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Medical Examination of Aliens: A Policy with Ailments of Its Own?

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COMMENTS

MEDICAL EXAMINATION OF ALIENS: A POLICY WITH AILMENTS OF ITS OWN?

Aliens seeking entry into the United States have long been subject to examinations of one form or another to determine their fitness to enter the country. Beginning in 1891, U.S. immigration laws decreed that aliens with contagious diseases would be excluded from entry.[1] The purpose of this law, and the laws that followed, was to protect persons in the United States from exposure to such diseases as cholera, yellow fever, and plague.[2] Unfortunately, the regulations Congress has issued through the years to fulfill this purpose have fallen short of their intended purpose. Congress charged the Public Health Service (PHS) with the duty of determining which diseases would cause an alien's exclusion.[3] Through the years the regulations promulgated by the PHS have caused the unnecessary exclusion of some aliens while the immigration laws themselves have allowed some aliens with contagious diseases to enter. While the present law provides for the exclusion of aliens with "dangerous contagious diseases,"[4] it fails to require *all* aliens seeking entry to submit to a physical examination to detect such diseases.[5] If, as the legislative history and case law indicate, the purpose of the requirement of a physical examination is to protect the public health, the present immigration laws and PHS regulations should be amended to fulfill this

1. Act of Mar. 3, 1891, ch. 551, § 1,26 Stat. 1084.

2. B. FURMAN, A PROFILE OF THE PUBLIC HEALTH SERVICE 1798-1948, 206 (1973).

3. *Id.* "The Marine Hospital Service surgeons had to pick from the approaching lines of immigrants all with the diseases and disabilities important enough to bar aliens from becoming citizens." *Id.* The Marine Hospital Service, established by President John Adams in 1798 was the forerunner of the modern Public Health Service. *Id.* at 1.

4. Immigration and Nationality Act § 212(a)(6), 8 U.S.C. § 1182(a)(6)(1988). The term "loathsome" was dropped in 1952 at the suggestion of the Public Health Service "as it is a nonscientific lay term and serves no useful purpose." HOUSE COMM. ON THE JUDICIARY-IMMIGRATION AND NATIONALITY ACT OF 1952, H.R. REP. NO. 1365, 82d Cong., 2d Sess. 1, *reprinted in* 1952 U.S. CODE CONG. AND ADMIN. NEWS 1653, 1702 [hereinafter *Legislative History*].

5. Immigration and Nationality Act § 221(d), 8 U.S.C. § 1201(d)(1988) (applicants for immigrant visas are required to submit to a physical examination, but applicants for non-immigrant visas must submit to physical exam only if the consular officer deems it necessary).

purpose. This Comment will show the weaknesses of the present laws and regulations and suggest possible changes that might better fulfill the purposes of both the Immigration and Naturalization Service (INS) and the PHS.

I. HISTORY

The founding fathers had barely set foot in the New World before they began to seek ways to prevent certain other immigrants from following.[6] This urge to regulate the flow of "foreigners" into the new nation began even before the American Revolution and before the newly-formed Congress found itself with the power and authority to promote such regulation.[7] These early immigration policies were sporadic at best and varied from colony to colony. The laws sought to restrict immigration for a variety of reasons, ranging from one's religious beliefs to his "economic fitness."[8]

Early federal immigration laws did little to restrict the flow of immigrants into the new nation, and at least one early law actually encouraged immigration by improving the traveling conditions on sailing vessels.[9] During the period that followed the War of 1812, the number of persons wishing to emigrate from Europe to America was so great that greedy ships' captains often loaded their vessels with more passengers than could be safely transported to the new land. In sponsoring the first of the "steerage-legislation,"[10] Virginia's representative reported that the suffering of the passengers on some of these vessels was so great that in at least one instance more than half of the passengers died before reaching our shores.[11] This legislation and that which followed set forth specific regulations as to the number of passengers allowed and the amount of food necessary to properly feed them during the journey.[12]

Although these early immigration laws appear to be more concerned with the color of an immigrant's skin[13] or the purpose for his

6. *Legislative History, supra* note 4, at 7, *reprinted in* 1952 U.S. CODE CONG. AND ADMIN. NEWS at 1655.

7. *Id.* at 7, *reprinted in* 1952 U.S. CODE CONG. AND ADMIN. NEWS at 1655.

8. *Id.*

9. *Id.* at 7, *reprinted in* 1952 U.S.CODE CONG. AND ADMIN. NEWS at 1656. *See also, infra* note 20 (The act set specifications for the amount of space that had to be allowed for each passenger to prevent the overcrowding that was felt to be the cause of illness on board ships.).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 11, *reprinted in* 1952 U.S. CODE CONG. AND ADMIN. NEWS at 1660 (the Chinese exclusion laws).

immigration,[14] restrictions based on the personal qualifications of the individual immigrant would soon follow. In 1882 Congress passed an act which sought to exclude "convicts, lunatics, idiots, and others unable to care for themselves" and authorized port officials to examine arriving passengers to determine if any fell into the excludable classes.[15] Nine years later Congress added persons afflicted with "loathsome or dangerous contagious disease[s]" to the list and provided authorization for the medical examination of arriving aliens.[16] Although it appears that the 1882 provision may have been merely an additional effort to stem the flow of immigrants,[17] it is clear that the latter legislation was based on a genuine concern for the public health.

A review of the history of the PHS indicates that when Congress added the "loathsome or dangerous contagious disease" provision to the Immigration Act of 1891,[18] it did so with the knowledge that such aliens could introduce diseases such as cholera or yellow fever into the United States.[19] While its grasp on the theory of disease transmission was not without flaws,[20] this congressional awareness was undoubtedly responsible, at least in part, for the disease provision in the new immigration law. A cholera epidemic in Europe and Asia the following year proved the wisdom of Congress' action.

In August of 1892 passengers with cholera began arriving in U.S. ports.[21] When the Surgeon General, Dr. Walter Wyman,[22] learned of this, he recognized the threat to the public health.[23] Dr. Wyman's first act was to prohibit the importation of rags from Europe that were

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14. *Id.* at 13, *reprinted in* 1952 U.S. CODE CONG. AND ADMIN. NEWS at 1661 (the contract labor laws).

15. Act of Aug. 3, 1882, ch. 376, § 2,22 Stat. 214.

16. Act of Mar. 3, 1891, ch. 551, § 1,26 Stat. 1084.

17. *Legislative History*, *supra* note 4, at 13, *reprinted in* 1952 U.S. CODE CONG. AND ADMIN. NEWS at 1662.

18. 26 Stat. 1084.

19. B. FURMAN, *supra* note 2, at 206.

20. S. REP. NO. 386, 33d Cong., 1st Sess. 4 (1854)(the report spoke of the miasma (poisonous vapor) present on ships as being the cause of ship fever or typhus. This miasma was supposedly from the decomposition of bodily excretions or secretions such as perspiration or even the moisture from the breath. Cholera, according to the report, came and went with no apparent cause known to man but seemed to be related to the same conditions of poor sanitation and hygiene as typhus).

21. B. FURMAN, *supra* note 2, at 208.

22. *Id.* at 199-208. Dr. Walter Wyman became Surgeon General on June 1, 1891, and served until his death in 1911. He was meticulous in his work and in his attention to detail. He no doubt saved many American lives. *Id.*

23. *Id.* at 208 (the cholera epidemic of 1892 was responsible for 80,000 deaths in Persia and 300,000 deaths in Russia. Public health officials were seeking ways to prevent its spread to the U.S. even before the American public was aware of the threat).

used for the manufacture of paper in this country.[24] Although such rags were thought to be a source of cholera, the Surgeon General realized that the flow of *people* from Europe and Asia posed a much greater threat to the health of U.S. citizens. News of the European and Asian epidemics soon reached the U.S. public, and there were demands for an immediate suspension of immigration.[25]

Although the President was powerless to take such action,[26] the Surgeon General was able to utilize the provisions of the 1891 Immigration Act in conjunction with state quarantine provisions to effectively halt immigration until the threat of an American epidemic had passed.[27] State quarantine laws in seaboard states allowed the detention of arriving passengers for quarantine for a minimum of twenty days. Recognizing that the economic impact of such restrictions on steamship companies would effectively halt immigration, Dr. Wyman declared a twenty-day quarantine of all vessels entering U.S. ports.[28]

While it is not surprising that the PHS gave the immigration laws a broad interpretation when issues of public health arose, it appears that the courts also shared this concern for the well-being of people in the United States. An excellent example of a court's recognition of the purpose of the "contagious disease" provisions of the immigration laws is found in a case decided in 1923.[29] Here, the district court for Massachusetts denied a petition to block the deportation of a Chinese alien whom immigration examiners found to be infected with liver flukes.[30] Liang Buck Chew was returning to the United States after a visit to his homeland when immigration authorities discovered the disease, clonorchiasis, during Liang's medical examination when he attempted to re-enter the country.[31] Public

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* Dr. Wyman's legal interpretation of state quarantine laws put a halt to immigration for ten weeks.

> In reading over the quarantine laws of the States,. . .I found that every seaboard State had the right, under its laws, to enforce a quarantine detention of at least twenty days. . .[and] [u]nder the national quarantine act of April 19, 1878, the General Government is authorized to aid State and local boards, and the principle has been announced by the highest legal authority that while, under existing laws, the National Government might not break down the quarantine barriers of a State, its power is unquestionable to add to these barriers when it becomes necessary.

Id.

28. *Id.*

29. *Ex parte* Liang Buck Chew, 296 F. 182 (1923).

30. *Id.*

31. *Id.*

Health regulations at that time classified clonorchiasis as a "dangerous contagious disease."[32] The court held that the provision of the Immigration Act of 1971 "excluding aliens afflicted with a 'dangerous contagious disease,' was passed for the protection of the public health" and, as such, should be given a liberal interpretation.[33] When one considers the nature of the disease in question, it is clear that the court took these words to heart.

Although clonorchiasis was once classified as a dangerous contagious disease, it is not contagious in the everyday sense of the word. The liver fluke cannot be passed directly from one human being to another—the disease in man is acquired by the ingestion of raw or nearly raw fish infested with the parasite.[34] While an infected individual excretes the eggs of the parasite in the feces, these eggs are incapable of producing disease in man. The eggs must go through a number of stages in different hosts before another human can be infected.[35] Thus, although this disease is still endemic in areas, such as the Far East, where population density could give rise to a presumption of contagion, it is the dietary peculiarities of the region, rather than the close contact with other humans that is responsible for the continued prevalence of this disease.

In spite of its complicated mode of transmission, clonorchiasis was nonetheless classified as a contagious disease by the PHS and persons such as Liang Buck Chew were excluded from the United States. The court considering Liang's case noted that the PHS's use of the word contagious in connection with the liver fluke was certainly broad, but then said that in light of the intent of the statute, such use was not unreasonable.[36] In the case of clonorchiasis, and some other parasitic diseases, one may have difficulty understanding the PHS's actions, but in other cases, the rationale is clear.

II. EPIDEMIOLOGIC ASPECTS OF SOME "LOATHSOME CONTAGIOUS DISEASES"

Webster's dictionary defines *contagious* as "spread by direct or

32. *Id.*

33. *Id.* at 184.

34. G. MANDELL, R. DOUGLAS, & J. BENNETT, PRINCIPLES AND PRACTICE OF INFECTIOUS DISEASES, 2149 (3d ed. 1990) [hereinafter MANDELL].

35. *Id.* (the eggs must be ingested by a particular species of snail (not found in the United States), develop further there, leave the snail and be ingested by certain fresh water fish).

36. 296 F. 182, 185 (1923).

indirect contact; communicable . . . ";[37] diseases such as the common cold or the measles come quickly to mind as examples. In law a contagious disease has been defined as a disease that is "communicated by contact or touch,"[38] "communicable by contact with a patient suffering from it, or with some secretions or object touched by such a patient,"[39] or "communicable by . . . bodily exhalations."[40] In addition, the PHS has said that contagious is synonymous with communicable,[41] thus allowing the PHS to apply the word to a wide variety of diseases. While the broad interpretation of contagious by the PHS coupled with the courts' liberal interpretation of the purpose for the statutory exclusion produced harsh results in cases such as Liang's, it is quite understandable as applied to certain other diseases.

Leprosy is one affliction that could have given rise to the term "loathsome contagious disease." It has been described as "a disease which affects the body of the patient and the mind of the public."[42] In biblical times victims of leprosy were banished to leper colonies, and some of these colonies still exist today.[43] The mere mention of the disease was once sufficient to cause near panic,[44] and even in today's world, the epidemiology of leprosy is not clearly understood.[45] It does appear, however, that the contagion of the disease varies and some patients are more likely to spread the disease than others.[46] Although humans were once thought to be the only reservoir of this disease, recent studies indicate that leprosy can be acquired through contact with certain animals.[47] Today the emphasis is on the detection and treatment of the disease rather than isolation of its victims. Even though it is not as contagious as once believed, the disease, quite understandably, remains on the list of dangerous contagious dis-

37. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, COLLEGE EDITION 318 (1968).

38. Stryker v. Crane, 33 Neb. 690, 50 N.W. 1132, 1133 (1892).

39. Davis v. Rodman, 147 Ark. 385, 227 S.W. 612, 613 (1921).

40. Grayson v. Lynch, 163 U.S. 468, 477 (1896).

41. 296 F. at 184.

42. MANDELL, *supra* note 34, at 1906 (quoting ANTIA, *The people we fail to reach*, 48 LEPROSY REVIEW 155 (1977)).

43. B. FURMAN, *supra* note 2, at 269 (the leper colony on the Hawaiian island of Molokai, is still in existence).

44. *Id.* at 271.

45. MANDELL, *supra* note 34, at 1907.

46. *Id.* (there are two polar types of leprosy, tuberculoid and lepromatous, and the risk of contracting the disease is four times greater in the household contacts of the latter form).

47. *Id.* (a leprosy-like disease has been identified in wild armadillos, indicating that there may be reservoirs other than man).

eases,[48] and aliens afflicted with leprosy remain in the category of excludable aliens.

The disease that was once the chief cause of the exclusion of aliens is no longer grounds for exclusion.[49] Trachoma is an infectious disease characterized by inflammation of the conjunctiva and painful granulation of the eyelids. Left untreated, the disease can become chronic in nature, leading to deformity of the eyelids and scarring of the cornea with resulting blindness.[50] The disease is spread by contact with discharge from the eyes of infected individuals and is often associated with poor hygiene and crowded living conditions.[51]

PHS physicians gained most of their early knowledge of this disease at the hospital on Ellis Island,[52] and this led to the mistaken belief that trachoma was not indigenous to the United States.[53] Although there were pockets of trachoma in the interior, it was felt that the source of the disease was foreign-born men brought in as miners.[54] When Minnesota public health officials asked for federal aid to combat the disease among the Indians, the PHS learned that the disease had been present in the United States for many years.[55] In spite of this new knowledge, trachoma remained on the list of dangerous contagious diseases for a number of years,[56] possibly because the PHS did not want to see its efforts at eradicating trachoma[57] thwarted by the introduction of new cases from foreign shores.

As late as the mid-twentieth century, the list of dangerous contagious diseases contained a number of diseases that do not readily fit the definition of contagious described above. Before 1971 the list included eight parasitic or fungal infections[58] that cannot, according to

48. Medical Examination of Aliens, 42 C.F.R. § 34.2 (1989).

49. B. FURMAN, *supra* note 2, at 388.

50. MANDELL, *supra* note 34, at 1430.

51. *Id.*

52. B. FURMAN, *supra* note 2, at 288.

53. *Id.*

54. *Id.*

55. *Id.* During the investigation that ensued, PHS officials learned that some 46% of the Indians (mostly miners) examined were infected. At this point, the investigation was broadened to include Indian children in boarding schools who would not have been exposed to the foreign-born miners. Nearly 23% of the children were also infected, and trachoma was thus revealed as "one of this country's oldest diseases." *Id.*

56. *See infra* note 58 and accompanying text (trachoma was deleted from the list of dangerous contagious diseases in 1970).

57. B. FURMAN, *supra* note 2, at 288-90.

58. F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES, 276 (2d ed. 1961) (actinomycosis, blastomycosis, favus, and mycetoma (fungal infections), and filariasis, paragonimiasis, schistosomiasis, and trypanosomiasis (parasitic infections)).

an American Public Health Association publication,[59] be directly transmitted from one human being to another. While many of these diseases are potentially fatal, especially if left untreated, the reason for their classifications as dangerous contagious diseases is not clear. One could surmise that the reason was the lack of medical knowledge about the means of transmission of such diseases, but there is evidence to the contrary.[60] On the other hand, the list contained some diseases whose contagious nature is well known, even to the lay person,[61] and some that can be readily transmitted if simple hygienic practices are not followed.[62]

In 1970 and again in 1987 the list was amended and it now contains only eight diseases, all of which can be spread from one human to another. The diseases now defined by the PHS as dangerous contagious diseases are: 1) chancroid, 2) gonorrhea, 3) granuloma inguinale, 4) human immunodeficiency virus (HIV) infection, 5) leprosy, infectious, 6) lymphogranuloma venereum, 7) syphilis, infectious stage, and 8) tuberculosis, active.[63] Of the diseases listed, six are generally spread by sexual contact.[64] Leprosy and tuberculosis are contracted through nonsexual contact with the infectious lesions or secretions of the infected individual.[65] Human immunodeficiency virus (HIV), the causative agent for Acquired Immunodeficiency Syndrome (AIDS), was added to the list in 1987.[66] While this disease can be transmitted by nonsexual means such as the transfusion of infected blood or the sharing of needles during intravenous drug abuse,[67] its primary means of transmission is through sexual intercourse. This latter means of transmission is clearly illustrated in countries where the disease in endemic.[68]

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59. A. BENENSON, CONTROL OF COMMUNICABLE DISEASES IN MAN (11th ed. 1970).

60. *Ex parte Liang Buck Chew*, 296 F. 182, 183 (1923) (the court heard medical testimony that clonorchiasis could not be transmitted form one human to another).

61. F. AUERBACH, *supra* note 58, at 276 (the list of diseases included a number of venereal diseases the contagion of which has been common knowledge for many years even though diseases such as gonorrhea and syphilis were not discussed in polite company).

62. A. BENENSON, *supra* note 58, at 3 (amebiasis can be transmitted by food handlers who do not use proper hygiene, resulting in food-borne outbreaks; trachoma has repeatedly been associated with poor sanitation).

63. Medical Examination of Aliens, 42 C.F.R. § 34.2 (1989).

64. *See generally* A. BENENSON, *supra* note 59 (chancroid, gonorrhea, granuloma inguinale, HIV infection, lymphogranuloma venereum, and syphilis are generally classified as sexually transmitted diseases).

65. *Id.* at 130, 266.

66. Medical Examination of Aliens, 42 C.F.R. § 34.2 (1989).

67. MANDELL, *supra* note 34, at 1037 (the infection can also be transmitted from mother to infant during the birth process and during breast feeding).

68. *Id.* at 1031.

As the discussion above reflects, the current list is comprised of diseases that fall within the generally accepted definition of contagious. Although the list now more accurately reflects the purpose for which it was established, the protection of the public health, there are diseases with similar means of transmission that do not appear on the list. Diseases such as Hepatitis B and malaria may be transmitted by the same routes as HIV or syphilis,[69] and yet they do not appear on the list. The PHS is to be commended for its efforts to review and revise the list of dangerous contagious diseases, but it appears that further revisions are necessary. A review of the interaction between the PHS and the INS will illustrate the basis for this need.

III. THE PRESENT LAW

American consular officers stationed abroad are charged with the responsibility of issuing visas[70] in compliance with the requirements set forth in section 221 of the Immigration and Nationality Act (INA).[71] The requirements for the physical examination of aliens are found in section 221(d),[72] and it is here that the purpose of protecting the public health is thwarted.

According to the language of section 221(d), "the consular officer *shall* require" applicants for an *immigrant visa* to submit to a physical examination prior to the issuance of a visa.[73] By this language, each and every person who seeks to enter and remain in the United States permanently must submit to a physical examination and thereby prove that he or she is not harboring one of the dangerous contagious diseases discussed above. While in a few instances the officer may issue a visa even if the examination uncovers evidence of such a disease,[74] no visa will be forthcoming without an examination.

One the other hand, if the applicant applies for a *nonimmigrant visa* a physical examination is required only if, in the opinion of the consular officer, "such examination is necessary to ascertain whether such alien is eligible to receive a visa."[75] In other words, an alien who wishes to visit the United States for two or three weeks is not required

69. A. BENENSON, *supra* note 59, at 108, 141 (Hepatitis B can be sexually . . . transmitted. Both diseases can be transmitted during the transfusion of infected blood.).

70. F. AUERBACH, *supra* note 58, at 41.

71. Immigration and Nationality Act § 221, 8 U.S.C. § 1201 (1988).

72. 8 U.S.C. § 1201(d) (1988).

73. *Id.* (emphasis added).

74. F. AUERBACH, *supra* note 58, at 275 (presumably a person with evidence of inactive tuberculosis (pulmonary fibrosis), would not be denied a visa).

75. 8 U.S.C. § 1201(d) (1988).

to submit to a physical examination unless the consular officer feels it is necessary. Likewise, the alien who seeks to enter on an H-1[76] or other visa allowing a long-term stay, will be required to submit to a physical examination only if the consular officer believes that the examination will prove the applicant ineligible for the visa.

While the PHS regulations set forth the specific tests required to determine the presence of the listed diseases,[77] these regulations do nothing to ensure that all aliens are free from disease. Section 34.4 of the PHS regulations state that, with certain exceptions, a chest x-ray and serologic tests for syphilis and HIV will be required as part of the examination.[78] However, the section further states that such tests will be performed only on those aliens required to submit to a medical examination and indicates that only applicants for immigrant visas will routinely be faced with such a requirement.[79]

IV. THE PROBLEM

Although one might be tempted to say that it is only fair to hold immigrants to a higher standard than nonimmigrants, such a statement flies in the face of the purpose of the statutory exclusion. The mechanisms of communicability do not change with the individual's intent—an alien with a contagious disease will be just as contagious if he remains here for two weeks as if he remains for twenty years. Admittedly, his opportunities for transmitting disease may be somewhat limited if the visit is a short one, but the communicability remains the same. The longer the alien remains in the United States, the greater the chance that the disease he may be harboring will be spread.

Because most of the diseases that would require exclusion cannot be detected without a physical examination or laboratory tests,[80] the consular officer has nothing upon which to base an opinion as to the excludability of the alien. If an alien appears healthy and there is nothing else to indicate a risk factor for acquiring one of the specified diseases, it is quite probable that the alien will be granted the re-

76. T. ALEINIKOFF & D. MARTIN, IMMIGRATION PROCESS AND POLICY 99 (1985) (H-1 is the nonimmigrant visa designation for a temporary worker of distinguished merit and ability).

77. Medical Examination of Aliens, 42 C.F.R. § 34.4 (1989).

78. *Id.* (alien children under the age of 15 are generally exempt from chest x-ray and HIV testing unless there is evidence of exposure to tuberculosis of HIV infection).

79. *Id.*

80. *See generally* MANDELL, *supra* note 34, and A. BENENSON *supra* note 58 (specific blood tests are required to definitively diagnose HIV infection and syphilis; a chest x-ray will suggest the presence of TB, but a definitive diagnosis requires culture confirmation).

quested nonimmigrant visa without being asked to submit to a physical examination.[81] While it is unlikely that this practice will result in a major epidemic, it is quite possible that it will result in the spread of one or more of the listed diseases.

For example, a person harboring HIV can look and feel healthy for a number of months, or even years, before developing symptoms associated with the infection.[82] During this time, the individual is capable of spreading the disease to sexual partners. In a worst-case scenario, if an infected alien enters the United States on an F-1 visa,[83] and works as a prostitute to supplement his or her income, many individuals could become infected. While the above example may seem extreme, it must be borne in mind that this disease was most likely introduced into the United States by a foreign national with no outward signs of disease.[84]

From the above discussion, it appears that the law in its present state does little to protect the public health of persons residing in the United States. But do aliens really present the threat of the spread of "dangerous contagious diseases"? The above discussion is based on exactly that premise and while at first blush it may appear that diseased aliens certainly do present such a threat, certain other factors must be considered.

First, it must be borne in mind that the diseases that may result in an alien's exclusion are all prevalent to some degree in our own population.[85] The diseases listed are not foreign or exotic, and a person in the United States can acquire any one of the listed infections even if he or she never has contact with an alien. Also, U.S. citizens who travel abroad are not required to submit to a physical upon re-

81. Interview in Little Rock, Arkansas, with Marnie Fitzgerald, R.N., Oxford, England, currently working at The University Hospital of Arkansas on an H-1 Visa (Sept. 28, 1989).

82. MANDELL, *supra* note 34, at 1038.

83. T. ALEINIKOFF & D. MARTIN, *supra* note 76. (F-1 is the nonimmigrant visa designation for a student attending an academic institution).

84. R. SHILTS, AND THE BAND PLAYED ON 130 (1987). A Canadian airline steward, Gaetan Dugas, was one of the first men to be diagnosed with AIDS in North America. He is sometimes referred to as "Patient Zero" and may be responsible for the introduction of this disease into the United States.

85. *Epidemiology Notes and Reports*, 38 MORBIDITY & MORTALITY WEEKLY REP. 554, (1989) (MMWR publishes a weekly report of diseases of public health concern indicating the number of cases reported and the states where they occurred. For example, during the week ending Sept. 29, 1989, there were 10,775 cases of gonorrhea reported in the U.S. by state and local public health offices. Five of the eight diseases classified as dangerous contagious disease appear on this weekly list (AIDS (HIV infection), gonorrhea, leprosy, syphilis, and tuberculosis).

entering the United States. A U.S. citizen who has acquired a contagious disease while abroad is free to re-enter and infect others.

Second, the physical examination itself must be reconsidered. Even if an alien is required to undergo such an examination, it may not detect the presence of the diseases listed.[86] PHS regulations require that blood tests for syphilis and HIV and a chest x-ray be performed on all aliens required to undergo a physical examination.[87] While the x-ray and syphilis test will probably detect most active (or even latent) disease, the test currently used to detect the presence of HIV infection may not identify all infected persons.[88] In addition, one must consider other communicable disease such as Hepatitis B that are not addressed by the PHS's list. An accurate series of tests is available to detect this disease, but is not required by PHS regulations.

The above factors lead one to doubt that the basis for this requirement remains the protection of the public health. While the requirement of a physical examination had merit when epidemics of yellow fever and cholera were prevalent, its present usefulness is questionable. Under the present law, one afflicted alien may be excluded while another, afflicted with the same disease, is permitted to enter. At the same time, U.S. citizens are free to come and go while harboring the same diseases. Such a policy hardly seems to comport with the principles upon which this country was founded, and certainly not with sound epidemiologic practice.

V. POSSIBLE SOLUTIONS

At the very least, it appears that the INS should re-examine the policies behind the requirement and implement changes based upon those findings. Depending on the results of such an examination, the following suggestions might bring the law into line with its purpose.

If the underlying policy is still the protection of the public health, the list of dangerous contagious diseases should be re-examined by the PHS. As noted above, most of the diseases on the current list are venereal diseases already prevalent in the United States; in addition, they are, for the most part, neither very dangerous nor very conta-

86. For example, a thorough medical examination should reveal the lesions associated with some of the venereal diseases such as chancroid or granuloma inguinale. However, genital lesions of this type would probably not be detected on a cursory examination.

87. Medical Examination of Aliens, 42 C.F.R. § 34.4 (1989).

88. MANDELL, *supra* note 34, at 1037 (the tests currently employed test for the presence of antibody to HIV and there exists a "window" of time between infection and the presence of measurable antibody wherein the disease cannot be detected).

gious when compared to diseases such as cholera or smallpox. The exclusion of aliens with such diseases does little to assure the continued health of U.S. residents and may be analogized to locking the barn after the horse has been stolen. In its determination of the diseases to be included on the list, the PHS should look at the prevalence of the disease in this country, the communicability of the disease, and its mode of spread. Diseases such as cholera and plague which will most certainly be spread by any alien who enters the United States for even a brief stay, seem to be more likely candidates for inclusion on the list than diseases that are already prevalent or spread only by intimate contact.

If the list is amended to include only diseases which will be spread no matter how long the alien remains in this country— diseases that are truly dangerous and contagious—then it seems practical to require *all* aliens to submit to an examination to detect the presence of those diseases. The likelihood of spread of the disease in this case would justify the administrative and monetary expense of such a requirement.

Although requiring a physical examination of all aliens under the current list would most certainly lead to the exclusion of more aliens, the expense of such a policy would hardly be justified by its results in terms of the added protection of our citizens. For example, each alien would have to undergo a complete physical including chest x-ray, blood tests for HIV and syphilis, and cultures to exclude the presence of other detectable diseases. A conservative estimate of the cost of such an examination puts the cost in excess of $150 per person,[89] and even at that, there is no guarantee that one of the listed diseases will not escape detection. When the cost of a single such examination is multiplied by the number of aliens seeking entry into the United States each year, the sum is staggering.[90]

In addition, international relations would undoubtedly be strained by such a measure. Although some countries already require entering aliens to submit to a test for HIV infection, many other coun-

89. Outpatient charges from the University Hospital of Arkansas serve as an illustration of potential costs, HIV serology, $30 (confirmation test, $120); VDRL (for syphilis), $14.50; chest x-ray, $45.60; physical examination, $50. If additional tests are required their costs would further raise the total expense. (University Hospital of Arkansas, Financial Management personnel, March 27, 1990).

90. FY88 figures from the INS indicate that 643,025 immigrants entered the United States. Using the figure of $150 as an estimate of the cost of one physical examination, the total expense for examining all of the 1988 immigrants would be in excess of $96 million.

tries have taken a dim view of such policies.[91] In light of the fact that the disease is already present in the United States, it is difficult to justify threatening our country's relations with other nations when such a policy will do little to halt the spread of this or other disease currently on the list.

Another possible means of protecting the public health in this country while reducing administrative costs and maintaining healthy international relations would be to base the requirement for a physical examination on the alien's country of origin and the prevalence of "dangerous contagious diseases." For example, if a country were in the midst of a cholera epidemic, *all* aliens seeking entry into the United States would be required to show proof of immunization against the disease or undergo a physical examination and perhaps quarantine procedures to prevent the spread of this deadly disease into the United States. Considering the nature of the disease and the fact that the majority of U.S. citizens have not been immunized against it, such a policy does not seem unreasonable. However, if Congress were to adopt such a policy, the PHS would once again be required to amend the list to contain diseases that are truly "dangerous" and "contagious."

But again, all of the above is predicated on the assumption that the physical examination is to protect the public health. If the INS determines that the requirement for a physical examination is no longer based on public health considerations, the suggestions for change would be different.

For example, if the requirement for a physical examination is merely a means to detect immigrant aliens that may become a public charge due to physical disability, then the mandatory nature of an examination only for *immigrant* aliens makes sense. In this situation, however, the use of the list of dangerous contagious diseases has little practical value since most of the diseases listed (with the exception of HIV infection and tuberculosis) do not lead to long-term physical impairment. The law in this case should be amended to reflect the true purpose of the requirement for a physical examination. However, if some sort of physical examination is still to be required of all immigrant aliens, it does seem prudent to perform tests such as those currently required to identify and treat any communicable diseases discovered.

91. Telephone interview with Mr. Lawrence Gostin, Adjunct Professor Of Law, Harvard School of Public Health, Boston, Massachusetts (October 31, 1989).

VI. CONCLUSION

In light of the fact that the current law no longer truly appears to fulfill any useful purpose, a re-examination of its provisions seems in order. Congress needs to redetermine the purpose of the law, and with the help of the PHS, establish new regulations that will fulfill that purpose. The ultimate goal of any such congressional action should be the adoption of provisions based on sound public health and epidemiologic practices with an eye to the continued health of international relations.

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