

Communicable Disease Control in Colorado: A Rational Approach to AIDS

By Edward P. Richards??

Introduction

Protecting the public from communicable diseases is a fundamental duty of a civilized society. As history has demonstrated, the fear of disease is a primal fear that can, and has, torn apart civilizations.<sup>1</sup> Sometime between the end of the last polio epidemic in the 1950's,<sup>1</sup> and the beginning of the AIDS epidemic<sup>1</sup> in the 1980's,<sup>1</sup> Americans lost their traditional fear of communicable diseases. This loss of fear was the product of a reasonable recognition of the growing ability of medicine to treat or prevent traditional illnesses, and an unreasonable perception that communicable diseases were a problem of the past. While this period saw a massive epidemic of an incurable and frequently deadly disease (hepatitis B)<sup>2</sup> and the recognition and spread of new epidemic diseases (Lyme Disease and Legionnaires' Disease),<sup>3</sup> there was little public awareness that communicable diseases constituted a continuing threat to the public health. AIDS shattered this false sense of security.<sup>4</sup>

This article has two objectives; to provide practical information to Colorado professionals dealing with communicable diseases, including AIDS,<sup>5</sup> and to give persons outside of Colorado an overview of the legal premises and practical details of the Colorado AIDS control law. Colorado physicians may use this article a guide to compliance with the Colorado communicable disease laws. Colorado attorneys must be prepared to counsel their clients who are affected by these laws, whether these clients are health care providers, disease sufferers, or employers. Attorneys should also endeavor to understand these laws to better participate in the ongoing public debate over the proper role

---

1 Visiting Professor of Law, University of Denver College of Law; Research Fellow, National Center for Preventive Law. University of Houston Law Center, J.D., 1978; University of Texas School of Public Health (Disease Control), M.P.H., 1983. The author wishes to acknowledge the intellectual and editorial contributions of Thomas Vernon, M.D., Director, Colorado Department of Health to preparing this paper. The author also acknowledges the assistance of Robin Gray of the class of 1990 at the University of Denver College of Law.

of public health in a modern society.

For persons outside of Colorado, this is an attempt to explain how one state has developed a rational approach to AIDS, based on existing public health principles. While the confusion over the Colorado AIDS control law<sup>6</sup> engendered this article, it is impossible to understand the AIDS control law outside of the context of the larger framework of disease control laws and administrative rules. (The Colorado Department of Health (CDH) Rules and Regulations pertaining to communicable disease control are included as an appendix to this article).

Colorado is the leading state in the fight to control AIDS. The Colorado approach to AIDS stands in contrast to states such as New York and California, which have chosen to ignore public health practice in favor of political expediency. Colorado has attempted to give its homosexual citizens the same public health protections as other Coloradans, but Colorado cannot fight AIDS alone. As long as the majority of states do not adopt a proper public health approach to AIDS, then AIDS control efforts are doomed to failure. The Colorado AIDS control law is not perfect, but it is hoped that a broader understanding of the law will stimulate other states to reconsider their AIDS control measures.

## I. Purposes of Disease Control Laws

### A. Controlling the Spread of Disease

The prime purpose of disease control laws is inherent in their name: they exist to control the spread of disease. Few communicable diseases are amenable to eradication or even substantial prevention. For example, there are between one and three million cases of gonorrhea each year.<sup>7</sup> While gonorrhea is easily treatable,<sup>8</sup> there is neither a screening test nor a vaccine for the gonococcus, making it impossible to eradicate. Given the large number of carriers, and the societal unease with state controls on sexual activity, it is also impossible to curtail the activities of persons carrying the disease. For individuals at risk of contracting gonorrhea, the most realistic disease control goal is to identify and treat new cases before they lead to permanent injuries such as sterility.<sup>9</sup> At the societal level, it is only possible to prevent the gradual increase of the disease and to be on guard against the emergence of new drug resistant strains.

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

For other diseases, such as typhoid fever, it is impossible to cure the disease in some persons. It is possible, however, to prevent its spread as an endemic disease in the community. Typhoid is easily controlled for three reasons: (1) there are relatively few cases;<sup>10</sup> (2) the risk to the community arises from easily identifiable occupations;<sup>11</sup> and (3) the public accepts that a health officer must actively supervise the disease carrier to prevent further spread of the disease.<sup>12</sup> In contrast with gonorrhea, it is reasonable for individuals to expect to be protected from infection with typhoid fever.

#### B. Disease Reporting

The scientific control of communicable diseases rests on the identification of infected individuals, the investigation of how these individuals contracted the disease, interventions to prevent the further spread of the disease, and, in some cases, the treatment of infected individuals. All of these activities are predicated on identifying the universe of infected individuals. Without effective disease reporting, one cannot know the number of persons infected,<sup>13</sup> the rate at which the disease is spreading in the community, the mode of spread of the disease, or the natural history of the disease. For a new disease, such as Lyme disease or HIV infection, this information is critical to such basic tasks as determining who is at risk for the disease and how the disease is spread.<sup>14</sup> Disease reports are also critical to maintaining the surveillance of well controlled diseases to assure that the patterns of spread and the prevalence of these diseases do not change.<sup>15</sup>

The mainstay of disease reporting is the identification of infected persons by name and address. Other information, such as occupation or dietary history may be obtained during the investigation of a specific disease outbreak.<sup>16</sup> If the disease is spread by personal contact, then the infected individual will also be questioned about who may have given him the disease and who he may in turn have infected. Because of the intrusive nature of the contact investigation, the reporting and investigation of communicable diseases has always been most problematic for sexually transmitted diseases (STD's).

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

Persons with STD's must contend with societal censure and the embarrassment of having to discuss intimate personal information with disease investigators. Yet the requirement that information about sexual habits and partners be disclosed to public health authorities has not been controversial until recently. Historically, persons with STD's have readily complied with the reporting of their contacts and have supported efforts by health departments to warn friends and lovers who might have become infected.<sup>17</sup> Most tellingly, homosexual men and prostitutes sought treatment in public health clinics in preference to private practitioners. Until AIDS, public health clinics were valued for their non-judgmental treatment of STD's and their strict protection of the patient's privacy.

A central dilemma of the AIDS hysteria has been a systematic effort by homosexual and civil rights advocacy groups to prevent the application of disease control measures to HIV infection. Since no health departments have seriously considered restricting HIV carriers, the major focus has been on preventing the mandatory reporting of HIV infection and limiting the notification of persons who have been exposed to the disease. Homosexual activists have resisted reporting and contact tracing because they fear that the health department records will be used to persecute homosexual men. The American Civil Liberties Union has resisted the reporting of HIV infection out of a vague sense that there is a constitutional right to conceal a communicable disease. In both cases, these efforts to prevent basic disease control activities are rooted in a naive view of disease control that assumes that diseases are only controlled through treatment, and that education is the best way to control the spread of communicable diseases. Unfortunately, there are no magic bullets for HIV infection, and education has had a dismal record in the control of STD's.

The tragedy is that since these groups have not be able to make a valid scientific argument against the reporting of HIV infection, they have instead chosen to attack the integrity of public health officials. Despite evidence that public health departments have an essentially unblemished record in protecting patient information,<sup>18</sup> homosexual advocacy groups have convinced most state legislatures that health departments cannot be trusted with information on the spread of HIV. This attack on the integrity of public health has been made with

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

the tacit support of many public health officers. These public health officers have become captives of the rhetoric of patient autonomy. They speak of protecting the patient's right to privacy, rather than the patient's right to life. The legacy of this schizophrenic view of the role of public health officials<sup>19</sup> has been the unnecessary death of tens of thousands of people, primarily homosexual men.<sup>20</sup>

These groups have been successful in preventing the reporting of HIV status and the warning of persons exposed to HIV. Except for Colorado and a few other jurisdictions, state, local and federal public health authorities have refused to support HIV reporting. Since HIV is a national problem, with mobile carriers and great regional variation, the data from the small number of jurisdictions that require the reporting of HIV are not adequate to describe the dynamics of HIV infection. As a result of the failure of most jurisdictions to require reporting of HIV status, it is impossible to determine the number of persons infected with HIV, or the rate and mode of its spread in the United States. The Centers for Disease Control (CDC) cannot determine, within the range of 100,000 to 5,000,000, the actual prevalence of HIV infection. While statutory reporting requirements provide less accurate prevalence information than properly conducted seroprevalance studies, they would provide valuable information that is not otherwise available.

## II. Disease Control in Colorado

### A. Federal Efforts

Public health has traditionally been a state rather than federal activity. The Federal government operates the United States Public Health Service,<sup>21</sup> but this was, historically, merely a uniformed service to provide medical care for members of the merchant marine. The Federal government became actively involved in disease control, specifically the control of STD's, during World War I and II. This involvement began because of the debilitating effect of STD's on the troops. The federal efforts continued though the early 1950's, resulting in the lowest rates of STD's in United States history. The rate of syphilis and gonorrhea is now higher than forty years ago.<sup>22</sup> Since World War II the Public Health Service has evolved to include

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

medical research at the National Institute of Health and other federal facilities.

The government also operates the Centers for Disease Control (CDC). The CDC: 1) conducts research on public health problems, including disease control; 2) maintains a clearinghouse for statistical information on health matters, including communicable diseases; 3) administers both general and categorical disease control grant funds; 4) oversees maritime disease control efforts; 5) engages in professional standard setting for laboratory and disease control activities; 6) provides special drugs and antitoxins; and 7) represents the United States in the World Health Organization. The Epidemic Investigation Service is also based at the CDC.<sup>23</sup> This is a group of investigators that will assist state and local health officers in the investigation of unusual disease outbreaks.

While the CDC attempts to coordinate and encourage state disease control efforts, its effectiveness is limited because the United States does not have a national disease control policy. Congress has preferred to leave disease control activities to the states. Each state is free to ignore CDC standards and resources, irrespective of the effect on national disease control efforts. While states should be free to adopt more rigorous disease control standards than those proposed by the CDC, there should be federally mandated minimum standards and greater standardization of disease control efforts.

## B. State Powers

### 1. General Powers

States have almost unfettered authority to protect their citizens from communicable disease. In a few old cases, the courts have declared blatantly racist laws unconstitutional,<sup>24</sup> but sustained even Draconian measures when applied to persons suspected of spreading a communicable disease. In modern times, the courts have seldom limited the authority of state and local public health officers to protect the public health.<sup>25</sup> The universe of available powers includes the authority to:

(1) require the reporting of private medical information to governmental agencies;<sup>26</sup>

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

- (2) search medical records held by physicians and hospitals to locate information about the spread of communicable diseases;<sup>27</sup>
- (3) immunize persons against communicable diseases;<sup>28</sup>
- (4) perform medical examinations, collect specimens, and perform laboratory analyses without, or against, a person's consent;<sup>29</sup>
- (5) treat persons without, or against, their consent;<sup>30</sup>
- (6) restrict the occupation of a disease carrier;<sup>31</sup>
- (7) restrict the freedom of movement and association of a disease carrier;<sup>32</sup> and
- (8) seize and destroy property that poses a threat to the public health.

## 2. Colorado's General Powers

The powers stated above are available to all states, but the state must pass legislation to empower the state health officer to exercise the state's power. In Colorado, as in most states, this legislation takes the form of a general authorization to protect the public health and safety, combined with legislation for specific diseases. The general authorization for the CDH is quite broad:

- (1) To investigate and control the causes of epidemic and communicable diseases affecting the public health;
- (2) "[t]o establish, maintain, and enforce isolation and quarantine, and, in pursuance thereof and for this purpose only, to exercise such physical control over property and the persons of the people within this state as the department may find necessary for the protection of the public health;"
- (3) to close theatres, schools, and other public places, and to forbid gatherings of people when necessary to protect the public health;
- (4) to abate nuisances when necessary to protect the public health; and
- (5) to collect, compile, and tabulate reports of marriages, dissolution of marriages, declaration of invalidity of marriages, births, deaths, and morbidity, and to require any person having information with regard to the same to

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

make such reports and submit such information as the board shall by rule or regulation provide.<sup>33</sup>

In addition to these general powers, there are specific laws governing alcoholism and intoxication treatment,<sup>34</sup> cholera and smallpox on trains,<sup>35</sup> prenatal examinations for syphilis,<sup>36</sup> "inflammation of the eyes of the newly born",<sup>37</sup> venereal diseases,<sup>38</sup> tuberculosis,<sup>39</sup> rabies,<sup>40</sup> psittacosis,<sup>41</sup> phenylketonuria,<sup>42</sup> school entry immunizations,<sup>43</sup> newborn screening and genetic counseling,<sup>44</sup> and HIV infection.<sup>45</sup>

### III. Disease Reporting

#### A. Disease Reporting in Colorado

The CDH has the general authority to require anyone to report communicable diseases, even attorneys. In Regulation two of the Rules and Regulations Pertaining to Communicable Disease Controls, the CDH has established which individuals, in addition to attending physicians, must report communicable diseases: "other persons either treating or having knowledge of a reportable disease, such as superintendents or persons in charge of hospitals or other institutions licensed by the Colorado Department of Health, (or their designees), persons in charge of schools (including school nursing staff) and licensed day-care centers."<sup>46</sup> Regulation two attempts to limit the duty to report to health care providers and the supervisors of licensed institutions through the qualification of persons with knowledge of a reportable disease, "such as superintendents." This qualification still leaves open the question of whether other persons, such as attorneys, have a legal duty to report communicable diseases. While the vague language might prevent prosecution under the public health laws, it might not foreclose liability for a civil lawsuit for failure to warn.<sup>47</sup>

The CDH has promulgated administrative regulations requiring the reporting of many diseases that are not the subject of specific statutes.<sup>48</sup> These regulations list the diseases that must be reported, the form of the required reports, and how quickly the report must be made. The regulations divide diseases into five categories: (1) those that must be reported within twenty-four hours (List A);<sup>49</sup> (2) those

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

that must be reported within seven days (List B);<sup>50</sup> (3) laboratory reporting of venereal diseases;<sup>51</sup> (4) laboratory reporting of non-venereal diseases;<sup>52</sup> and (5) reporting requirements for HIV infection.<sup>53</sup>

The disease reports must contain the following information: "patient's name, address (including city and county), age, sex, name and address of responsible physician, and such other information as is needed to locate the patient for follow-up."<sup>54</sup> This information is also required in reports of HIV infection. There is an exemption for "influenza-like illness, animal bites and mumps, in which only the number of cases seen need be reported."<sup>55</sup> All List A diseases and certain List B diseases<sup>56</sup> must be reported by a clinical diagnosis, irrespective of laboratory confirmation. The remainder of List B diseases are only to be reported when the diagnosis is supported by laboratory confirmation. These reports may be made to the local health officer, his designate, or the CDH Epidemiology Division.<sup>57</sup>

Lists A & B delineate the diseases that the CDH believes are of public health significance, and that are likely to be seen in Colorado. Regulation one of the Colorado Department of Health also requires the reporting of:

any unusual illness or outbreak of illnesses which may be of public concern whether or not known to be, or suspected of being, communicable, regardless of its absence from lists A and B. A physician who observes any unusual pattern of illness, or, more broadly, any threat to the public health,<sup>58</sup> should contact the state or local health department.<sup>59</sup>

More importantly, the CDH protects the confidentiality of all disease control reports: "All records and reports submitted to the Colorado Department of Health in compliance with these regulations are deemed to be confidential public health information and are to be used by the Department as source material for problem analysis and necessary disease control efforts."<sup>60</sup> As with all public health departments, the CDH has an exemplary record of maintaining the confidentiality of disease control reports. This was recently highlighted in a report prepared by the Association of State and Territorial Health Officers (ASTHO).<sup>61</sup> As part of this report the committee conducted a national

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

survey attempting to show that new laws are necessary to protect the confidentiality of HIV carriers. The study showed that the number of documented cases of breaches of confidentiality were very low, and that breaches by disease control workers were essentially nonexistent.<sup>62</sup>

#### B. The Duty to Protect Others

A person infected with a communicable disease has a duty to prevent the spread of the disease to others. If a person transmits a disease through a negligent failure to prevent harm to others, then the disease carrier could be sued for damages.<sup>63</sup> In Colorado and other states which criminalize certain reckless conduct, an action based on a negligence per se theory could be supported. The reckless or intentional transmission of a communicable disease could also be grounds for prosecution under a state's criminal laws.<sup>64</sup> While it might be difficult to obtain a conviction for specific intent crimes such as murder, a person who knowingly exposes others to a dangerous communicable disease could be successfully prosecuted for reckless endangerment.<sup>65</sup> The health department may also prosecute such conduct under the public health laws.<sup>66</sup>

Physicians and other health care workers have a duty to prevent the spread of communicable diseases. They must counsel an infected person on how to prevent the spread of disease.<sup>67</sup> They also have a duty to warn persons that might be infected through contact with the disease carrier.<sup>68</sup> An important function of a state's disease control laws is to allow the discharge of a physician's duty to warn persons who his patients might endanger.

A central dilemma in the treatment of persons with communicable diseases is the conflict between the physician's duty to warn third persons and the duty to protect the patient's confidentiality. Many physicians believe that they have both the right and the duty to personally warn persons who may be put at risk by their patients. This belief is strongest among family practitioners, who, rightly, abhor the notion that they cannot warn a wife, for example, that her husband has syphilis. Unfortunately, assuming the duty to personally warn third parties is fraught with liability,<sup>69</sup> and may even violate specific statutes designed to protect a patient's privacy.

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

In Colorado it is illegal for a physician to contact a third party without the patient's consent. Colorado is unusual in that its statutory protection for patient confidentiality is part of the criminal code.<sup>70</sup> This statute applies to all medical records<sup>71</sup> and medical information,<sup>72</sup> imposing a criminal penalty<sup>73</sup> on any person, "who, without proper authorization, . . . discloses to an unauthorized person a medical record or medical information. . . ." <sup>74</sup> Proper authorization means the written consent of the patient or his duly designated representative, an appropriate court order, or that the record or information is being used in various designated health care related functions.<sup>75</sup> This law accepts the reality of health care as a team activity, but strictly limits disclosures to third persons who are not involved in the health care system.

The restrictions on warning third persons are balanced by the duty to report specific diseases, and other conditions that pose a threat to the public health, to the public health officials. This provides Colorado physicians with a solution to the dilemma of public versus private trust: they are required to report communicable diseases to the CDH, which then warns third parties as necessary, and they are forbidden to personally warn third parties without their patients' consent.<sup>76</sup>

Physicians in jurisdictions that do not accept or act on reports of communicable diseases, such as HIV, are in an unenviable position. They cannot discharge their duty to warn (and the liability for failing to warn) third persons through the public health department, but personal attempts to warn others may subject the physicians to liability for breaching their patients' confidences. A physician in such as jurisdiction has three choices:

- (1) Do nothing beyond counseling the patient to warn persons that he might put at risk of becoming infected with the communicable disease;
- (2) Personally warn the persons at risk himself, thus assuming the threat of litigation for invasion of privacy, libel or slander, and the risk that the physician's actions will establish the patient's dangerousness while being ineffective in warning all appropriate persons; or
- (3) Carefully document the details of each case in which there is a danger to third parties. This should include giving the patient a written form explaining the dangers to others and his duty to act

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

responsibly. The physician should, unless specifically forbidden by state law, copy this documentation and send it to his state health department. This will put the health department on notice that the patient poses a risk to the public health.<sup>77</sup>

In Colorado, a physician or another health care provider who complies with the Colorado laws and regulations governing the reporting of communicable diseases should have a complete defense to lawsuits based on a failure to warn third persons. This compliance is especially important for HIV reporting, where there is both a statutory duty to report and a statutory protection from litigation for physicians who report.<sup>78</sup> To assure that this protection is available, the person making the disease control report should document the fact of the report in the patient's medical record, including time, date, and person contacted at the health department.

#### C. Liability for Failing to Report Communicable Diseases

The communicable disease control laws and regulations are evidence of the state's interest in protecting the public health. As such, their violation gives rise to legal liability for the damages related to the particular consequences of the breach. The best known of these duties, and one that is shared with certain other health care providers, is to report the disease to the public health authorities.<sup>79</sup> Failing to report a communicable disease is punishable under the law.<sup>80</sup> Physicians also have a duty to counsel the infected person on measures to avoid the spread of the disease.<sup>81</sup> Persons who violate these laws may be sued if their patients infect others. In such a lawsuit the violation of the statute would be evidence of negligence per se. While negligence per se has not been specifically adopted by a Colorado court in a disease control case, it is well accepted in other contexts.<sup>82</sup>

The Colorado Supreme Court recently reviewed negligence per se.<sup>83</sup> The court held that "[t]he standard of conduct is adopted by the court from the statute or ordinance, and violation of the enactment conclusively establishes negligence."<sup>84</sup> Merely showing that the defendant violated the statute is not enough. The plaintiff must also "show that he is a member of the class the statute was intended to protect and that the injuries were of the kind that the statute was

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

enacted to prevent."<sup>85</sup> In the case under consideration, the defendant violated the law against selling liquor to an intoxicated person. The plaintiffs were the family of a man killed by the intoxicated person. The court had no trouble in finding that the purpose of the Dramshop law was to protect both the drinker and the "safety of those with whom the drinker comes into contact."<sup>86</sup> Thus, the court found for the plaintiffs on the issue of negligence per se.

In a case alleging negligence per se for violation of a communicable disease law, there would typically be a plaintiff who contracted a communicable disease from the defendant's patient. If this patient had contracted HIV, then the legislative intent for part fourteen of the communicable disease control laws<sup>87</sup> would be in issue. The introduction of part fourteen establishes: (1) that the legislature supports the Colorado Department of Health's efforts at controlling HIV infection; (2) that restrictive measures should only be used to protect the public health; and (3) that the legislature wants to control the spread of HIV. In particular, the legislature explicitly endorsed the reporting of HIV infection and the notification of persons known to be exposed to HIV infection as a method of controlling the spread of HIV.<sup>88</sup>

When a bar owner serves alcohol to a drunk, the owner does not know which members of the general public that the drunk may injure. It is sufficiently foreseeable, for the purpose of assigning liability in tort, that a drunk will engage in driving under the influence, and that the drunk will injure a member of the general public. Similarly, it is foreseeable that a person carrying a communicable disease will pass that disease on to a member of the general public. Thus, the public health duty to counsel and report is designed to protect third parties in the same way as the Dramshop laws. Irrespective of the physician's common law duty to warn of communicable diseases,<sup>89</sup> there is clearly a duty to warn through notification of the public health department. Any person injured through this failure to warn would be entitled to recover damages.<sup>90</sup>

#### IV. Constitutional Considerations: Restricting the Innocent

Public health law occupies that nether world between criminal and civil law. While public health proceedings may constitutionally be

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

carried out without the rigor of a criminal proceeding, they may result in the incarnation of a disease carrier. Most interestingly, public health laws are seldom litigated. (A recurring explanation is that judges are not interested in having infectious litigants in their court rooms.) There is little case law on communicable disease control measures. While this invisibility is often taken as evidence that the courts must have curtailed disease control activities, it is more accurately a reflection of the courts' acquiescence in these activities.

Only one recent case, Reynolds v. McNichols,<sup>91</sup> has examined the constitutional reach of the Colorado communicable disease laws. Reynolds arose when a prostitute challenged the public health officer's authority to require her to be examined and treated for venereal disease. Reynolds demonstrates the level<sup>92</sup> of constitutional scrutiny that has historically been applied to disease control cases. This is an important case because it refutes the charge, levied by civil rights activists and homosexual advocacy groups, that Colorado's disease control laws are antiquated and would not withstand constitutional scrutiny.<sup>93</sup>

The Denver ordinance under which Reynolds was prosecuted provided that persons suspected of having a venereal disease could be examined, detained, and treated. The statute defined a person under suspicion as any person arrested and charged with "vagrancy, prostitution, rape, a violation of this article, or another offense related to sex"<sup>94</sup>, or:

Any person reasonably suspected to have had a contact with another individual reasonably believed to have had a communicable venereal disease at the time of such contact and any person who is reasonably believed to have transmitted any such disease to another individual. Any person who has had any such disease or who has been convicted of any offense of the kinds herein specified within twelve months next past, and who is reasonably believed to be engaged in any activity which might have occasioned exposure to a communicable venereal disease.<sup>95</sup>

The ordinance provides that persons who have been arrested may be detained in jail pending examination and treatment. Detention may be

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

circumvented if the prisoner agrees to accept treatment without further testing.<sup>96</sup> The Director of Denver Health and Hospitals is empowered to order persons suspected of carrying a venereal disease, who are not in jail, to present themselves for examination and treatment.<sup>97</sup> The ordinance provides that the Denver police have the authority to order persons to present themselves at Denver Health and Hospitals for examination and treatment.<sup>98</sup>

The court found both the detention and the walk-in orders to Denver Health and Hospitals to be constitutional:

Involuntary detention, for a limited period of time, of a person reasonably suspected of having a venereal disease for the purpose of permitting an examination of the person thus detained to determine the presence of a venereal disease and providing further for the treatment of such disease, if present, has been upheld by numerous state courts when challenged on a wide variety of constitutional grounds as a valid exercise of the police power designed to protect the public health.<sup>99</sup>

While this case is fifteen years old, the United States Supreme Court has not weakened its authority.

In 1987, the United States Supreme Court reiterated the right of the government to restrict the freedom of individuals to protect the public safety. In United States v. Salerno,<sup>100</sup> the Court upheld the preventive detention provision of the Bail Reform Act of 1984.<sup>101</sup> Preventive detention, for the purpose of protecting the public safety, was found to be an allowable regulatory function, rather than an impermissible punishment.<sup>102</sup>

In the companion case of Hilton v. Braunskill,<sup>103</sup> the Court applied the same individual liberty/public safety balancing test to support a decision not to release a successful habeas corpus petitioner, pending final appeal, because he might pose a threat to the community.<sup>104</sup>

In both of these cases, the Court stresses the right of the government to restrict, though not punish, persons who pose a threat to the public safety. While these restrictions must be accompanied by appropriate due process, proceedings need only show by "clear and

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

convincing evidence after an adversary hearing"<sup>105</sup> that the restrictions are necessary to protect the public safety. Given the highly suspect nature of pre-trial detention, it is reasonable to assume that the court would support public health restrictions based on clear and convincing evidence, without requiring that the person actually be caught in the act of harming another.

The basic premise that the state has the power to order individuals to be examined and be treated for communicable disease is still good law.<sup>106</sup> As to the detention in jail, as opposed to the walk-in orders to Denver Health and Hospitals, the Reynolds court found this acceptable because the plaintiff in this case was a prostitute, who had been arrested for prostitution. Noting that venereal disease is an occupational disease for prostitutes,<sup>107</sup> the court found nothing impermissible in detaining the plaintiff in jail a little longer for examination and treatment. While this case dealt with a prostitute, it is clear precedent for all persons arrested and charged with a crime reasonably related to the spread of a communicable disease. This creates a broad reaching precedent in Colorado because of the acceptance of reckless endangerment as a chargeable criminal offense.<sup>108</sup>

Even in states where spreading a communicable disease is not a chargeable offense, the Salerno case provides guidance for the restriction of persons who pose a threat to the public safety. The Salerno Court listed several situations where potentially dangerous persons, or classes of persons, may be detained without trial: enemy aliens during time of war; persons detained by executive order during time of insurrection; potentially dangerous aliens during pending deportation proceedings; mentally unstable persons who present a danger to the public; dangerous persons who become incompetent to stand trial; post arrest detention of juveniles; and persons who might flee the jurisdiction before trial.<sup>109</sup>

"Dangerous" is a more objective determination when dealing with communicable diseases. For example, a person with a deadly disease that is spread through respiratory contact poses a threat to the public safety. In contrast to determining the threat posed by a pretrial detainee, the diagnosis of this disease, and the probability of its spread, are determined by relatively unambiguous physiologic measures. This is an extreme case, but not an unusual one. There are

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

many communicable diseases for which dangerousness, and the type and degree of restriction necessary to protect the public safety, is an objective, technical determination. These cases should not require the extensive procedural protections that are necessary when the determination of dangerous is more subjective.

#### V. Colorado Statutory Public Health Law Penalties

Since Colorado uses both general public health authority and specific disease control laws, there are varying penalties for disease control law violations. The penalty for violations of the general public health law is fairly severe:

[a]ny person, association, or corporation, or the officers thereof, who violates any provision of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not more than one thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment, and in addition to such fine and imprisonment, shall be liable for any expense incurred by health authorities in removing any nuisance, source of filth, or cause of sickness.<sup>110</sup>

This penalty applies to the violation of any order or rule promulgated under the general powers of the CDH, or under the provisions of specific laws that do not have designated penalties. Physicians and others with a duty to report communicable diseases may be prosecuted if they "fail to make or file reports required by law or rule of the board relating to the existence of disease or other facts and statistics relating to the public health."<sup>111</sup>

#### VI. Specific Colorado Public Health Statutes

##### A. Food Handling

Colorado law makes it illegal to employ a person as a food handler who has a contagious, infectious, or venereal disease. It is also a violation for the infected person to accept the employment.<sup>112</sup>

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

This is an old statute, but it has not been superceded. The CDH regulations on communicable disease in food handling establishments assume that the law means that the person cannot be employed if he has a disease that may be transmitted through the handling of food.<sup>113</sup> An employer or employee who does not comply with the provisions of this regulation will be subject to the statutory penalty.<sup>114</sup>

The problem is that the law as written applies to persons who have any communicable disease, not merely those that are communicable through food handling. However, this law is probably preempted by the Rehabilitation Act<sup>115</sup> for most employers. The CDH will not prosecute employers not covered by the Rehabilitation Act who comply with the CDH regulation rather than the statute. While this leaves the theoretical risk of a negligence per se based lawsuit, causation would fail if the disease were not communicable through food. Employers and infected persons must comply with the CDH regulation. Violation of state and federal antidiscrimination laws would occur when employers attempt to fire food handlers who have a communicable disease (thus technically illegal to employ), but who do not pose a threat of contagion.

#### B. Prenatal Examinations

Colorado requires that the physician attending a pregnant woman test the woman for syphilis within ten days of her first patient visit. If the woman is attended by a midwife or faith healer who is not permitted to draw blood, then the woman must be sent to a physician to have a blood sample drawn for testing.<sup>116</sup> The person reporting the birth or stillbirth of a child must state that the test was done and provide the approximate date of the test.<sup>117</sup> The result of the test is not reported with the birth certificate, but if the test is positive it must be reported to the CDH. A person who violates this law is subject to a fine of not more than three hundred dollars. If the person attending the woman requests that the blood test be done, but the woman refuses, there is no violation of the statute. This request must include full information about the consequences of having a baby with congenital syphilis if it is to also discharge tort liability for not testing a pregnant women for syphilis.<sup>118</sup>

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

C. Prophylaxis for Ophthalmia Neonatorum<sup>119</sup>

Colorado requires that physicians, nurses, and other persons attending the birth of a baby treat the baby with an ophthalmic prophylaxis approved by the CDH. Although the CDH is empowered to require the reporting of ophthalmia neonatorum,<sup>120</sup> it has not chosen to do so. If the inflammation is caused by an otherwise reportable disease, it must be reported pursuant to the appropriate regulation.<sup>121</sup> This statute contains a specific exclusion for parents who belong to a "well-recognized church or religious denomination and whose religious convictions, in accordance with the tenants or principles of his church or religious denomination, are against medical treatment for disease."<sup>122</sup>

D. Venereal Diseases

This statute deals explicitly with syphilis, gonorrhea, chancroid, granuloma inguinale, and lymphogranuloma venereum.<sup>123</sup> There are at least fifty additional venereal diseases not listed in this act. While it is not certain whether the legislature intended this to be an exhaustive list, it is clear that diseases excluded from the statutory list could be managed under the general powers of the Health Department. In fact, before the AIDS Control Bill went into effect in 1987, the CDH regulated HIV infection through its general power.

The venereal disease statute creates a specific reporting duty for a large class of persons: "Any physician, intern, or other person who makes a diagnosis in, prescribes for, or treats a case of venereal disease and any superintendent or manager of a state, county, or city hospital, dispensary, sanitarium, or charitable or penal institution in which there is a case of venereal disease. . . ."<sup>124</sup> The CDH, through its rule making authority,<sup>125</sup> has broadened this duty to the "attending physician . . . [and] other persons either treating or having knowledge of a reportable disease."<sup>126</sup> The CDH has also promulgated rules that require laboratories to report the results of certain clinical tests for venereal diseases. While the statute does not mandate that infected persons be named in the reports,<sup>127</sup> the CDH requires that the infected person be identified pursuant to the

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

general regulations for reporting communicable diseases. Since these are statutorily required reports, making the reports will not subject a person to any liability. This common law notion is elaborated in the statute, which absolves physicians of any liability "whatever" for reporting a venereal disease carrier.<sup>128</sup> The statute also codifies the duty of a physician who diagnoses or treats a venereal disease in a patient. The physician is "to instruct him in measures for preventing spread of such disease, to inform him of the necessity for treatment until cured, and to hand him a copy of the circular of information regarding venereal disease from the department of health."<sup>129</sup>

The venereal disease control law contains one of only two explicit statutory authorizations for the treatment of minors.<sup>130</sup> This authorization is a model of clarity:

Any physician, upon consultation by a minor as a patient and with the consent of such minor patient, may make a diagnostic examination for venereal disease and may prescribe for and treat such minor patient for venereal disease without the consent of or notification to the parent or guardian of such minor patient or to any other person having custody of such minor patient. In any such case, the physician shall incur no civil or criminal liability by reason of having made such diagnostic examination or rendered such treatment, but such immunity shall not apply to any negligent acts or omissions.<sup>131</sup>

This section provides clear authority for the treatment of minors, while not taking away the minor's right to non-negligent treatment. Unlike statutory provisions for other diseases, the venereal disease control law does not have an exemption from treatment for persons with religious objections to medical treatment.<sup>132</sup> This would give the physician the ability to treat minors who consent, even if their parents have religious objections to medical treatment. Given the danger that communicable diseases pose to the public health, authorization for treating minors should be part of all the disease control laws.<sup>133</sup>

A person -- who knows, or has reasonable grounds to know, that he is infected with a venereal disease -- commits a crime by willfully

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

exposing or infecting another with the disease. It is also unlawful to knowingly perform an act that exposes or infects another with a venereal disease.<sup>134</sup> The public health authorities are given broad authority to control the spread of venereal diseases:

- (1) To make examinations of persons reasonably suspected<sup>135</sup> of being infected with venereal disease [without or against their consent];
- (2) to detain such persons examined for venereal disease until the results of the examination are known;
- (3) to require persons with a venereal disease to obtain treatment from a physician; and
- (4) to isolate and quarantine persons infected with venereal disease.<sup>136</sup>

These provisions are consistent with the state's police power. Although they have not been litigated, they have been upheld by implication in Reynolds.<sup>137</sup> Violation of a health officer's order, or of the duty to report venereal diseases, is a misdemeanor, punishable by a \$300 fine, ninety days in jail, or both.<sup>138</sup>

#### E. Tuberculosis

Tuberculosis may be the once and future disease.<sup>139</sup> It was once a scourge in this country, and it is again on the increase. The surge of new tuberculosis cases has many roots. One is the increase in the urban homeless. Another is introduction into the United States of a large number of Southeast Asian refugee who were not properly screened and treated for tuberculosis. The most legally challenging increase has been among persons who are infected with the HIV virus. For example, New York has recently seen a substantial increase in its tuberculosis rate, mainly attributable to HIV carriers.<sup>140</sup> Most troubling, for many of these person, tuberculosis is their first HIV related illness. This is further evidence that even "asymptomatic" infection with HIV carries serious medical consequences.<sup>141</sup>

Tuberculosis is an important disease to understand because its control demands the full range of public health restrictions acceptable under the United States Constitution. While the

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

peculiarities of HIV transmission have shaped much contemporary thinking about disease control laws, tuberculosis is a much better disease to use as a heuristic for determining the proper extent of the state's police power to protect its citizens from communicable diseases.

Tuberculosis is frightening because it is communicable through respiratory contact. A cough or sneeze can spread the tuberculosis bacillus, although more prolonged contact, such as in the home or workplace, is usually required.<sup>142</sup> Unlike HIV, where it is easy to assume that a person is not at risk unless he chooses to be, there need be no element of personal choice in tuberculosis exposure. Tuberculosis is disturbing to civil libertarians because a carrier will expose other individuals by just being around them. A tuberculosis carrier may need to be restricted irrespective of his best efforts to not infect others.

The pathophysiology of tuberculosis is such that it is able to hide in the community. Persons who are exposed to tuberculosis frequently become infected, in that the tuberculosis bacillus lodges in their bodies and lives there, usually without causing any symptoms. Most of these asymptomatic carriers are not infectious because their immune systems prevent the bacillus from growing fast enough to be excreted. If this infected person then is weakened, either through another illness or other physiological stress such as starvation, the bacillus will multiply and the individual will become both ill and infectious.

Children are especially susceptible to tuberculosis because they are not as efficient as adults in keeping the bacillus suppressed. Children often become infected, sick, and infectious in a short period of time. Once a person becomes symptomatic with tuberculosis he may die unless he is provided prolonged treatment with antituberculosis drugs. Tuberculosis, a difficult disease to treat, requires treatment with somewhat toxic drugs for several months.<sup>143</sup> In some cases, the bacillus becomes resistant to the drugs and thus becomes untreatable. Patients with infectious, drug resistant tuberculosis pose a particular problem because some of the persons that they infect will also develop drug resistant tuberculosis. Pan-drug resistant tuberculosis is frequently fatal in adults and children, despite all available treatments.

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

As expected, the disease control laws for tuberculosis are quite strict. They are also used on a regular basis. A common tuberculosis enforcement action involves a derelict who does not want, or is not able, to take his antituberculosis medication. The local health officer will have the derelict picked up and medicated. This sometimes requires that the person be held for treatment until he is no longer infectious. The Colorado tuberculosis control law provides for the following:

(1) That it is "the duty of the department of health to conduct an active program of hospitalization and treatment of persons suffering from said disease."<sup>144</sup>

(2) "every attending physician in this state shall make a report in writing, on a form furnished by the department of health, on every person known by said physician to have tuberculosis within 24 hours after such fact comes to the knowledge of said physician;"<sup>145</sup>

(3) all laboratories providing diagnostic services must also report a diagnosis of tuberculosis within 24 hours;<sup>146</sup>

(4) the CDH will perform tuberculosis tests for physicians without charge;<sup>147</sup>

(5) the CDH will maintain a register of tuberculosis reports and investigations, which are not to be opened for inspection except to the health authorities and as necessary for tuberculosis control under the statute;<sup>148</sup> and

(6) the CDH is authorized to provide treatment and hospitalization to indigent persons suffering from tuberculosis.<sup>149</sup>

The tuberculosis control act<sup>150</sup> also contains specific provisions for the investigation of suspected tuberculosis cases, the examination of persons suspected of having tuberculosis, and the isolation and quarantine of persons who threaten the public health.

Every chief medical health officer is directed to use every available means to investigate immediately and ascertain the existence of all reported or suspected cases of tuberculosis in the infectious stages within his jurisdiction and to ascertain the sources of such infections. In carrying out such investigations, such chief medical officer is invested with full powers of inspection, examination, and quarantine or isolation of all

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

persons known to be infected with tuberculosis in an infectious stage and is directed to make or cause to be made such examinations as are deemed necessary of persons who, on reasonable grounds, are suspected of having tuberculosis in an infectious stage and to isolate or isolate and quarantine such persons whenever he deems it necessary for the protection of the public health.<sup>151</sup>

The test for invoking these broad powers is that the health officer must have "reasonable grounds"<sup>152</sup> to believe that an examination is necessary. These powers are reviewable through a habeas corpus proceeding, but there is no right to a hearing to contest the order. A person does have the right to be examined by his own physician.<sup>153</sup> If the person "depends exclusively on prayer for healing"<sup>154</sup> he may not be forced to accept treatment for tuberculosis. He may, however, be quarantined and restricted, for an indefinite time, so as not to pose a threat to the public health.<sup>155</sup>

The Colorado tuberculosis control act grants the CDH powers which are broad, but within constitutional constraints. Many persons argue that the state should rewrite the communicable disease laws, limiting the power of the CDH by requiring elaborate due process protections before a person could be examined, treated, or quarantined. While increased due process requirements would protect the right of the carrier to be free from governmental interference in his personal life, this would be at the price of unduly compromising the rights of the carrier's fellow citizens to be protected from easily communicated deadly diseases. If, for example, the due process provisions of the Colorado AIDS control law were applied to tuberculosis, a person with drug resistant tuberculosis could roam the community for weeks before CDH could restrict his actions. During this period of time, the carrier might infect numerous other persons, perhaps including many children if the infected individual were to volunteer at a day care center. Many of these newly infected persons would die. Given the resurgence of tuberculosis, and the continuing threat posed by other communicable diseases, it is critical not to abandon the necessary legal tools for controlling dangerous communicable diseases.

#### VII. The Colorado AIDS Control Law

Copyright 1988 - Edward P. Richards, III  
Preprinted, Permission University Of Denver Law Review

Colorado has been a pioneer in the control of HIV infection. This position is best expressed in the principles expressed by the CDH and Denver Health and Hospitals:

Public Health must not apply a lesser standard of control to AIDS than to syphilis and other STDs, since AIDS was spreading far more rapidly, was far more deadly, and could not be averted through prevention. . . . AIDS case reports are inadequate to monitor the course of the HIV epidemic. AIDS cases occurred an average more than five years after infection and were outnumbered by undetected HIV infections by 30-50 to one. More accurate knowledge of HIV antibody prevalence with a means to correct for multiple positive results from a single person would assist in better understanding of the epidemic. Approximately ten to 20% of individuals who voluntarily are tested for HIV do not return for their test results and, therefore, do not receive the all-important counseling. Much benefit could come from locating such individuals and providing counseling in the field.

Persons at risk of HIV infection have an ethical responsibility to be tested and, if positive, to notify all unsuspecting partners in unsafe sex or needle sharing activities. When an infected individual is unwilling or unable to notify partners of exposure, the health care provider and/or public health authorities are obligated to assume this responsibility through traditional or innovative methods of partner notification. To achieve the full public health benefit of these principles, confidential reporting by name and locating information of all persons testing positive for HIV antibody is indicated.<sup>156</sup>

Unfortunately, HIV control is an area where being a pioneer simply means treating HIV as if it were a communicable disease rather than a political issue. When the HIV antibody test became available in 1985, the CDH added HIV infection to its list of reportable





















































































