

B420. "Corral This Disease Now" National Law Journal (May 19, 2003) p. 27.

Ten years from now, after we have readily survived a bio-terrorist attack, some historian may well mutter, "Thank God for SARS!" We have long known that the laws concerning safeguarding public health in case of an epidemic, especially those dealing with isolation and quarantining, are highly inadequate and obsolete (some are nearly a century old).

Indeed, Lawrence O. Gostin of the Georgetown University Law Center has drafted a Model State Emergency Health Powers Act, to help states to update their laws and regulations. So far, fewer than half of the states have adapted their laws to the age of bio-terrorism. SARS, especially if it spreads further, may just be a sad, costly wake-up call.

The key legal and ethical issue is as clear as the danger posed by an incurable, infectious disease: Public health outweighs individual rights. Forced isolation and quarantining are fully justified. Indeed, in previous generations we had few qualms about locking up TB patients until the highly infectious period passed. However, as Ronald Bayer of Columbia University shows in his book, *Private Acts, Social Consequences*, all this changed with HIV. Gay leaders and liberals feared that those identified as having AIDS would be isolated, as they are in Cuba. They railed against any remotely coercive notion to prevent the spread of HIV, including closing public bath houses, where unprotected, anonymous sex with multiple partners was common; quarantining began to lose its political support.

Worse, there is not one relevant legal code, but 50 inconsistent ones. If SARS spreads more rapidly, or some future, terrorist-induced epidemic (say, of smallpox) hits, it might not be detected in a timely manner in many states because they have not enacted or implemented an early-warning system for monitoring and reporting unusual symptoms to health authorities. As a result, all other states would be endangered as travelers brought the infection from one negligent state to another. The very notion that SARS-like attacks are matters that should be handled by the states rather than governed by federal law is one more example where our constitutional and legal arrangements have not caught up with the fact that we no longer travel by horse and buggy, rarely crossing state lines.

Whether or not state public health agencies are much more integrated into a federal service, as they ought to be, states need to have on the books detailed legislation that determines under what conditions the governor can declare a health state of emergency and what that would entail, including orders to remain at home, distribution of food and National Guard patrols. Absent clear laws, before one could say "curfew," the American Civil Liberties Union would be in court, challenging the government's quarantine powers and arguing that there are better ways to fight the disease without trampling our rights. We have already seen such rebukes to Gostin's model act.

While voluntary isolation is the preferred approach, if large numbers of people are involved and some refuse to be quarantined or try to leave, what legal remedies do public health authorities have? May they drag thousands of people into detention camps? Shoot them if they break out?

This is far from a theoretical question: *The Washington Post* reported that a health care worker in Toronto with symptoms of SARS refused to be isolated, and was allowed to remain free, endangering many others. Thankfully, the Bush administration just added SARS to the list of diseases for which quarantine is authorized and has allowed for the use of force by immigration and custom officials to detain passengers with SARS symptoms who arrive on

these shores. Similar power should also be granted to the National Guard and local police with respect to domestic travelers.

We need statutory measures that spell out not merely that force may be used, but with more detail as to how it may be used, and to what purpose. Given the highly emotional nature of illness and quarantine, detailed guidance is needed.

When granting the government power, there is the danger of abuse. Hence Congress should authorize a review of all coercive acts undertaken in the name of public health, and determine whether existing legislation goes overboard and revise the statute. Those state legislatures that have gotten around to enacting the needed new public health laws may wish to do the same. Schools of public health could compose a national citizen commission to provide some oversight.

We cannot allow a SARS epidemic—or other epidemics that may be many times more severe—to spread while courts sort out legalities. The quarantine issue, and the related question of forced immunization, require urgent attention.

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