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UNM School of Law
Final Examination

Professor James Ellis
Thursday, May 8, 2003
Take-Home Examination

526 CONSTITUTIONAL RIGHTS
INSTRUCTIONS

This is an eight-hour, open-book final examination.

Your eight hours begin when you open this question for the first time. You should not pick up the question until you are ready to begin, or as close to that time as practical. Similarly, you should return your answer to the staff as soon as possible after your time has elapsed. Working on the exam past the eight-hour deadline will constitute a violation of the Honor Code.

The exam question will be available to be picked up after 9:30 on Thursday, May 8th. Answers must be returned by 4:00 on Friday, May 16th.

In preparing your answer, you may consult your textbook, published and photocopied supplements, any notes prepared by you (either alone or in conjunction with your classmates), treatises and other primary or secondary materials to be found in the law library. Please note that this exam is not a research project. It is my belief and anticipation that you can prepare a successful answer based solely on the course materials and your notes alone, but I have no objections if you want to consult the full text of a relevant case or check your understanding against a secondary source. You may not discuss any aspect of this exam or your answer with any other student or any other individual.

Your answer is limited to 3,500 words. Please count the words in your answer and write the total on the first page of your exam answer. No credit will be awarded for anything past the 3,500 words of your answer.

You have eight hours to write an exam answer that is no longer than that expected of a four-hour, in-class, ambush-style exam. This gives you the opportunity re-read a case or two and any notes or materials you might deem relevant to the question, and consider your answer. It also gives you the opportunity to read over what you have written to determine whether it makes sense to you.

GOOD LUCK!

QUESTION

The worldwide epidemic of Sudden Acute Respiratory Syndrome surprised the world with the speed with which it spread around the planet in early 2003. Among its frightening characteristics were its virulence and contagiousness. But another feature (shared with many other newly discovered viruses) is its maddening tendency to change and adapt itself rapidly, frustrating the efforts of public health officials to control and eradicate it. Thus it was that in the summer of 2003 it was followed by Mutating Acute Respiratory Syndrome (MARS), which fiendishly transformed its own attributes to involve the maximum number of constitutional issues regarding governmental efforts to combat it.

MARS appears to be caused by a virus, which has not been identified yet. Its initial symptoms resemble a bad cold, with an elevated temperature being common. The evidence currently available does not provide a complete answer regarding the transmission of the virus, but it appears that it is not airborne, and that the mostly likely causes of transmission are close physical contact (such as sexual contact or even a hearty handshake) and contact with human waste (such as changing a baby's diapers). The incubation period for the disease appears to be no more than ten days. There is no known treatment, and approximately six percent of those who are infected die. The virus was first detected in the Guangdong province of China, where the majority of the worldwide cases have occurred. But a single traveler from China appears to have spread the contagion to Canada, where over 3,000 cases have now been identified. Slow response to the epidemic and failure to isolate infected individuals by public health officials in both China and Canada have been severely criticized and blamed for the spread of the disease. For unknown reasons, 80% of those who die of MARS are male.

In response to this epidemic and the terror it evoked among the general population, some states enacted new statutes, while others dusted off older laws which had been enacted in earlier times to address other public health crises.

In the State of Paranoia, legislators expressed deep concern about the potential for spread of the MARS virus, despite the fact that no cases had been identified in the state. The quarantine provisions of the statute they enacted (see APPENDIX) were not extended to the recently identified Viennese Erratic Nasal Uncomfortableness Syndrome, which has identical contagiousness and death rate, but 95% of whose victims are female. Sara Susceptible, a woman who is deeply afraid of contracting the Viennese illness, has sued the state Department of Infections, Precautions, and Warnings Against Disaster (DIPWAD) for an order mandating that they take equivalent preventive measures to those adopted for MARS. The state trial court's denial of her petition for a writ of mandamus is now on appeal to the Paranoid State Supreme Court.

By contrast, the State of Hypothermia, which shares a long border with Canada, has experienced more than 500 cases of MARS, of whom three have died. All of the cases involved either individuals who entered the state from Canada (82 cases) or

individuals who came into contact with them. The Hypothermic Legislature was alarmed at this phenomenon and the threat it posed to local residents, debated responses to the public health of the state. (The debate also included several disparaging references to the refusal of the Canadian government to support U.S. efforts in Operation Iraqi Freedom as well as criticism of the common use of the French language in Canada.) The legislature enacted a statute (see APPENDIX) that, *inter alia*, required all persons crossing the border into the state spend ten days quarantined at a specially designated Holiday Inn, leased and operated by the state government, before they could travel into other areas of the state (or beyond). Almost 80% of the travelers subject to this quarantine are holders of Canadian passports. While confined at the Inn (at which they are billed at only 75% of the ordinary rack rate), they receive mandatory medical monitoring (including having their temperature taken with annoying frequency) and are inundated with commercials, on every station on the hotel's cable television hook-up, trumpeting the importance, as Canadian visitors to Hypothermia, of washing their hands frequently. (All Canadian television channels, including the CBC, have been blocked from the hotel's system. As a result, there is no programming in the French language, other than those ubiquitous hand-washing commercials, which are bilingual.) One outraged Canadian internee, François Trudeau, filed suit in state court, claiming that his confinement and its conditions violated his substantive due process and equal protection rights, and that the program offerings on cable television violated his First Amendment rights. The dismissal of his suit is now on appeal in the State Supreme Court.

There were proposals for legislation in the State of Anachronism, but no consensus was achieved between the Legislature and the Governor, who vetoed a bill as "insufficiently draconian," and as a result, the only legal tool available for combating and preventing MARS was the statute that dated from the Nineteenth Century, and had been enacted originally when consumption (tuberculosis), syphilis, and smallpox were the public health concerns of the day. Utilizing the powers under that statute, the Anachronistic Director of Public Health issued regulations (which are included in the APPENDIX).

Paul and Paula Parent have two natural children of their own, and are biologically capable of having a third, but have decided that adoption is more "ethically appropriate," and believe that it is "spiritually necessary" for their new child to be a Buddhist (a faith to which they have recently converted, following their dissatisfaction with their previous successive and short-lived affiliations with Unitarian, Episcopal (High Church), Amish, and Mormon religions). The Parents strongly desire to adopt an infant from China, and were close to concluding negotiations with the Zen Adoption Program (ZAP), a faith-based enterprise, to adopt an orphan from a province that is 1,000 miles from Guangdong. (The State Director of Public Health concedes that there are no Buddhist children available for adoption in Anachronism, although "there is an abundance of Unitarians.") The Parents are unwilling to wait for the end of the MARS epidemic because it is unclear when – if ever – that will happen, and because, in their view, their "spiritual clock is ticking." The Parents and ZAP filed a lawsuit seeking to enjoin enforcement of the ban on adoption of Chinese children, claiming that the regulation

violates both the Federal and State Constitutions. The trial court's dismissal of their complaint is now on appeal in the Anachronism Supreme Court.

One of the Parents' children, a 15-year-old who insists on being called Ulrich the Unruly, is mightily peeved by the requirement that he wear the prescribed face mask while attending Authoritarian High School. As a protest to what he sees as MARS hysteria, he obliterated the words "FORGET TO" on his mask with an indelible marking pen. This amused many of his classmates, who responded, during algebra class, by repeatedly chanting "Hell No, We Won't Soap." Assistant Principal Hendrik Henschman, after listening to what he described as Ulrich's "sophomoric and subversive" explanation of his action, summarily suspended him from school for three weeks. Metoo, Ulrich's 12-year-old brother refused to wear a mask altogether, claiming that it "wasn't cool," and that it would prevent everyone from seeing his newly-acquired tongue stud, which he believes to be central to his expression of his own individuality. After a similarly fruitless discussion with the authorities at Medieval Middle School, Metoo was also suspended from school for three weeks, and told that he could only return if he both wore a mask and got rid of the tongue stud. Both children appealed their suspensions on constitutional grounds, and denial of their cases by lower courts are now on appeal to the Anachronistic Supreme Court.

Libby Libertarian believes the entire process of random health checks is absurd. Unfortunately for her, she has never been selected for evaluation, so she has lacked the opportunity to refuse to participate. But still determined to participate in civil disobedience, she rented a large commercial billboard (previously advertising a particular brand of toothpaste), from which she proclaimed, "STAND UP FOR YOUR RIGHTS: IT'S NONE OF THEIR DAMN BUSINESS WHAT YOUR TEMPERATURE IS." In the weeks following the unveiling of the billboard, refusals to permit evaluations rose by 50%. Libby was arrested, tried for violation of Penal Code § 1984, and sentenced to five years imprisonment. The trial court also enjoined her from renting any other billboards for a period of ten years, without first obtaining government approval. She has appealed her conviction and the injunction to the State Supreme Court on constitutional grounds. One of the individuals who found the billboard thought-provoking and who three days later refused to be evaluated, Fiona Follower, has challenged her presumption-based quarantine, and that case, too, has reached the State Supreme Court.

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Implausibly enough, you are a peripatetic free-lance law clerk to State Supreme Court Justices in all three States. Analyze the constitutional issues in each of the cases. (Equally implausibly, assume that there are no Congressional pre-emption issues involved in any of these cases.)

APPENDIX

STATE OF PARANOIA
CONSTITUTION (portions)

ARTICLE IX. The State shall never discriminate on the basis of race, creed, gender, or national origin, and citizens shall be free from unreasonable discrimination or segregation on the basis of age, sexual orientation, or physical or mental disability.

STATE OF PARANOIA
MARS ERADICATION ACT

WHEREAS, the threat to the public health from infectious disease is ever present,
and,

WHEREAS, you can never be too careful,

THEREFORE, is hereby enacted the following Act:

Quarantine. Any person suspected by the Department of Infections, Precautions, and Warnings Against Disaster of being infected with the MARS virus shall be quarantined and isolated from the general public for the entire incubation period of the disease, plus an extra week just to be sure.

STATE OF HYPOTHERMIA
ATTACK ON MARS ACT

Section 1. Any individual entering the State of Hypothermia from Canada shall be quarantined in a secure facility near the border for ten (10) calendar days following their entry. During the time of quarantine, they shall be subject to such physical examinations as state health officials shall deem necessary. If at the end of the quarantine period, the health officials certify that the individual is in good health, the individual may be released from confinement. Any individual attempting to escape from quarantine shall be subject to immediate arrest and deportation.

Section 2. This Act shall remain in effect until the Governor, upon advice of public health officials, declares the health emergency of MARS to be eradicated.

STATE OF ANACHRONISM
CONSTITUTION (portions)

ARTICLE I. Liberty of conscience being essential to the well-being of the State and its People, no citizen shall be thwarted in his worship of our One True Lord and Savior.

ARTICLE V. No man may be deprived of life, liberty, privacy, reputation, or property except by due course of law. Freedom of expression shall never be restrained, each man being responsible for the abuse thereof.

ARTICLE X. The State shall have the power and the responsibility to provide for the health, education, and welfare of The People.

STATE OF ANACHRONISM
LOATHSOME DISEASE ACT (enacted in 1879)

The Director of Public Health shall have the power to enact any regulations he deems necessary to protect the health and well-being of the Anachronistic people from any loathsome disease. His authority over such emergencies shall be absolute, and may not be questioned on either substantive or procedural grounds.

STATE OF ANACHRONISM
PENAL CODE (portion) (enacted in 1919)

Section 1984. Any person who advocates, teaches, aids, or abets disobedience to any Act of the Legislature or any Regulation promulgated pursuant to such an Act for the purpose of accomplishing political change shall be guilty of a felony, which is punishable by imprisonment for a period not to exceed twenty (20) years.

STATE OF ANACHRONISM
MARS REGULATIONS (promulgated in 2003)

Section 1. No adoption or custodial arrangement can be contracted which would involve the immigration of any minor child from the People's Republic of China into the State of Anachronism.

Section 2. All children in public and private schools shall wear protective masks that cover their nose and mouth. To ease the administrative assurance of their effectiveness, all such masks shall be issued by the State Department of Public Health. All masks in the public schools shall prominently display the printed declaration, "AND DON'T FORGET TO WASH YOUR HANDS!"

Section 3. The Department of Public Health shall conduct random medical evaluations of individuals residing in the State, which shall consist of taking their temperature and asking them whether they are feeling poorly. Any individual who refuses such a medical evaluation shall be presumed to be a carrier of the disease, and shall be confined in quarantine for ten (10) days.

[END OF EXAMINATION]