limits on the power of government to regulate public health, including questions about whether individuals suspected of having venereal disease could be examined involuntarily90 and about whether immunization could be made a prerequisite to school attendance.91

C. Legal Implications of the Uncertainties About AIDS

Medical assumptions that justified the compulsory immunization of school children, a maritime quarantine to control cholera and yellow fever, or the quarantine of a rooming house in which the residents suffered from typhoid fever, are largely absent in the

83. *Id.* at 26 (quoting Railroad Co. v. Husen, 95 U.S. 465, 471 (1878)).
84. *Jacobson,* 197 U.S. at 28.
85. Id. at 29.
86. People v. Robertson, 302 Ill. 422, 134 N.E. 815 (1922).
87. *Id.* at 426, 432-34, 134 N.E. at 817, 819-20.
88. 103 F. 10, 23-24 (C.C.N.D. Cal. 1900).
89. *Id.* at 24 (quoting *Yick Wo v. Hopkins,* 118 U.S. 356, 373-74 (1886)).
90. Wragg v. Griffin, 185 Iowa 243, 170 N.W. 400 (1919) (ruling that holding petitioner for examination for venereal disease deprived him of liberty without due process).
91. Allen v. Ingalls, 182 Ark. 991, 33 S.W.2d 1099 (1930) (upholding state’s right to mandate immunization as a prerequisite to school attendance).
92. *See id.*
93. *See P. STARR,* supra note 78, at 184-85.
94. *See People v. Robertson,* 302 Ill. 422, 134 N.E. 815 (1922).
case of AIDS. Regardless of whether these cases should have been decided as they were, or whether they would be decided similarly today, in each of these cases a court presumably acted on the basis of a judgment, grounded in medical evidence, that the program in question would effect the desired goal. In the case of AIDS, medical showings preliminary to governmental regulation involve probabilities rather than facts.

Governmental regulations which threaten "fundamental rights" are unconstitutional unless they further a "compelling state interest." Courts are likely to decide that the state's interest in controlling AIDS is compelling. In *Roe v. Wade*, Justice Blackmun, writing for the Court, stated that "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." Even when the state's interest is compelling, regulations limiting fundamental rights must be "tailored to the recognized state interests."

In the case of AIDS, it will often be difficult to ensure that this last requirement is met because medical knowledge is not yet adequate to guarantee that particular state regulations intended to control or prevent AIDS will have that effect. At present, regulations concerning AIDS can only be judged by taking uncertainty into account.

Judges and legislators must be conscious of the significance of uncertainty in decisions concerning AIDS, particularly in cases involving fundamental rights. Moreover, they must be aware that this uncertainty as to cause, cure and prognosis, is inevitably exacerbated by popular conceptions of the disease which have turned what might simply be a serious medical condition into a significant symbol evoking fear and rage. The symbolic correlates of AIDS pose obvious pitfalls for lawmakers. For instance, the link between AIDS and certain groups, and the association of those groups with social marginal-

95. Typically, courts apply a "rational relationship" test to ascertain whether a state statute to effect public good, which affects individual rights, is unconstitutional on due process or equal protection grounds. If "fundamental rights" or "suspect classifications" are involved, however, courts employ the more stringent "strict scrutiny" test. Under the strict scrutiny test, the government must show that a "compelling state interest" is served by the statute at issue, and that the statute has been narrowly drafted to effect the compelling end. See J.E. Nowak, R.D. Rotunda & J.N. Young, *Constitutional Law* 448-51 (2d ed. 1983); L. Tribe, *American Constitutional Law* 1000-02 (1978).

96. *See supra* note 95.


98. *Id.* at 154.

99. *See id.* at 165.
ity, suggests that governmental regulation concerning AIDS may limit unnecessarily the fundamental rights of individuals in such groups. Enlightened lawmakers about AIDS depends upon the recognition by judges and legislators that AIDS is a powerful symbol, and upon their continuing sensitivity to the shifting symbolic meanings of the disease.

Clear medical showings should become an integral prerequisite to all governmental regulation and decision concerning AIDS. Whatever medical knowledge exists should be readily available to legislative and judicial forums. Because medical knowledge about AIDS is likely to continue changing rapidly, judges and legislators should have access to new knowledge, most felicitously through the computerization of all information concerning the disease.

CONCLUSION

In the case of AIDS, the “compelling point” at which state regulation infringing fundamental rights is justified will shift as medical understanding of the disease develops. Medical knowledge can only be utilized appropriately in the promulgation of legislation if legislative and judicial forums are alert to the significance of AIDS as a bearer of social meanings. AIDS is a disease, but it is more than that. It has become a symbol of the social order, of certain groups within society, of particular behaviors and particular responses to behavior. Moreover, the irrational fears surrounding AIDS are strengthened by the rational fears that the real disease brings. The development of a sage governmental response to AIDS involves locating the “compelling point” at which regulation can or must be imposed, recognizing that such a point will shift as medical knowledge about the disease grows, and perceiving that popular conceptions of AIDS, infused by fear and elaborated through the powers of metaphor, can distort the process of developing an effective response.

100. See id. at 163.