

THE LONG AMERICAN PLAN: THE U.S. GOVERNMENT’S CAMPAIGN AGAINST VENEREAL DISEASE AND ITS CARRIERS

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INTRODUCTION

At about 3:30 a.m. on May 6, 1947, two sisters were arrested in the city of Wichita, Kansas.¹ Their names were Fern and Pauline Welch, and their exact offenses are lost to history. The police claimed that the women possessed liquor and were drunk in public—the sisters were also charged with “vagrancy.”² The police further claimed that the sisters associated with “persons of low moral character” and were frequently seen on the streets “at

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¹ Welch v. Shepherd, 196 P.2d 235, 237 (Kan. 1948).

² *Id.*

all times of the night where women of good reputation are not found.”³ Fearing that the Welches may have posed a threat to the public health, the City Physician ordered the sisters to be held and examined for venereal disease.⁴ Had they acquiesced and tested positive, the Welches likely would have been isolated in the State Industrial Farm for Women, a detention facility that had imprisoned venereally infected women for the past thirty years. Yet the sisters refused to submit to the examination. The City Physician and police “cajoled, promised and threatened” them, but to no avail.⁵ City officials decided to hold the sisters in “quarantine and isolation in the city jail” until they yielded to the examination.⁶ So, for weeks, the Welches remained in isolation, behind bars.⁷

Looking back on this case more than six decades later, the reader surely finds herself asking the same question the Welch sisters would have asked: What exactly was going on? Why were the municipal authorities so intent on testing these women for venereal disease? Why did they insist that the sisters remain behind bars the entire time? And why were they truly arrested—under the vague charge of “vagrancy”—in the first place?

Pauline and Fern Welch’s treatment at the hands of the state did not emerge out of thin air. They were arrested under the auspices of laws that were part of the “American Plan,” a public health campaign that traces its origins back to the late 1910s.⁸ The American Plan drew upon local anti-vice

³ *Id.* at 238.

⁴ *Id.* at 237–38. In Kansas at this time, examinations for venereal disease were typically the purview of a public health official, such as a City Physician. *Id.* at 242.

⁵ *Id.* at 237. For the last century, public officials and scholars have referred to such forced isolation as both “isolation” and “quarantine.” Compare *Rock v. Carney*, 185 N.W. 798, 799 (Mich. 1921) (referring to “isolation”), with Transcript of Record at 50, 99–100, 107, *Rock*, 185 N.W. 798 (No. 17) (referring to “quarantine”) (in *Rock*, the judge, the lawyers, and several witnesses (including public health officials) used “quarantine” to mean “isolation”). Though the terms were and often are used interchangeably, they refer to different practices. According to the Centers for Disease Control and Prevention, “isolation” refers to the separation of “sick people with a contagious disease from people who are not sick.” *Quarantine and Isolation*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/quarantine>, archived at <http://perma.cc/8HX5-QH8P>. Quarantine, in contrast, refers to the separation and restriction of movement of “people who were exposed to a contagious disease to see if they become sick.” *Id.* Throughout this Article, I use the terms according to these definitions, except when doing so would be contrary to the vocabulary of a primary source that I discuss.

⁶ *Welch*, 196 P.2d at 238.

⁷ *Id.* at 236–37.

⁸ The origin of the phrase “American Plan” appears to have been tied to a sense of national pride in its supposed efficacy at preventing infections. Physicians and sanitarians used the phrase to distinguish it from the “European Plan,” which referred to “regulation” as undertaken in France in the early nineteenth century and England in the mid-nineteenth century; this approach included the tacit endorsement of prostitution through government oversight or the issuance to women of certificates attesting to their non-infectious status, which they could then show to potential customers. See Maurice Gregory, *State Regulation of Vice; its Various Forms*, THE LIGHT, Mar.–Apr. 1922, at 21 (on file in Folder 1, Box 122, 3AMS/D/51/01, Records of the Association for Moral & Social Hygiene, Women’s Library, London School of Economics); HUGH YOUNG, BRIEF SUMMARY OF REPORT BY MAJOR HUGH H. YOUNG ON INVESTIGATION AT BLOIS 30 (1918) (on

practices that had existed for decades: in the early years of the twentieth century, local governments and private organizations, such as those in New York and San Francisco, pioneered efforts to arrest suspicious women and isolate those infected with venereal disease.⁹ As the country prepared to enter World War I, many of the individuals who created or oversaw these programs assumed positions of power within the federal government and ended up recreating those programs in a single, federally overseen “American Plan.”¹⁰ Generally speaking, the American Plan was a collection of laws and practices under which federal, state, and local government officials arrested and examined any woman whom they reasonably suspected of having venereal disease. If that woman tested positive, she was placed in isolation for an indeterminate sentence until she was cured or rendered noninfectious. Because there were few effective treatments for syphilis or gonorrhea during this time, women were sometimes held for months, even years, until an official decided that enough was enough.¹¹ Often, the woman received few or

file in Folder 3, Box 1, Raymond Blain Fosdick Papers, Department of Rare Books and Special Collections, Princeton University Library). As early as 1885, physicians were writing of the “[s]o-[c]alled American Plan of the [t]reatment of the late [l]esions of [s]yphilis.” F. N. Otis, *Concerning the So-Called American Plan of the Treatment of the Late Lesions of Syphilis by Large Doses of Iodide of Potassium*, 27 MED. REC. 82, 82 (1885). For a contemporaneous definition of the “American Plan,” see Marjorie Delavan, “*American Made*,” 8 PUB. HEALTH 61, 63–64 (1920).

⁹ For more on New York, see THOMAS MACKAY, *PURSUING JOHNS: CRIMINAL LAW REFORM, DEFENDING CHARACTER, AND NEW YORK CITY’S COMMITTEE OF FOURTEEN 24–25* (2005). For more on California, see Wilbur A. Sawyer, *The California Program for the Prevention of Venereal Diseases*, 4 SOC. HYGIENE 25, 25–29 (1918).

¹⁰ The individuals who came from the New York and California grassroots efforts to the federal government to create the American Plan included William F. Snow, Bascom Johnson, and Maude Miner, among many others. See ALLAN M. BRANDT, *NO MAGIC BULLET: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880*, at 38, 73, 81 (1987); CHARLES WALTER CLARKE, *TABOO: THE STORY OF THE PIONEERS OF SOCIAL HYGIENE 72–82* (1961). Eventually, the federal government came once again to depend on local or private organizations to enforce the American Plan. For more on this dynamic, see NANCY K. BRISTOW, *MAKING MEN MORAL: SOCIAL ENGINEERING DURING THE GREAT WAR 102* (1996).

¹¹ There was a somewhat effective treatment for syphilis at this time, which relied on arsenic-based chemicals such as neosalvarsan. JOHN PARASCANDOLA, *SEX, SIN, AND SCIENCE: A HISTORY OF SYPHILIS IN AMERICA 22* (2008). However, there was no effective treatment for gonorrhea—the more common infection—and physicians still frequently relied on mercury and other ineffective remedies to treat syphilis. See Abigail Claire Barnes, *Pure Spaces and Impure Bodies: The Detention of Prostitutes in the U.S. During World War One 4* (2010) (unpublished Ph.D. dissertation, University of California, Los Angeles) (on file with author) (“In addition to the general hardships of jail existence, detainees were forced to endure mercury and arsenic treatments. The treatments were not only toxic, they could even be fatal.”). This reality suggests that officials eventually just decided to release women after some period of time, since I have not found an example of a woman being held indefinitely for infection alone. Some states had maximum time periods that an infected person could be held. See George E. Worthington & Ruth Topping, *Summary and Comparative Study of the Special Courts in Chicago, Philadelphia, Boston, and New York*, 9 SOC. HYGIENE 348, 354 (1923) (discussing New York’s sentencing, which permitted a female defendant to be given an indeterminate sentence not exceeding three years to a State Reformatory or a semi-private reformatory institution). Some states demanded that women continue treatment after release, tacitly acknowledg-

none of the protections of due process. Tens of thousands of women were arrested and treated in this manner.¹²

No historian has ever traced the American Plan, as such, beyond the 1920s. The few who have written about it usually stop their coverage shortly after World War I, often with a vague statement that it likely extended into the very immediate future; as one historian wrote, “the work continued in many cases on the state and local level throughout the 1920s.”¹³ Anything after the mid-1920s is typically treated as a different program.¹⁴ Yet the American Plan continued far enough into the future to ensnare the Welch sisters in 1947. In fact, it continued for years after the sisters’ arrests, lasting in some form at least as late as the 1970s.¹⁵ And the laws that undergirded the American Plan have outlasted even that late date, extending all the way to the present.¹⁶ The law under which the Welches were arrested in 1947 had been created right at the beginning of the enforcement of the American Plan in 1917, and it still exists—with remarkably few changes—today.¹⁷

ing that the state’s medical personnel had not actually achieved a cure. See George E. Worthington & Ruth Topping, *The Morals Court of Chicago*, 7 SOC. HYGIENE 351, 377 (1921) (describing how a woman discharged from the hospital would be “given the address of the clinic nearest to her home in order that she may continue treatment until cured” but that “no follow-up work [was] done . . . to see that the advice [was] followed”).

¹² See *infra* Parts I and II. The traditional estimate is that 18,000 women were committed to federally supported facilities between 1918 and 1920. BRANDT, *supra* note 10, at 89; MARY E. ODEM, *DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES 1885–1920*, at 126 (1995) (“Throughout the remainder of the war and the demobilization period, field agents and law enforcement officials apprehended an estimated 30,000 women and girls suspected of illicit activity, prostitution or venereal disease.”). As I will show, however, these numbers are likely a bare fraction of the total women detained under the American Plan.

¹³ BRISTOW, *supra* note 10, at 197.

¹⁴ See, e.g., PARASCANDOLA, *supra* note 11, at 122 (calling the enforcement of American Plan laws during the 1940s a “repetition” of the earlier program, not one continuous program); MARILYN E. HEGARTY, *VICTORY GIRLS, KHAKI-WACKIES, AND PATRIOTUTES: THE REGULATION OF FEMALE SEXUALITY DURING WORLD WAR II* 43 (2008) (describing the “new effort” to repress prostitution and prevent venereal disease during World War II).

¹⁵ See *Reynolds v. McNichols*, 488 F.2d 1378 (10th Cir. 1973). This case, involving a Denver prostitute who was arrested, and given a choice between remaining in detention and submitting to an examination, or accepting prophylactic treatment for venereal disease, is the last case I have found that I consider to be part of the “American Plan” as I have conceptualized it. For more on my conceptualization, see *infra* note 20.

¹⁶ See *infra* Parts I.B–III. See Appendix A for a compilation of the original laws enacted as part of the American Plan. See Appendix B for a compilation of current state laws authorizing quarantine. Most of the current laws address venereal diseases/STDs directly, though some are intentionally open-ended, vesting authority in public health authorities to choose which diseases are suitable for restrictive measures. Many of these laws were originally created in direct response to the American Plan. Further, as I will discuss later, even when they are not merely amended versions of previous laws, the modern laws (in Appendix B) feature wording that is strikingly similar to that of the laws created under the American Plan (Appendix A), and the powers they vest in public health authorities are usually identical.

¹⁷ In the 1920s, this law was KAN. STAT. ANN. § 65-128 (1923). Today, it remains KAN. STAT. ANN. § 65-128 (2012).

In this Article, I will propose a radical extension of the timeline of the American Plan—beyond the 1920s and for the half century that followed. I will demonstrate that the government machinery and legislation undergirding the Plan extended it beyond its traditional Progressive Era confines. My findings suggest that we should view the American Plan less as a limited public health response to World War I and more as a system of laws, a collection of enforcement procedures, and an attitude toward women and disease that continued for much of the twentieth century. By understanding the Plan through this lens, its true scope and staying power become clear. Though there are distinctions between the early American Plan and its later manifestations,¹⁸ it is important to understand it as a single, continuous campaign to police female mobility and sexuality. Only by fully understanding such continuities, rather than seeing the past as distant and unconnected to the present, can we be informed participants in ongoing debates over public health and state power. Only by grasping this continuity can we fully understand campaigns in our own time that operate in the shadow of the American Plan: the movement to quarantine HIV/AIDS patients is the philosophical and judicial successor to the American Plan.¹⁹

Using court cases, I will trace the Plan from its inception in the 1910s all the way until 1973.²⁰ In Part I of this article, I will discuss the roots of the American Plan—it did not emerge spontaneously, but rather it was the product of decades of precedent. Multiple lines of attack against prostitution and

¹⁸ BRANDT, *supra* note 10, at 154–55. Brandt noted that the

campaign against syphilis during the 1930s differed substantially from the reforms of the Progressive years and even the significant programs of World War I. Three essential themes characterized [Surgeon General Thomas Parran's 1930s] effort. First, Parran rejected the traditional emphasis within the anti-venereal movement on sexual morality and ethics. Second, he hoped to place his crusade on the plane of science and medicine, to incorporate the battle against venereal disease within the tradition of efforts to combat infectious disease. And third, the surgeon general sought to force the State to accept certain fundamental responsibilities for the care of venereal sufferers. In each of these respects his program marked a watershed, a rejection of Progressive notions of voluntarism, charity, and morality.

Id.

In spite of genuine advances made by Surgeon General Parran in de-emphasizing sexual morality, some scholars have argued that, even in World War II, government policies retained a connection between female venereal disease and sin. *See, e.g.,* HEGARTY, *supra* note 14, at 62.

¹⁹ *See infra* Part V.A.

²⁰ For reasons that I will explain later, *see infra* Part V, I have chosen to cease calling the arrest, examination, and isolation of those with venereal disease the “American Plan” after 1973 because after this date I have not found anyone isolated for having syphilis or gonorrhea, the diseases primarily affected by the American Plan. However, 1973 is a flawed endpoint. Assigning a concrete endpoint for the American Plan is a highly subjective and ultimately impossible task, as it continued in evolving forms for decades after the end of World War I (the traditional endpoint). At which point in time such evolutions rendered it distinct enough to be labeled a different program is subject to interpretation.

venereal disease²¹ came together in the 1917 formation of the federal Commission on Training Camp Activities, which solidified the federal government's role in the burgeoning movement to imprison women with venereal disease. In Part I.A, I will analyze the laws that the federal government pushed the states to pass, in order to allow state authorities to imprison women even without federal muscle. Though many of these laws were gender-neutral on their face, their enforcement almost always targeted women. Thus, the enforcement of these laws did not so much police venereal disease as it policed female sexuality. Parts I.B and I.C will focus on the early legal challenges to these laws and the practices that the laws endorsed. Though courts did sometimes rule in favor of detained individuals, they almost never questioned the right of the state to detain and forcibly treat someone with venereal disease. In large part because of their faith in the wisdom of public health authorities, courts afforded states an extraordinary amount of deference in the use of their police power. Part I.D will briefly examine the results of this police power on a human level. In Part II, I will show that, though the federal agency enforcing this repressive program lost its funding in 1922, nearly every state—most empowered by laws the federal government had encouraged them to pass during World War I²²—continued to arrest, examine, and lock up women for decades.²³

Part III will examine the World War II period, during which the federal government began imprisoning women in “rapid treatment centers;” federal authorities were once again assisting state officials with the administration of a program that state officials had never ceased to operate. Federal involvement in this program appears to have ended with the conclusion of World War II. Nonetheless, many states continued to enforce the American Plan in the post-war era as well. Part IV will discuss the 1950s, 1960s, and 1970s and the decline of American Plan enforcement.

Notwithstanding this decline, I will argue that, in many ways, the American Plan is still with us to this day. Part V will demonstrate that every single state still has a law on its books that endows government authorities with the power to determine which diseases are suitable for quarantine and isolation.²⁴ In many states, the American Plan laws created in 1917, 1918, and 1919 have survived largely unchanged; yet even where they have not,

²¹ In this Article, I repeatedly use the words “prostitute,” “prostitution,” and “venereal disease.” In the last few decades, many have replaced these words with “sex worker,” “sex work,” and “sexually transmitted infection,” respectively. Such word choice is intended to accord more respect and specificity to persons in a particular line of work or with a particular medical condition. I have chosen to retain an older vocabulary throughout this article for two principal reasons. First, I quote from so many sources that use the words “prostitute,” “prostitution,” and “venereal disease” that I believe it would be confusing to have all the quoted material in this article use one terminology and all of my commentary use another. Second, I hope that, by using more colloquial terms, this Article can be comprehensible to a lay reader.

²² See Appendix A.

²³ See *infra* Parts II, III, and IV.

²⁴ See Appendix B.

state authorities would still formally have the right today to intern a woman with syphilis or gonorrhea in a state facility.²⁵ Though surely many public health officials today would reject such a notion as absurd, pointing to the precautions they must take to impose quarantine or isolation and the fact that these diseases are now easily treatable, authorities in the past similarly emphasized their wisdom and restraint in obviating risks to civil liberties.²⁶ To modern eyes, such claims from historical figures appear preposterous and paternalistic; with a full understanding of the American Plan, we will become better able to assess similar assertions today. These claims surround us; the recent Ebola crisis is only one example.²⁷

Part V.A will demonstrate how American Plan laws sometimes remained in use in modern-day America. In the 1980s and 1990s, when states began to mandate that anyone under arrest for certain crimes be subjected to an HIV/AIDS test, officials acted under the authority of revised American Plan laws and explicitly cited American Plan cases. When scholars and state officials began to argue that the government should isolate HIV/AIDS patients, they relied on the American Plan as precedent. In the few cases in which some manner of isolation and quarantine of HIV/AIDS patients did occur, the authorities were acting in the shadow of the American Plan. The laws of the American Plan remain on the books today, and, as the HIV/AIDS crisis shows, American Plan practices can be reintroduced, aimed at a different disease, if a “crisis”—say, a war or epidemic—rears its head. The quarantine and isolation power of the state is a vitally important one, but the citizenry must be informed about the history of these practices in order to ensure that this power is being wielded with as much respect and restraint as possible. This is not always the case. Part V.B will examine Kansas—the site of incarceration for Fern and Pauline Welch—as a case study to further demonstrate how the American Plan persists, in a sense, even in 2015.

My use of the phrase, “The Long American Plan,” comes from historian Jacquelyn Dowd Hall’s groundbreaking article, *The Long Civil Rights Movement and the Political Uses of the Past*.²⁸ In this article, Hall argues

²⁵ See *id.* In the past, that state facility was variously a jail, a prison, a detention hospital, a reformatory, or a quarantine center—in terms of living conditions, there was often no difference.

²⁶ This will be discussed later in detail. See *infra* text accompanying notes 363–67.

²⁷ New Jersey and New York, for example, instituted a mandatory quarantine for healthcare workers returning from affected countries in West Africa. Tim Mak, *Are Mandatory Ebola Quarantines Legal?*, DAILY BEAST (Oct. 28, 2014), <http://www.the-dailybeast.com/articles/2014/10/28/are-mandatory-ebola-quarantines-legal.html>, archived at <http://perma.cc/3CF3-A2RW>. One National Institutes of Health official, Anthony Fauci, Director of the National Institute of Allergies and Infectious Diseases, called such policies “draconian.” Carrie Dann, *Fauci: Returning Ebola Health Workers Shouldn’t Face ‘Draconian’ Rules*, NBC NEWS (Oct. 26, 2014), <http://www.nbcnews.com/storyline/ebola-virus-outbreak/fauci-returning-ebola-health-workers-shouldnt-face-draconian-rules-n234141>, archived at <http://perma.cc/UHG6-ZT8L>.

²⁸ Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1239 (2005).

that we should see the Civil Rights Movement as a movement much longer than its traditional late-1950s to early-1960s timeline, one far more inclusive than merely a story of its “classical” figures, and one whose participants employed a broad array of tactics and were motivated by a varied and often radical set of philosophies.²⁹ Further, Hall argues that many have used the truncated history of the Civil Rights Movement to undermine its goals.³⁰ “Clearly,” Hall writes, “the stories we tell about the civil rights movement matter; they shape how we see our own world.”³¹

In many respects, the treatment of the Civil Rights Movement is very different from that of the American Plan. While the shortened and simplified narrative of the Civil Rights Movement has “ensure[d] the status of the classical phase as a triumphal moment in a larger American progress narrative,”³² the shortened narrative of the American Plan has ensured that it is forgotten—excluded from classrooms, textbooks, and a larger narrative of repressive regimes. Yet, as with the truncated understanding of the Civil Rights Movement, the conventional timeline of the American Plan can be used for political purposes. The Plan can be depicted as something distant, distinct from the present, dead and gone. Its significance can be ignored. By understanding the Plan as a longer, broader, and more varied campaign, we can more completely understand the lessons it imparts to the present. By seeing the Plan as a continuous narrative of repression and contempt for women and their sexuality, enabled by a still-existing set of laws and enforcement mechanisms, it can be instructive to us yet. The story of the Long American Plan still has the power to shape how we see our own world.

I. A TALE OF TWO PHILOSOPHIES

“Shoot the lewd women as you would the worst German spy; they do more damage than all the spys [sic],” Marcia Louise Bradley, a mother from Oregon, wrote in August 1917 to Secretary of War Newton Baker.³³ This memorable sentence appeared in a letter addressed to the War Department mere months after the United States entered World War I. By this time, the nation had already been up in arms over the twin specters of venereal disease and prostitution for years.³⁴ This outrage attracted the attention of the

²⁹ *Id.* at 1234, 1239.

³⁰ *Id.* at 1237–38.

³¹ *Id.* at 1239.

³² *Id.* at 1234.

³³ BRISTOW, *supra* note 10, at 135.

³⁴ Beginning in the early twentieth century, for instance, cities and reformist groups produced dozens of vice commission reports, investigating instances of venereal disease and prostitution and sending the information to the police. For an example of one of these, see WILLIAM H. BALDWIN, JR., ET AL., COMMITTEE OF FIFTEEN, THE SOCIAL EVIL: WITH SPECIAL REFERENCE TO CONDITIONS EXISTING IN THE CITY OF NEW YORK (1902). According to historian Ruth Rosen, forty-three cities would conduct vice commission reports between 1910 and 1913. RUTH ROSEN, THE LOST SISTERHOOD: PROSTITUTION IN

federal government one year earlier, in 1916, when thousands of troops were dispatched to the Mexican border to root out the Mexican revolutionary General Pancho Villa and his followers.³⁵ Stories flooded the press about the lack of discipline and rise of venereal disease among the troops.³⁶ Under considerable pressure from outraged activists and public health professionals, Secretary Baker dispatched a well-known reformer, Raymond Fosdick, to investigate the conditions along the border.³⁷ Fosdick was deeply concerned by what he saw.³⁸ Street solicitation was becoming more and more flagrant; venereal disease rates were climbing higher and higher.³⁹ To remedy this cocktail of terrors, Fosdick suggested that the military, perhaps assisted by municipal police, scour the streets in order to prevent the “the cheaper grade of prostitutes” from soliciting near the military bases.⁴⁰

Fosdick, who had studied police practices in major cities around the world,⁴¹ was surely aware that he was participating in a debate that had been ongoing for decades: should government authorities attempt to eliminate prostitution, or should they accept it as an inevitability and just try to make the practice safer for all involved? Proponents on one side of the debate advocated a philosophy known as “regulation,” which sought to use the state’s police power to ensure that prostitutes were free from infection and operating far from respectable citizens; advocates of an alternate philosophy, “abolition,” insisted that prostitution should never be allowed to exist in any form, even if the women themselves were free from disease or geographically isolated.⁴²

AMERICA, 1900–1918, at 14 (1982). *See also* BARBARA MEIL HOBSON, *UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION* 154–58 (1987); Nancy Moore Rockafellar, *Making the World Safe for the Soldiers of Democracy: Patriotism, Public Health and Venereal Disease Control on the West Coast 1910–1919*, at 54–55 (May 31, 1990) (unpublished Ph.D. Dissertation, University of Washington) (on file with Yale University). Numerous cities also passed new laws to try and curb venereal disease and prostitution, empowering citizens to file suit against brothels if the police proved unhelpful. *See* Rockafellar, *supra* note 34, at 54–55.

³⁵ JAMES W. HURST, *PANCHO VILLA & BLACK JACK PERSHING: THE PUNITIVE EXPEDITION IN MEXICO* 44–53 (2008).

³⁶ RAYMOND B. FOSDICK, *CHRONICLE OF A GENERATION: AN AUTOBIOGRAPHY* 135–36 (1958).

³⁷ *Id.* at 135–37; BRANDT, *supra* note 10, at 53.

³⁸ Letter from Raymond Fosdick, Chairman, CTCA, to Newton Baker, Sec’y of War (Aug. 10, 1916) (containing Fosdick’s report on conditions in the Southwest) (on file in Folder 1, Box 23, Raymond Blaine Fosdick Papers, Public Policy Papers, Department of Rare Books and Special Collections, Princeton University Library) (“Certainly, if steps are not taken to curb some of the evils described . . . venereal disease is bound to increase.”).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ FOSDICK, *supra* note 36, at 124–34.

⁴² The distinctions are neatly summarized in CHARLES WINICK & PAUL M. KINSIE, *THE LIVELY COMMERCE: PROSTITUTION IN THE UNITED STATES* 9–12 (1971); *see also* DAVID J. PIVAR, *PURITY AND HYGIENE: WOMEN, PROSTITUTION, AND THE “AMERICAN PLAN”* 1900–1930, at 1–4, 25 (2002). To some extent, such debates continue to this day. *See* Janie A. Chuang, *Rescuing Trafficking From Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1663–71 (2010)

Doctors, reformers, and elected officials debated these philosophies vociferously in the United States from the 1870s through the 1920s, with victories on each side. St. Louis and San Francisco became the only American cities to formally register and examine prostitutes, but numerous other cities established “red light” districts, which tacitly allowed prostitution to flourish so long as it was out of sight.⁴³ Abolitionists, meanwhile, fiercely battled these laws and policies in court and succeeded in overturning many.⁴⁴ Abolitionists also waged an intellectual war against regulation, successfully stopping the American Medical Association from endorsing regulation in 1876.⁴⁵ By the 1890s, far more reformers supported abolition, yet regulationists fought on, seeking a new, more palatable way to control what they saw as an inevitable evil. This new way became known as “neo-regulation,” an approach which emerged early in the twentieth century following the putative failings of the traditional regulationist approach.⁴⁶ Under neo-regulation, the state could still control prostitutes, but through hygiene or public health mechanisms, rather than the criminal justice system.⁴⁷ In other words, much of the regulatory activity could be accomplished by relying on doctors to manage infected patients or report such patients to the government, sparing the police much of the investigatory legwork. The American Plan emerged largely from this philosophical foundation, drawing together elements of abolitionism, regulationism, and neo-regulationism.⁴⁸

The American entrance into World War I provided the impetus to unite various strains of these three philosophies into a comprehensive, federally controlled “American Plan.” Government officials feared the injurious effects of venereal diseases on troops, and with purportedly good reason; Surgeon General W. C. Gorgas calculated that venereal diseases were “the greatest cause of disability in the army.”⁴⁹ To combat this threat, Secretary

(summarizing the current positions of and debate between “neo-abolitionists” and “non-abolitionists”).

⁴³ Neil Larry Shumsky, *Tacit Acceptance: Respectable Americans and Segregated Prostitution, 1870–1910*, 19 J. SOC. HIST. 665, 669 (1986).

⁴⁴ For example, St. Louis’s brief experiment in licensing lasted only four years, from 1870 to 1874, before abolitionists succeeded in dismantling it through a lawsuit and subsequent legislation. See generally John C. Burnham, *Medical Inspection of Prostitutes in America in the Nineteenth Century: The St. Louis Experiment and Its Sequel*, 45 BULL. HIST. MED. 203 (1971) (providing historical context on the rise and fall of St. Louis’s regulatory system). For more on legal challenges to regulation or red light districts, see Rockafellar, *supra* note 34, at 54–56.

⁴⁵ PIVAR, *supra* note 42, at 3.

⁴⁶ *Id.* at 25.

⁴⁷ *Id.*

⁴⁸ Its emphasis on reformation and uplift, as well as much of its moralistic rhetoric, was abolitionist, while its veritable obsession with compulsory examination and coercive treatment can be seen as regulationist in origin. The reliance on a state public health infrastructure is quintessentially neo-regulationist.

⁴⁹ W.C. Gorgas, *Venereal Diseases and the War*, 8 AM. J. PUB. HEALTH 107, 107 (1918). In 2010, Abigail Claire Barnes reevaluated much of the data from the 1910s, and found that the extent of the venereal disease “epidemic” had been exaggerated. Barnes, *supra* note 11, at 23.

Baker created the Commission on Training Camp Activities (CTCA) and placed Fosdick in charge.⁵⁰ Baker tasked the CTCA with a number of responsibilities, some relatively benign, others less so. Much of the CTCA's work concerned recreation in and around military training camps: CTCA officials sought to provide soldiers with access to films and music and organized games of baseball and leapfrog.⁵¹ However, the CTCA also focused on the policing of so-called "moral zones" around military training camps—circles with five-mile radii in which the government prohibited alcohol and women infected with venereal disease.⁵² Seeking to control prostitution and venereal disease within the training camps, the CTCA dispatched federal investigators across the nation, and many of these officials personally scoured the surrounding streets for women who might be infected.⁵³ The investigators were instructed to "secure the stimulation" of local law enforcement in suppressing prostitution, which led to more arrests.⁵⁴

In terms of arresting women, the CTCA was tremendously successful. Its agents, as well as local police, military police, and federal Public Health Service (USPHS) investigators,⁵⁵ detained and examined women near training camps in droves.⁵⁶ A woman could be subjected to a compulsory examination if she were thought to be a carrier of venereal diseases, a determination sometimes made on the basis of her perceived promiscuity, "suspicious conduct," or "incurability."⁵⁷ A detained woman was then tested, usually by a male physician, in a highly invasive manner that in-

⁵⁰ BRISTOW, *supra* note 10, at 7–8.

⁵¹ *Id.* at 57–58.

⁵² BRANDT, *supra* note 10, at 71. For a more detailed look at the CTCA, see Linda Sharon Janke, *Prisoners of War: Sexuality, Venereal Disease, and Women's Incarceration During World War I* (2006) (unpublished Ph.D. dissertation, State University of New York—Binghamton) (on file with author).

⁵³ *See, e.g.*, Commission on Training Camp Activities, Law Enforcement Division, 2, 47–48 (unpublished manuscript) (on file in Box 2, Entry 404, Record Group 165, Records of the Commission on Training Camp Activities, Records of the War Department, National Archives, College Park, Maryland) (lengthy unpublished manuscript describing the Law Enforcement Division, likely dated 1919). This document describes CTCA officials conducting investigations in Virginia. For an example in Michigan, see EDWIN K. PIPER, REPORT OF LIEUT. EDWIN K. PIPER, SANITARY CORPS, U.S.N.A., WEEK ENDING NOVEMBER 24, 1917 (1917) (on file in Box 9, Entry 395, Record Group 165, National Archives, College Park, Maryland). For a modern summary, see BRISTOW, *supra* note 10, at 101–02.

⁵⁴ Commission on Training Camp Activities, *supra* note 53, at 2.

⁵⁵ The U.S. Public Health Service, created in the late eighteenth century and overhauled in 1912, was a federal agency tasked with protecting the health of the public. *See generally* BESS FURMAN, A PROFILE OF THE UNITED STATES PUBLIC HEALTH SERVICE, 1798–1948 (1973). In April 1917, with President Woodrow Wilson's urging and in anticipation of war, Congress established a special reserve corps of the Public Health Service, which had the responsibility to maintain "proper sanitation" in places where military personnel were to be mobilized. *See* Rockafellar, *supra* note 34, at 262–64.

⁵⁶ BRANDT, *supra* note 10, at 74–75.

⁵⁷ HOBSON, *supra* note 34, at 176–77.

volved close scrutiny of the genitals and often a blood test.⁵⁸ “I was horrified beyond anything I expected,” wrote one outraged reformer in California who witnessed an examination.⁵⁹ The “speculum is introduced . . . the probe thrust into the *cervix*, and brought out bloody, and this examined. I do not know, and did not think to ask, whether the blood was secured on purpose, or simply because the patient was carelessly handled.”⁶⁰ If a woman tested positive, authorities held her in a jail or other penal institution for an indeterminate period; she would be held until she was cured (or, since a cure was often impossible, until she was deemed reformed or determined to be noninfectious).⁶¹ Government agents interned so many women in this manner that local jails became insufficient. To handle this problem, the CTCA, flush with federal money, began to construct its own detention facilities, or renovate existing ones, to confine infected women for treatment.⁶² Ironically, many of these new detention facilities were former brothels.⁶³

In late 1917 and early 1918, President Woodrow Wilson himself controlled the CTCA’s finances, personally disbursing money from the National

⁵⁸ *Id.* at 167; Janke, *supra* note 52, at 210–11; Rockafellar, *supra* note 34, at 325–26 (describing Seattle’s procedure). The Wassermann test, the standard test for syphilis, involved a blood sample. *See id.* at 326. The genital examination is described in great technical detail in Rupert Blue, *Venereal Disease Control: Standards for Discharge of Carriers*, 33 PUB. HEALTH REP. 1189, 1190 (1918). Outside of the enforcement of the American Plan, the genital examination was not common at this time, and some feminists considered it a form of rape. *See* HOBSON, *supra* note 34, at 168–69.

⁵⁹ MAURICE GREGORY, EXAMINATION FOR V.D. IN 1918 (1918) (on file in Folder 4, Box 123, 3/AMS/D/51/04, Records of the Association for Moral & Social Hygiene, Women’s Library, London School of Economics).

⁶⁰ *Id.*

⁶¹ *See* BRISTOW, *supra* note 10, at 120; PIVAR, *supra* note 42, at 212; W.F. Draper, *The Detention and Treatment of Infected Women as a Measure of Control of Venereal Diseases in Extra-Cantonment Zones*, 80 AM. J. OBSTETRICS & DISEASES WOMEN & CHILDREN 642, 642–45 (1919); *cf.* Janke, *supra* note 52, at 270 (noting that reformatory detainees held not on confirmation of venereal disease but mere suspicion of it were sometimes held until believed to be “sufficiently reformed”).

⁶² MARA L. KEIRE, FOR BUSINESS & PLEASURE: RED-LIGHT DISTRICTS AND THE REGULATION OF VICE IN THE UNITED STATES, 1890–1933, at 109 (2010). Such institutions were located all over the country, in both rural and urban areas. *See* MARY MACEY DIETZLER, DETENTION HOUSES AND REFORMATORIES AS PROTECTIVE SOCIAL AGENCIES IN THE CAMPAIGN OF THE UNITED STATES GOVERNMENT AGAINST VENEREAL DISEASES 88–223 (1922). The rural facilities were usually reformatories, as the fresh air was considered curative for delinquency; reformers in the late nineteenth century constructed rural reformatories along these lines. *See* NICOLE HAHN RAFTER, PARTIAL JUSTICE: WOMEN IN STATE PRISONS, 1800–1935, at 35 (1985). Several decades later, these exact same reformatories came to be used under the American Plan. *See* ROSEN, *supra* note 34, at 20–27 (describing the growth in the use of reformatories for women delinquents, especially prostitutes); Janke, *supra* note 52, at 215–81 (examining women incarcerated under the American Plan in the Minnesota Home School for Girls (Sauk Centre, MN), the Western House of Refuge (Albion, NY), the Bedford Hills Reformatory (Bedford, NY), and the Massachusetts Reformatory for Women (Framingham, MA), each established many years before World War I).

⁶³ *See* KEIRE, *supra* note 62, at 109. As Keire put it, “With large reception rooms, many bedrooms, and a disproportionately high number of bathrooms, brothels made ideal detention houses. Government contractors usually only needed to fit the brothel with an infirmary and add a high wall topped with barbed wire to complete the conversion.” *Id.*

Security and Defense Fund.⁶⁴ Yet Congress quickly felt the need to take action—to attempt to centralize all of the federal agencies and actors taking part in this program of arrest, examination, and quarantine (which government officials soon began calling the “American Plan”).⁶⁵ Congress thus passed the Chamberlain-Kahn Act in July 1918.⁶⁶ This Act allotted \$1 million “for the purpose of assisting the various States in caring for civilian persons whose detention, isolation, quarantine, or commitment to institutions” could protect the military from disease; the Act also established an agency called the Interdepartmental Social Hygiene Board (ISHB) to disburse the money and administer the program.⁶⁷

By mid-1918, military physicians realized that only a fraction of infected troops contracted venereal disease after joining the army; by questioning incoming troops, these physicians learned that most had acquired the infection before enlistment.⁶⁸ This realization provided the rationale to expand the American Plan beyond the “moral zones” immediately around military camps.⁶⁹ In order to create the expanded program, and because of some early difficulties securing the CTCA’s and ISHB’s funding, the federal government encouraged state and local governments to pass laws of their own, allowing them to detain, examine, and quarantine women.⁷⁰ The USPHS, CTCA, and American Social Hygiene Association (ASHA) (a private organization working in concert with the federal government)⁷¹ provided “model

⁶⁴ DIETZLER, *supra* note 62, at 18; ODEM, *supra* note 12, at 125–26. The National Security and Defense Fund was a multi-million dollar wartime cash reserve for the president to disburse at his discretion. FRANK SURFACE & RAYMOND BLAND, *AMERICAN FOOD IN THE WORLD WAR AND RECONSTRUCTION PERIOD: OPERATIONS OF THE ORGANIZATIONS UNDER THE DIRECTION OF HERBERT HOOVER IN 1914–1924*, at 88 (1931).

⁶⁵ See *supra* note 8 and accompanying explanation.

⁶⁶ Chamberlain-Kahn Act, Pub. L. No. 65-193, 40 Stat. 845 (1918).

⁶⁷ *Id.*

⁶⁸ BRANDT, *supra* note 10, at 77–78.

⁶⁹ *Id.*

⁷⁰ See FURMAN, *supra* note 55, at 321 (describing the uniform system of model law distributed by the USPHS); Kayla Jo Blackman, *Public Power, Private Matters: The American Social Hygiene Association and the Policing of Sexual Health in the Progressive Era* 99–100 (May 2014) (unpublished M.A. thesis, University of Montana) (on file with Maureen and Mike Mansfield Library, University of Montana) (describing model laws disseminated by the American Social Hygiene Association). For a compilation of these laws, see generally COMM’N ON TRAINING CAMP ACTIVITIES, STANDARD FORMS OF LAWS FOR THE REPRESSION OF PROSTITUTION, THE CONTROL OF VENEREAL DISEASES, THE ESTABLISHMENT AND MANAGEMENT OF REFORMATORIES FOR WOMEN AND GIRLS, AND SUGGESTIONS FOR A LAW RELATING TO FEEBLE-MINDED PERSONS (1919).

⁷¹ Blackman, *supra* note 70, at 29–32. The ASHA, founded in 1913, had been providing rudimentary model laws to states in some form since the mid-1910s and published extensive studies that justified future repressive actions. *Id.* at 99–100. Many of its personnel became leaders within CTCA and ISHB. *Id.* at 5–7. The ASHA in many ways laid the groundwork for the CTCA and the American Plan as a whole. As historian David Pivar summed it up, “The American Social Hygiene Association maintained a loose partnership with the public health movement. . . . What resulted was a major experience in social and venereal control equal in significance to Prohibition. Plans for this joint venture, the ‘American Plan,’ were completed in the ASHA New York offices.” PIVAR, *supra* note 42, at 208.

laws” to states, giving them precise language to enable the control of venereal disease.⁷² Significantly, the model law for venereal disease control distributed by the CTCA, with approval by the ISHB, included a provision that empowered officials to examine anyone whom they “reasonably suspected” of carrying a venereal disease and to detain that person until the results of the examination were known.⁷³ By war’s end, thirty-nine states had passed the government’s model laws.⁷⁴

A. *Laws and Flaws*

One typical state law passed at the instigation of the CTCA was Montana’s, created in 1919.⁷⁵ The first section of this law read:

For the purpose of the prevention, control and treatment of venereal diseases the State Board of Health shall have authority to cooperate in this State with the Division of Venereal Diseases of the Bureau of Public Health Service created by Sub-Chapter XV of Chapter 143 of the Act of Congress of July 9, 1918, appropriating money for the United States Army and giving aid to the several states in the prevention, control and treatment of venereal diseases.⁷⁶

Montana’s law thus referred directly to the Chamberlain-Kahn Act—“Sub-Chapter XV of Chapter 143 of the Act of Congress of July 9, 1918”—the federal law that set aside one million dollars to help the states detain, isolate,

⁷² See sources cited *supra* note 70.

⁷³ COMM’N ON TRAINING CAMP ACTIVITIES, *supra* note 70, at 18. In addition to permitting the government to stop any woman deemed suspicious and test her for venereal disease, the model law disseminated by the CTCA also included provisions outlawing pandering and pimping, allowing civilians to report brothels as a civil action, illegalizing premarital sex, and establishing “reformatories” to house venereally infected women or those detained for reasons of “incurability or delinquency.” *Id.* at 9–15, 26. Another provision of the model law required doctors to report to the government any patients they examined and found to be infected with venereal disease. *Id.* at 18. ISHB member William F. Snow was one of the earliest proponents of “reporting,” and, under his early-1910s tenure as Secretary of the California State Board of Health, the Board ordered all doctors to report infected persons to state officials (usually by number, not by name, to maintain confidentiality). Sawyer, *supra* note 9, at 26. Other states quickly followed suit; by 1918, thirty-eight states had passed laws mandating reporting. See Rockafellar, *supra* note 34, at 502–03; see also ODEM, *supra* note 12, at 124 (by March 1918, thirty-two states had enacted laws “that allowed for the detention of any woman ‘reasonably suspected’ of carrying venereal disease”).

⁷⁴ PIVAR, *supra* note 42, at 218; C.C. Pierce, *Venereal Disease Control in Civilian Communities*, 9 AM. J. PUB. HEALTH 340, 342 (1918). See also George E. Worthington, *Developments in Social Hygiene Legislation From 1917 to September 1, 1920*, 6 SOC. HYGIENE 557, 566 (1920) (by 1920, venereal diseases were reportable in at least forty-three states).

⁷⁵ Act of Mar. 3, 1919, ch. 86, 1919 Mont. Laws 159; Act of Mar. 4, 1919, ch. 106, 1919 Mont. Laws 159.

⁷⁶ MONT. REV. CODE § 2562 (1921).

or quarantine infected individuals.⁷⁷ The third section of the Montana law continued:

That syphilis, gonorrhoea and chancroid, hereinafter designated as venereal diseases, are hereby declared to be contagious, infectious, communicable and dangerous to the public health. It shall be unlawful for anyone infected with these diseases, or any of them, to expose another person to infection.⁷⁸

This text differed from Section 1 of the CTCA's model law only in that it added the letter "o" to the word gonorrhoea.⁷⁹

The second section further clarified the manner in which Montana state officials could obtain the federal money to combat venereal disease.⁸⁰ The fifth section included the pivotal language:

State, county, and local health officers, or their authorized deputies, within their respective jurisdictions, are hereby directed and empowered, when in their judgment it is necessary to protect the public health, to make examinations of persons reasonably suspected of being infected with venereal disease, and to detain such persons until the results of such examinations are known, to require persons infected with venereal disease to report for treatment to a reputable physician and continue treatment until cured, or to submit to treatment provided at public expense until cured; and also, when in their judgment it is necessary to protect the public health, to isolate or quarantine persons infected with venereal disease.⁸¹

The sixth section required the establishment of an "isolation hospital" wherein such infected persons might be detained and treated, and the seventh section stated that if an individual were able to pay for her detention and mandatory treatment she must cover its cost.⁸² The eighth section demanded the examination for venereal disease of every prisoner in the state (and the isolation of those infected).⁸³ Finally, there came the ninth section:

Local and county health officers are authorized and directed to quarantine persons who have, or who, after examination, are reasonably suspected of having syphilis, gonorrhoea, or chancroid, whenever in the opinion of said local or county health officer, or

⁷⁷ Chamberlain-Kahn Act, Pub. L. No. 65-193, § 5, 40 Stat 845 (1918).

⁷⁸ MONT. REV. CODE § 2564 (1921). To modern eyes this section appears particularly draconian, in light of the fact that women might pass on venereal disease without knowing they were infected; this would still merit prosecution.

⁷⁹ COMM'N ON TRAINING CAMP ACTIVITIES, *supra* note 70, at 18.

⁸⁰ MONT. REV. CODE § 2563 (1921).

⁸¹ *Id.* § 2566.

⁸² *Id.* §§ 2567-68.

⁸³ *Id.* § 2569.

the state board of health or its secretary, quarantine is necessary for the protection of the public health.⁸⁴

Isolation would not end until “the diseased person has become non-infectious.”⁸⁵

The fifth and ninth sections were remarkable for two reasons. The first was the phrase “reasonably suspected,” on which nearly every challenge to the Montana law and similar laws across the country would hang. It was an intentionally open-ended phrase, vesting no small amount of trust and discretion in public health officials. Bascom Johnson, a prominent reformer and social hygienist, calculated in 1922 that forty-five of the existing forty-eight states had laws on the books allowing them to “examine and quarantine persons reasonably suspected of having venereal disease.”⁸⁶ In twenty-seven of those forty-five states, prostitutes or their customers were automatically “reasonably suspected,” as was anyone convicted on charges of “a sex offense involving promiscuity.”⁸⁷

The second remarkable component of these sections was their mandate that quarantine last until the diseased individual became non-infectious. This is notable for the simple reason that the government lacked an ideal treatment for syphilis and any effective treatment at all for gonorrhea. In 1910, German scientist Paul Ehrlich had developed Salvarsan, a drug that was a moderately effective treatment for syphilis, though it entailed painful injections administered over a long period of time and often gave the user serious side effects.⁸⁸ Penicillin, a more effective and less potentially injurious treatment for syphilis, did not become widely available until World War II.⁸⁹ The introduction of sulfa drugs in the late 1930s would mark the first effective treatment for gonorrhea, which had always been the more common of the two diseases.⁹⁰ The limitations of the treatment do not appear to have diminished the number of individuals incarcerated; it simply meant that they were treated with ineffective or agonizing chemicals.⁹¹ Among the more common treatments was injecting the patient with mercury and administering slightly improved versions of Ehrlich’s Salvarsan, all of which were based on compounds of arsenic.⁹² Historian Nicole Hahn Rafter quoted physician Ronald

⁸⁴ *Id.* § 2570.

⁸⁵ *Id.*

⁸⁶ Bascom Johnson, *The Functions of Law and Law Enforcement in Combating Venereal Diseases*, 8 SOC. HYGIENE 163, 166 (1922).

⁸⁷ *Id.*

⁸⁸ NANCY TOMES, *THE GOSPEL OF GERMS: MEN, WOMEN, AND THE MICROBE IN AMERICAN LIFE* 252 (1998); RAFTER, *supra* note 62, at 218 n.40.

⁸⁹ BRANDT, *supra* note 10, at 170.

⁹⁰ JOHN DUFFY, *THE SANITARIANS: A HISTORY OF AMERICAN PUBLIC HEALTH* 280–81 (1992).

⁹¹ CLARKE, *supra* note 10, at 46.

⁹² PARASCANDOLA, *supra* note 11, at 22; RAFTER, *supra* note 62, at 218 n.40.

Gold as stating that only in the 1930s did doctors realize “that mercury plus arsenic treatment may have killed as many patients as syphilis.”⁹³

In spite of the absence of an effective treatment, laws such as Montana’s normally stipulated that infected patients be declared “non-infectious” or “cured” before they would be released.⁹⁴ The CTCA’s model law included this provision as well.⁹⁵ For a number of incarcerated individuals, this meant weeks or months of painful and dangerous injections with little hope of results, while for others, it meant that government agents would release them and then require the continuation of agonizing treatment on an outpatient basis.⁹⁶

B. *The Prisoners Strike Back*

In response to these laws and their assiduous enforcement, many quarantined individuals—both men and women—began to challenge their internments in court. Before World War I, the establishment of the CTCA, and the passage of the “reasonably suspected” laws, courts limited the state’s ability to examine and isolate venereal disease patients. For instance, the Supreme Court of Iowa ruled in 1905 that a compulsory venereal examination of an alleged rapist for the purpose of obtaining evidence against him violated due process.⁹⁷ Meanwhile, the Supreme Court of Missouri ruled in 1915 that suspicion of venereal disease did not give the state the right to examine an individual without consent.⁹⁸ This all changed as the United States entered World War I.⁹⁹ Beginning in 1919, courts across the country proved remarkably amenable to upholding examination or isolation in cases of “reasonable suspicion” or when authorities arrested someone “reasonably suspected” of having a venereal infection,¹⁰⁰ decisions which rested on the state’s expansive “police power.”

The idea that police power justifies restraints on individual liberty in the name of public health was, however, clearly expressed as early as a decade prior to World War I, in the 1905 Supreme Court case *Jacobson v. Mas-*

⁹³ RAFTER, *supra* note 62, at 218 n.40.

⁹⁴ MONT. REV. CODE §§ 2566, 2570 (1921).

⁹⁵ COMM’N ON TRAINING CAMP ACTIVITIES, *supra* note 70, at 18.

⁹⁶ For an example of both painful treatment and an order for its futile continuation, see Transcript of Record at 9, 13–14, *Rock v. Carney*, 185 N.W. 798 (Mich. 1921) (No. 17) (on file with the Archives of Michigan).

⁹⁷ *State v. Height*, 91 N.W. 935, 938 (Iowa 1902).

⁹⁸ *State v. Matsinger*, 180 S.W. 856, 857 (Mo. 1915).

⁹⁹ See MARK THOMAS CONNELLY, *THE RESPONSE TO PROSTITUTION IN THE PROGRESSIVE ERA* 145 (1980) (“Venereally infected women were as much a threat to public health in 1910 as to military health in 1918. Prior to the war, however, suspicion of venereal infection was not widely advanced as constituting sufficient grounds for detention and quarantine of prostitutes or women suspected of being prostitutes . . .”).

¹⁰⁰ See *Ex parte McGee*, 185 P. 14, 15–17 (Kan. 1919); *Dowling v. Harden*, 88 So. 217, 217 (Ala. Ct. App. 1921); *Ex parte Company*, 139 N.E. 204, 206–207 (Ohio 1922). For later examples of this approach, see *Ex parte Kilbane*, 67 N.E.2d 22, 23 (Ohio C.P. 1945); *Reynolds v. McNichols*, 488 F.2d 1378, 1383 (10th Cir. 1973).

sachusetts.¹⁰¹ In that case, Jacobson, a resident of Cambridge, Massachusetts, refused to comply with the town's mandatory smallpox vaccination statute and later challenged the law, claiming it impinged on his liberty.¹⁰² Jacobson lost at the Massachusetts Supreme Judicial Court and appealed the case to the U.S. Supreme Court.¹⁰³ "According to settled principles," wrote Justice Harlan, "the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."¹⁰⁴ The question the Court answered in Jacobson's case, then, was whether the mandatory vaccination statute was reasonable, or whether it was an invasion of "liberty."¹⁰⁵ In the end, Harlan sided with Massachusetts' right to create a mandatory vaccination statute. "[I]n every well-ordered society charged with the duty of conserving the safety of its members," Harlan wrote, "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."¹⁰⁶

Jacobson rested on a subjective standard of reasonableness. The state's compulsory public health statutes had to be "reasonable,"¹⁰⁷ and they could not go "beyond what was reasonably required for the safety of the public."¹⁰⁸ Such a standard—much like the standard of upholding isolation or examination in cases of "reasonable" suspicion—vested enormous faith in the ability of public authorities to use the state's police power with adequate restraint and respect. Yet, as historian Judith Leavitt noted, "[p]ublic power wielded by established scientific experts and experts of all kinds increased significantly in the early twentieth century."¹⁰⁹ Using *Jacobson* as a guide, public health officials could use their power to isolate infected individuals if they reasonably believed the public health was at risk. And as the United States entered World War I, officials considered venereal disease to be one of the greatest threats to the public health of the military¹¹⁰—certainly enough to justify certain repressive activities.

Seattle offers an excellent example of a city caught up in the anti-venereal fervor of 1918, providing some of the first lawsuits by individuals challenging their internment. Seattle responded with a vengeance to (and, indeed, anticipated) the federal government's call to repress vice, initiating mass arrests of "suspicious" or "disorderly" women (as well as men and

¹⁰¹ 197 U.S. 11 (1905).

¹⁰² *Id.* at 26.

¹⁰³ *Id.* at 23–24.

¹⁰⁴ *Id.* at 25.

¹⁰⁵ *Id.* at 26.

¹⁰⁶ *Id.* at 29.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 28.

¹⁰⁹ JUDITH WALZER LEAVITT, *TYPHOID MARY: CAPTIVE TO THE PUBLIC'S HEALTH* 84 (1996).

¹¹⁰ Gorgas, *supra* note 49, at 107.

labor activists) during the winter of 1917.¹¹¹ These persons were held in various jails for several days while they were charged with a “blood test,” which meant that they could not post bail or obtain a hearing; rather, they had to submit to an invasive examination of their blood and their genitals for venereal disease.¹¹² Hundreds of individuals were arrested, and a “large percentage” of those who tested positive were detained indefinitely while they underwent forced treatments.¹¹³ A Seattle dentist and socialist, Edwin J. Brown, decided to serve as attorney for several men and women challenging their internment in court.¹¹⁴ These individuals claimed that they were being forcibly treated for diseases they did not actually have and were being held without a warrant or bail in filthy quarters.¹¹⁵ Most local judges “largely ignored” these claims, and affirmed the authority of the state to exercise its police power in the interest of the public welfare.¹¹⁶

Yet a handful of cases did reach the Washington Supreme Court in 1918. The first of these was *State ex rel. Woods v. Mackintosh*,¹¹⁷ decided on January 17, 1918. One month earlier, Seattle police had arrested a woman for being a “disorderly person” and brought her to the city jail.¹¹⁸ The next day a health department physician examined her and found that she had a venereal disease.¹¹⁹ City officials brought her to the jail’s hospital ward and placed her under isolation.¹²⁰ On December 10, 1917, the woman filed a petition for habeas corpus, alleging that she had been denied bail and a fair hearing; that she had asked, and been refused, to be examined by a physician of her choice to determine if she had a venereal disease; and that if she were properly diagnosed with a venereal disease, she would follow the court’s order to quarantine herself in her home.¹²¹ The trial court denied her habeas application.¹²² A few weeks later, the Washington Supreme Court affirmed this decision, denying the petition because “relator argues that the trial court did not consider the petition for the writ of habeas corpus,” while in fact the lower court had denied the petition; they had not “refused to act at all.”¹²³

Meanwhile, in April 1918, a man named Francis Williams was arrested in Seattle for being a “disorderly person.”¹²⁴ Williams was likewise ex-

¹¹¹ Rockafellar, *supra* note 34, at 325–26.

¹¹² *Id.* at 326.

¹¹³ *Id.* at 326–27.

¹¹⁴ *Id.* at 327–29.

¹¹⁵ *Id.* at 329–30.

¹¹⁶ *Id.* at 330.

¹¹⁷ 169 P. 990 (Wash. 1918).

¹¹⁸ *Id.* at 991.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *State ex rel. McBride v. Superior Court for King Cnty.*, 174 P. 973, 974 (Wash. 1918).

amed and committed to the city's isolation hospital.¹²⁵ He filed a petition for habeas corpus, alleging that he was being held on charges that were "unfounded and in fact untrue" and that he was subject to "unsanitary, filthy, and poorly ventilated quarters,"¹²⁶ but this time a trial court judge ordered that a panel of new physicians verify Williams's diagnosis,¹²⁷ as well as the diagnoses of dozens of other individuals seeking habeas relief.¹²⁸ The Seattle health commissioner, J.S. McBride, refused to comply, claiming that the court's order violated the quarantine laws, which gave the authority to determine infectiousness to the health commissioner, and thus constituted judicial interference.¹²⁹ McBride sought a writ of prohibition from the state supreme court to prevent the trial judge from second-guessing the health department's determination that Williams and the others were infected (by allowing their reexamination by new physicians).¹³⁰

The Washington State Supreme Court's ruling was highly technical in its reasoning and startlingly powerful in its implications. The decision came down to whether the legislature had the power to grant the health commissioner the authority to make final decisions regarding quarantine and isolation.¹³¹ The court decided that it did.¹³² "The power to detain one who is suspected of having a contagious disease rests in the police power, and to this extent the authority of the commissioner is not challenged," the court wrote.¹³³ Indeed, because the law creating the state board of health stated that the "board shall have supreme authority in matters of quarantine,"¹³⁴ the health commissioner's decisions were not even subject to judicial review. "[I]t is within the power of Legislature, in dealing with the problems of public health," the court concluded, "to make the determination of a fact by a properly constituted health officer final and binding upon the public as well as upon the courts."¹³⁵

Were there any limits on McBride's authority as the health commissioner? The court quoted a 1913 decision by the Court of Appeals of Kentucky dealing with the authority of Kentucky's board of health over milk bottling: "Being the agency created by the Legislature to prevent the outbreak and spread of disease, and to remove causes of sickness, the presumption is always in favor of the board of health, and its action will not be interfered with unless it appear unreasonable or oppressive."¹³⁶ Such a stan-

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Rockafellar, *supra* note 34, at 327-29.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ State *ex. rel.* McBride v. Superior Court for King Cnty., 174 P. 973, 976 (Wash. 1918).

¹³² *Id.* at 979.

¹³³ *Id.* at 976.

¹³⁴ *Id.* at 975; WASH. CODE § 5406 (1916).

¹³⁵ McBride, 174 P. at 979.

¹³⁶ Bd. of Health v. Kollman, 160 S.W. 1052, 1054 (Ky. 1913).

dard—“unreasonable or oppressive”—was obviously a high hurdle for detained individuals. Practically speaking, it endowed McBride with virtually unlimited authority over his patients. “The immediate effect of the ruling at the local level,” historian Nancy Rockafellar commented dryly, “was to cut off all legal action on behalf of quarantined inmates. Dr. McBride, confirmed in his authority, refused to allow patients to communicate further with any attorneys.”¹³⁷

The *McBride* case was hugely influential, heralded across the country by experts and journalists alike.¹³⁸ *McBride*, Rockafellar tells us, was “the high point of the authority of scientific public health in the twentieth century.”¹³⁹ It would be cited in numerous cases challenging the validity of the American Plan.¹⁴⁰ Yet, as Rockafellar noted, *McBride* was unique in the deference the court accorded to the public health authorities because of the particularities of Washington law. “Regarding venereal disease the courts felt that the imposition of quarantine was justified, but upheld the right of individuals to have their detention passed on judicially. The only exception was Washington State where the State Board of Health became the final tribunal for the validity of quarantine.”¹⁴¹ Even in states that did not endow such extrajudicial authority in public health officials, *McBride* surely shaped public health officials’ conceptions of their own authority, and thus their actions.

Rockafellar’s account of these cases and their context is an incredibly valuable study of how the American Plan operated on the ground. However, her analysis largely concludes in 1919. Rockafellar does briefly trace the diminution of the American Plan’s machinery following the end of World War I, noting, “the war’s end brought significant changes to the political climate that had prompted the stringent quarantine policy in the first place.”¹⁴² She comments that, post-war, detention was expensive, federal funds were hard to obtain, and the isolation policies were difficult to enforce.¹⁴³ Yet, perhaps because of her conceptualization of the American Plan as a distinctly 1910s initiative, Rockafellar does not acknowledge that the

¹³⁷ Rockafellar, *supra* note 34, at 335.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See, e.g., *In re Application of Johnson*, 180 P. 644, 645 (Cal. Ct. App. 1919); *People ex rel. Baker v. Strautz*, 54 N.E.2d 441, 443 (Ill. 1944); *People ex rel. Barmore v. Robertson*, 134 N.E. 815, 817 (Ill. 1922); *Rock v. Carney*, 185 N.W. 798, 803 (Mich. 1921); *Ex parte Lewis*, 42 S.W.2d 21, 22 (Mo. 1931); *Ex parte Hardcastle*, 208 S.W. 531, 531 (Tex. Crim. App. 1919).

¹⁴¹ Rockafellar, *supra* note 34, at 507. In *Hardcastle*, the Court of Criminal Appeals of Texas acknowledged this difference, writing, “The Washington decision construed a statute passed under a special provision of the Constitution of that State, authorizing the ‘establishment of boards of health with such powers as the Legislature may direct.’ . . . Our Constitution, unlike that of the State of Washington, contains no special provision on the subject . . .” *Hardcastle*, 208 S.W. at 531–32.

¹⁴² Rockafellar, *supra* note 34, at 335.

¹⁴³ *Id.* at 373.

Plan continued for many decades beyond the scope of her dissertation, though challenges in court to testing and detention continued.

One such challenge came from Marlin J. Wragg, who was arrested in Des Moines on September 27, 1918, along with a female acquaintance, Isabel Newman, for "lewdness."¹⁴⁴ While Wragg was being held in jail, the city health officer wished to take a blood sample in order to assess Wragg for venereal disease.¹⁴⁵ The blood test, the state admitted, was "somewhat painful," though it did not "pose a substantial danger to life," and the treatment "induce[d] a considerable reaction."¹⁴⁶ Wragg quickly filed suit, claiming he was being illegally restrained in the county jail and that he had not seen a copy of the order for a venereal disease examination.¹⁴⁷ The Supreme Court of Iowa ruled in Wragg's favor, noting, "there is no express provision for interfering with the liberty of persons who are merely 'suspected' of being diseased."¹⁴⁸

Yet the federal government was not worried. "The decision in the Wragg case is clearly based on the fact that the detention of Wragg was under a municipal ordinance whose enactment exceeded the authority of the municipality," wrote Bascom Johnson, then head of the CTCA's Law Enforcement Division, to Claude C. Pierce of the USPHS's Division of Venereal Diseases (DVD).¹⁴⁹ "The decision does not hold that examination and isolation is necessarily illegal."¹⁵⁰ The CTCA was further heartened by "[a] recent case in the State of Washington[,] . . . [which] held that not only was the law providing for examination and detention valid, but also that the Court would not review the decision of the Health Department as to whether or not a person was infected."¹⁵¹ This was, of course, the case of Health Commissioner McBride.

Johnson's analysis was astute. Indeed, in 1919, the Supreme Court of Nebraska rejected the habeas petition of a woman citing *Wragg*, as Wragg was only released because Iowa lacked a statute allowing the state to imprison someone reasonably suspected of having a venereal disease; in the case of the Nebraska woman, authorities had examined her and found her to be infected, which justified her detention for such time as to render her non-infectious.¹⁵² Over the next several decades, the government would win the vast majority of cases against individuals isolated for having a venereal in-

¹⁴⁴ *Wragg v. Griffin*, 170 N.W. 400, 400 (Iowa 1919).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 401.

¹⁴⁷ *Id.* at 400.

¹⁴⁸ *Id.* at 402.

¹⁴⁹ Memorandum from Bascom Johnson, Dir. of Legal Dep't, Am. Soc. Hygiene Ass'n, to C.C. Pierce, Assistant Surgeon Gen. (Feb. 8, 1919) (on file in Folder 409.1, Box 224, Entry 42, Record Group 90, National Archives, College Park, Maryland).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Ex parte Brown*, 172 N.W. 522, 522 (Neb. 1919).

fection or “reasonably suspected” of having an infection.¹⁵³ And, significantly, even as Marlin Wragg, a man, was able to secure his freedom, his companion Isabel Newman had been taken immediately to a detention hospital following her arrest; there she was examined for venereal disease (whether against her will or not has been lost to history) and detained to complete treatment for several weeks.¹⁵⁴ Women constituted the vast majority of those imprisoned because of venereal disease or suspected prostitution, even under supposedly gender-neutral laws. These policies were, in the words of historian Barbara Meil Hobson, “one of the most blatant examples of sex discrimination in the history of American justice.”¹⁵⁵ Hobson recounted a 1930 study of New York by scholar Willoughby Waterman: “Over a ten-year period [from 1920 to 1930],” she wrote, “1,782 persons were sentenced to institutions for chastity offenses; only 67 of them were men.”¹⁵⁶

It is notable that many of the earliest cases challenging the American Plan were brought by men, though virtually all of the later cases were brought by women. This may be because men were more likely to challenge their internment, perhaps because being accused of being a john was less stigmatizing in a male-dominated, hierarchical society than being accused of being a (female) prostitute, and perhaps because johns had had more connections, economic and social, to lawyers and legal resources than prostitutes. Military officials actively campaigned against women infecting troops, but never discussed men in the same way.¹⁵⁷ And promiscuity in women was

¹⁵³ See *Reynolds v. McNichols*, 488 F.2d 1378, 1383 (10th Cir. 1973); *State v. Hutchinson*, 18 So. 2d 723, 725–26 (Ala. 1944); *City of Little Rock v. Smith*, 163 S.W.2d 705, 705 (Ark. 1942); *In re Fisher* 239 P. 1100, 1100 (Cal. Ct. App. 1925); *Ex parte Clemente* 215 P. 698, 698 (Cal. Ct. App. 1923); *In re Dayton*, 199 P. 548, 548 (Cal. Ct. App. 1921); *Ex parte Arata* 198 P. 814, 814 (Cal. Ct. App. 1921); *Application of Travers*, 192 P. 454, 454 (Cal. Ct. App. 1920); *In re Application of Johnson*, 180 P. 644, 644–45 (Cal. Ct. App. 1919); *People ex rel. Baker v. Strautz*, 54 N.E.2d 441, 444 (Ill. 1944); *Welch v. Shepherd*, 196 P.2d 235, 241 (Kan. 1948); *In re Hooper v. Henderson* 294 P. 678, 678 (Kan. 1931); *Ex parte McGee*, 185 P. 14, 15 (Kan. 1919); *Rock v. Carney*, 185 N.W. 798, 798 (Mich. 1921); *Ex parte Brown*, 172 N.W. 522, 522 (Neb. 1919); *People v. Johnson* 169 N.E. 619, 619 (N.Y. 1930); *Ex parte Kilbane*, 67 N.E.2d 22, 22 (Ohio C.P. 1945); *Ex parte Company*, 139 N.E. 204, 205 (Ohio 1922); *Ex parte Mason*, 30 Ohio Dec. 139, 139 (1919); *Ex parte Fowler*, 184 P.2d 814, 818 (Okla. Crim. 1947); *Ex Parte Gilbert* 135 S.W.2d 718, 718 (Tex. Ct. App. 1940); *Ex parte Brooks*, 212 S.W. 956, 956–57 (Tex. Crim. App. 1919). These will be discussed in more detail in Part I.C.

¹⁵⁴ *Wragg*, 170 N.W. at 401.

¹⁵⁵ HOBSON, *supra* note 34, at 167.

¹⁵⁶ *Id.* at 161.

¹⁵⁷ Such rhetoric had interesting consequences. As historian George Chauncey wrote, during World War I, “Some gay men interested in sex with ‘straight’ men also portrayed themselves as less dangerous than women by arguing that there was no chance they would infect the men with the venereal diseases women were thought to carry.” GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940*, at 85 (1994).

often linked explicitly with prostitution.¹⁵⁸ There is also reason to believe that venereal disease itself was far more stigmatized in women than in men. While male soldiers could routinely and casually report for venereal disease treatments, the threat of the community finding out that one woman had tested positive for venereal disease—"a disgrace to the family," as she put it—was enough to convince her to submit to incarceration.¹⁵⁹ Surely, similar shame associated with such labels prevented many women from entering the public fray by filing a lawsuit. Further, if some of the isolated women actually were prostitutes, then they may have had reason to mistrust the legal system. Their profession was stigmatized and illegal, and, more importantly, prostitutes have long been subject to police violence.¹⁶⁰

Moreover, as time went by, the purpose of the American Plan became more plainly discriminatory, so there were fewer men behind bars to challenge their internment. (This may have been spurred, in part, by successful or partially successful early challenges from men, such as those of Marlin Wragg.) Many women noticed this sexist enforcement. Maude Miner, a prominent female reformer and an early administrator within the CTCA who was initially optimistic about its mission, resigned from her position as Chair of the CTCA's Committee on Protective Work for Girls (CPWG) in April 1918, because Raymond Fosdick, head of the Commission, ignored her repeated entreaties to make the enforcement of the American Plan less sexist.¹⁶¹ "I could not be satisfied," Miner confided in a fellow government official, Ethel Sturges Dummer, a few days later, "to see the girl interests entirely subordinated to the interests of the soldier and the only reason for caring for girls in detention homes or reformatories reduced to just that."¹⁶² A few months later, Dummer wrote to another reformer,

Do you not think that our Committee should come to some standard of requirement which we may put before the country as a present minimum to be asked for the position of women? Why should a woman be imprisoned for a disease when the man, as responsible, goes scot free?¹⁶³

¹⁵⁸ James Wunsch, *Prostitution and Public Policy: From Regulation to Suppression, 1858–1920*, at 157 (1976) (unpublished Ph.D. Dissertation, University of Chicago) (on file with the University of Chicago).

¹⁵⁹ Transcript of Record at 5, *Rock v. Carney*, 185 N.W. 798 (Mich. 1921) (No. 17) (on file with the Archives of Michigan).

¹⁶⁰ See ELIZABETH ALICE CLEMENT, *LOVE FOR SALE: COURTING, TREATING, AND PROSTITUTION IN NEW YORK CITY, 1900–1945*, at 195 (2006).

¹⁶¹ Letter from Maude Miner, Chairman, Comm. on Protective Work for Girls (CPWG), to Raymond Fosdick, Chairman, CTCA (Apr. 9, 1918) (on file in Doc. 26056, Box 53, Entry 393, Record Group 165, National Archives, College Park, Maryland).

¹⁶² Letter from Maude Miner, Chairman, CPWG, to Ethel Sturges Dummer, Member, CPWG (Apr. 17, 1918) (on file in Folder 378, Box 24, A-127, Ethel Sturges Dummer Papers, Schlesinger Library, Radcliffe).

¹⁶³ Letter from Ethel Sturges Dummer, Member, CPWG, to Jessie Binford, Supervisor of Cent. Dist., CPWG (Dec. 24, 1918) (on file in Folder 402, Box 25, A-127, Ethel Sturges Dummer Papers, Schlesinger Library, Radcliffe).

Women outside of the government were far more vocal in their denunciations. According to Edith Houghton Hooker, a medical doctor and suffragist, “the impracticable and discriminatory nature” of the Plan “becomes clear upon the most cursory consideration.”¹⁶⁴ The Plan’s language, she continued, “makes it verbally applicable to the two sexes, but it is plain that this cannot be its honest intent”¹⁶⁵ Katharine Bushnell, another doctor and activist, was the most vocal opponent of the Plan, traveling extensively decrying it. In her celebrated pamphlet, *What’s Going On?*, she wrote, “See how afraid they are to touch the rights of men, and how ready to trample upon the rights of even *suspected* women.”¹⁶⁶ This discriminatory application essentially ensured that the American Plan would be ineffective at controlling venereal disease. By focusing almost exclusively on women, the Plan only imprisoned half of potential infectious carriers. Civilian men were virtually never imprisoned at all.¹⁶⁷

Some authorities chose not to deny the discriminatory practices, but rather defend them. A.J. McLaughlin, a USPHS officer, wrote in 1919, “Men take more precautions, and are more particular about treatment and prophylaxis. Women are very negligent, and take treatment only for the relief of pain or under compulsion. One woman will infect ten men for every one woman that one man will infect.”¹⁶⁸

The fact that the enforcement of the American Plan centered on women underscores one of its hidden truths—it was not, in actuality, policing venereal disease; it was policing female sexuality. This policing was inextricably tied to demographic shifts. Beginning in the late nineteenth century, women began entering the labor force in greater numbers,¹⁶⁹ and, as they moved away from rural families or earned enough to move away from urban families, wage-earning women began living alone.¹⁷⁰ In 1880, approximately 3,800 wage-earning Chicago women lived apart from their families; by 1910, that number had reached 31,500.¹⁷¹ At the same time, newly independent wage-earning women—as well as an increasing number of middle-class

¹⁶⁴ Edith Houghton Hooker, *The Modern Social Hygiene Program: A Constructive Criticism*, 43 SURVEY 707, 708 (1920).

¹⁶⁵ *Id.*

¹⁶⁶ KATHARINE BUSHNELL, *WHAT’S GOING ON?* 12 (2d rev. ed. 1919) (on file in Folder 1, Box 122, 3AMS/D/51/01, Records of the Association for Moral & Social Hygiene, Women’s Library, London School of Economics).

¹⁶⁷ HOBSON, *supra* note 34, at 161 (on disparity of imprisonment of female prostitutes versus civilian “pimps or procurers”). Interestingly, perhaps as an expression of moral condemnation toward infected men, there was a movement to keep infected soldiers out of treatment facilities and on the frontlines as a form of punishment for their indiscretions. See BRANDT, *supra* note 10, at 102.

¹⁶⁸ A.J. McLaughlin, *Pioneering in Venereal Disease Control*, 80 AM. J. OBSTETRICS & DISEASES WOMEN & CHILDREN 636, 639 (1919).

¹⁶⁹ JOANNE J. MEYEROWITZ, *WOMEN ADRIFT: INDEPENDENT WAGE EARNERS IN CHICAGO, 1880–1930*, at xvii (1988) (“From 1880 to 1930, the female labor force increased from 2.6 million to 10.8 million.”).

¹⁷⁰ *Id.* at 5.

¹⁷¹ *Id.*

women—began having premarital sex at greater rates.¹⁷² Terrified by these changes, and fearing that many of these women were victims of male exploitation, reformers sought to intervene and save innocent women and girls from lives of vice.¹⁷³

Yet circumstances changed in the years surrounding World War I. Independent women vocally refuted depictions of their destitution, and journalists studying these women realized that wage-earning women were less “lost” than they had believed.¹⁷⁴ Reformers came to believe that women were not so sexually vulnerable; rather, they “lived in a world that attached less stigma to female sexual activity,” as historian Joanne Meyerowitz put it.¹⁷⁵ Some women, striving to avoid poverty, chose prostitution; others allowed men to “treat” them to meals or entertainment.¹⁷⁶ Reformers were horrified by this apparent repudiation of conventional morality.¹⁷⁷ It was this horror that led reformers to create reformatories and seek harsher anti-prostitution laws in the first place.¹⁷⁸ Both of those initiatives were a way to control “immoral” sexual behavior or promiscuity.¹⁷⁹ Certainly, as the country mobilized for war, reformers feared for soldiers’ health. One motive in the creation of the American Plan was genuinely to protect the health of young men.¹⁸⁰ Yet the fact that officials rounded up and imprisoned women but, for the most part, excluded men from such treatment, reveals these programs had always been part of a larger effort to repress female sexuality.

C. *The Reasoning is Refined*

Beginning just two months after *Wragg*, a number of cases reached the Court of Appeal of California; the collective rationale underlying these decisions would set much of the precedent that allowed state and local governments to continue to isolate infected women for decades to come.¹⁸¹ Though petitioners won some of these cases, and the government won others, the court of appeal’s cumulative message was that, so long as the state had reasonable suspicion, it could arrest, examine, and isolate individuals at will.

The first of these was *Ex parte Johnston*,¹⁸² which the court decided on March 12, 1919. In that case, a woman named Grace Johnston was, “with

¹⁷² *Id.* at 123–24.

¹⁷³ *Id.* at 48–49, 52.

¹⁷⁴ *See id.* at 123.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 39, 101–04.

¹⁷⁷ *Id.* at 123.

¹⁷⁸ *See ODEM, supra* note 12, at 96.

¹⁷⁹ *Id.*

¹⁸⁰ *See CONNELLY, supra* note 99, at 144–45.

¹⁸¹ *See Ex parte Dayton*, 199 P. 548 (Cal. Ct. App. 1921); *Ex parte Arata*, 198 P. 814 (Cal. Ct. App. 1921); *Application of Travers*, 192 P. 454 (Cal. Ct. App. 1920); *Ex parte Dillon*, 186 P. 170 (Cal. Ct. App. 1919); *Ex parte Johnston*, 180 P. 644 (Cal. Ct. App. 1919).

¹⁸² 180 P. 644 (Cal. Ct. App. 1919).

her consent,” subjected to an examination for venereal disease and found to have gonorrhea; she was then incarcerated in a detention hospital for treatment.¹⁸³ Johnston filed a petition for habeas corpus, and on December 5, 1918, the trial court ordered that she be released on bail, pending a formal hearing.¹⁸⁴ However, at the bail hearing on February 8, 1919, the court remanded her back into custody and authorities returned Johnston to the hospital, “since which time she has steadfastly refused to accept any treatment or submit to any examination.”¹⁸⁵ The court of appeal ruled that Johnston’s detention was “reasonable and proper, [and] indeed, the usual measure” the state should have taken.¹⁸⁶ Significantly, the court also stated, “There is no merit in the contention that the infection with which petitioner is afflicted is noncommunicable except by actual contact.”¹⁸⁷ Regardless of the fact that Johnston could transmit gonorrhea only through sexual intercourse, then, her isolation was justified. This last statement is noteworthy, for in it the court casually dismissed the “merit” of the argument that isolation was scientifically inappropriate for venereal disease.

Eight months later, the court of appeal released a woman named Ethel Adams who had been arrested by the Los Angeles police for supposedly violating the “Rooming-house Ordinance” by using a “rooming house, lodging house, hotel or other place in the city of Los Angeles” for sexual intercourse between unmarried persons.¹⁸⁸ The court noted in this case, *Ex parte Dillon*, that it had been the health department’s policy for the past two years to examine everyone brought to jail for violating the rooming-house ordinance for venereal disease.¹⁸⁹ Eventually, the court stated that the police could not “reasonably assume” that anyone violating the ordinance was infected and then deny that person basic procedural protections—that idea would be “shocking to our sense of justice.”¹⁹⁰ The court further stated that *Johnston* was “intended to be read only in view of the facts of that particular case,” as authorities knew for a fact that Johnston was “afflicted with an infectious or contagious disease,” unlike Adams.¹⁹¹ However, on another, perhaps more vital point, the court remained crystal clear:

Where sufficient reasonable cause exists to believe that a person is afflicted with a quarantinable disease, there is no doubt of the right of the health authorities to examine into the case and, in a proper way, determine the fact. Such preliminary investigation must be

¹⁸³ *Id.* at 644.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 645.

¹⁸⁷ *Id.*

¹⁸⁸ *Ex parte Dillon*, 186 P. 170, 170 (Cal. Dist. Ct. App. 1919) (quoting Los Angeles, Cal., Ordinance 25,640).

¹⁸⁹ *Id.* at 170–71.

¹⁹⁰ *Id.* at 172.

¹⁹¹ *Id.*

made without delay, and, if quarantining is found to be justifiable, such quarantine measures may be resorted to only as are reasonably necessary to protect the public health, remembering that the persons so affected are to be treated as patients, and not as criminals.¹⁹²

In *Dillon*, far more than in *Johnston*, the court cautioned the police to respect the rights of the infected. Yet this respect only went so far, especially where the health of the public was concerned. Even violence was not enough to diminish the court's deference to public health authorities. In *Application of Travers*,¹⁹³ decided on July 29, 1920, the court dismissed the petition of a woman arrested for vagrancy and claiming to have been examined for venereal disease "against her consent" and under duress.¹⁹⁴ The court of appeal declared that the power to isolate diseased persons "cannot be seriously questioned."¹⁹⁵

A year later, the court further refined its rationale, and seriously weakened the reasoning that underlay *Dillon*. Betty Dayton was detained in jail as a "lewd and dissolute person," meaning prostitute, and refused to submit to an examination for venereal disease ordered by the health department.¹⁹⁶ The court of appeal concluded in *Dayton* that the authorities were completely justified in attempting to force Dayton to yield to an examination. The court claimed that, as Dayton had been arrested in "a house of ill fame," and as witnesses attested to her status as a prostitute, the state could reasonably assume she was infected.¹⁹⁷ "It is not essential that the particular acts indulged in in such houses be expressly shown," the court added, a touch prudishly.¹⁹⁸ In *Dillon*, the court had written that the police could not make a warrantless arrest under the rooming-house ordinance unless "all of the acts essential to make out the crime are committed in the actual presence and view of such officer."¹⁹⁹ The difference between *Dillon* and *Dayton* (which did not acknowledge *Dillon*) appears to be simply that Adams and Dillon were arrested in a place used for sex between unmarried couples,²⁰⁰ whereas Dayton had been arrested in a "house of ill fame"—a brothel—which was proof of a crime in and of itself.²⁰¹ Another California case, *Ex Parte Cle-*

¹⁹² *Id.*

¹⁹³ 192 P. 454 (Cal. Ct. App. 1920).

¹⁹⁴ *Id.* at 455.

¹⁹⁵ *Id.* The court also explicitly connected the *Travers* case to the American Plan: "It is a matter of common knowledge that the federal government, the state government, and the municipal government are engaged in an effort to prevent the spread of the two diseases in question." *Id.*

¹⁹⁶ *In re Dayton*, 199 P. 548, 548-49 (Cal. Ct. App. 1921).

¹⁹⁷ *Id.* at 549.

¹⁹⁸ *Id.*

¹⁹⁹ *Ex parte Dillon*, 186 P. 170, 171 (Cal. Dist. Ct. App. 1919).

²⁰⁰ *Id.* at 172.

²⁰¹ *Dayton*, 199 P. at 549.

mente,²⁰² decided in 1923, held that the state was justified in assuming a woman managing a “house of ill fame” was infected and compelling her to submit to an examination.²⁰³ *Dayton* and *Clemente* are notable because they held that presence in a “house of ill fame” was sufficient not just to allow the state to conduct an examination, but to allow the state to hold the suspect in quarantine until the results proved one way or another.

The Court of Appeal of California decided the most such appeals of any state in the nation, and the collective rationale it produced would be cited across the country. California essentially set the standard for those who were infected with venereal disease or suspected of being so who challenged their detention: the state was completely justified in examining those reasonably suspected of having venereal disease, and evidence of prostitution provided sufficient “reasonable suspicion.” The idea that a positive diagnosis would justify isolation was never once rejected.

Elsewhere across the country, the reasoning was similarly refined. Prostitution was increasingly conflated with venereal disease. In Texas, the court of criminal appeals ruled in June 1919 that the police had acted properly by examining and quarantining Grace Brooks, “a common prostitute and a street walker.”²⁰⁴ After all, “[t]he Legislature has power to declare that prostitution is a source of communicable diseases, and that its suppression is a public health measure”²⁰⁵ Public health authorities provided the evidence to support such a law. Katherine Bement Davis, a respected physician and later official in the CTCA, claimed to have found in 1913 that ninety percent of prostitutes in a particular reformatory were infected with venereal disease.²⁰⁶ Paul Johnson, a medical doctor and member of the Committee for Civilian Cooperation in Combating Venereal Diseases, quoted a California statute from 1917 stating that “[o]wing to the prevalence of such disease among prostitutes, all such persons may be considered” as belonging to the class of reasonably suspected.²⁰⁷ *Brooks*, *Clemente*, and *Dayton* suggest that at least some courts agreed. And because prostitution was often defined as an exclusively female crime at this time, such an interpretation served to allow authorities to discriminatorily target women.²⁰⁸

In *Brooks*, the Texas Court of Criminal Appeals added an additional, significant sentence: “The object of the law is not punishment for the unfortunates who are afflicted with these maladies, so easily transmitted and so fearful in results, but the well-being of these and the remainder of the people.”²⁰⁹ The purpose was not to punish infected people, but rather to separate

²⁰² 215 P. 698 (Cal. Ct. App. 1923).

²⁰³ *Id.* at 698. The court cited *Dayton* in its conclusion. *Id.*

²⁰⁴ *Ex parte Brooks*, 212 S.W. 956, 957 (Tex. Crim. App. 1919).

²⁰⁵ *Id.*

²⁰⁶ Wunsch, *supra* note 158, at 17.

²⁰⁷ Paul B. Johnson, *Social Hygiene and the War*, 4 SOC. HYGIENE 91, 119 (1918).

²⁰⁸ See Kristin Luker, *Sex, Social Hygiene, and the State: The Double-Edged Sword of Social Reform*, 27 THEORY & SOC'Y 601, 624, 633–34 n.82 (1998).

²⁰⁹ *Brooks*, 212 S.W. at 957.

them from society for their own good and the good of everyone else. The Texas court did not originate this logic; it had deep roots in female prison reform. Since the early nineteenth century, religious and secular institutions had been attempting to reform and rehabilitate “fallen women” by forcibly separating them from dangerous influences, such as alcohol, music, or men.²¹⁰ These institutions, known as reformatories, sprang up across the country in the late nineteenth and early twentieth centuries.²¹¹ Reformatories were not seen as punitive; rather, they were an alternative to punitive measures, such as jails.²¹² Most reformatories were not created specifically to house women with venereal disease per se. However, as officials arrested more and more infected women, reformatories began to house an increasing number of them.²¹³ In mid-1918, less than a year before the Texas Court of Criminal Appeals decided *Brooks*, the CTCA created a Section on Reformatories and Detention Houses. As Section Head Martha Falconer put it, the Section was designed to address the question, “Where were these girls . . . to go, for treatment for venereal disease, and the training which would equip them to lead useful lives?”²¹⁴

This reformatory, as opposed to punitive, rationale was quickly becoming accepted in courtrooms across the country as yet another justification for the incarceration of venereally infected or “promiscuous” individuals. In dismissing an infected man’s attempt to win his release from quarantine, the Supreme Court of Kansas declared in July 1919:

While it is true that physical facilities constituting part of the penitentiary equipment are utilized, interned persons are in no sense confined in the penitentiary, and are not subject to the peculiar obloquy which attends such confinement.²¹⁵

The Alabama Court of Appeals stated two years later that people who are infected or “reasonably suspected” of being so may be isolated until “they will cease to be a menace to the public.”²¹⁶ Nonetheless, “persons affected with diseases are not for that reason criminals,” the court continued, “and

²¹⁰ See, e.g., RAFTER, *supra* note 62, at xxi–xxiii; Steven Ruggles, *Fallen Women: The Inmates of the Magdalen Society Asylum of Philadelphia, 1836–1908*, 16 J. Soc. HIST. 65, 65 (1983).

²¹¹ ODEM, *supra* note 12, at 115–16.

²¹² Miriam Van Waters, an enthusiastic female prison reformer, epitomized this opinion in 1922: “If one were asked to sum up in a phrase the background idea of correctional institutions for girls in this country, it would be, not punishment, nor discipline, but ‘welfare, adjustment and education.’” Miriam Van Waters, *Where Girls Go Right: Some Dynamic Aspects of State Correctional Schools for Girls and Young Women*, 48 SURVEY 361, 362 (1922).

²¹³ See, e.g., Janke, *supra* note 52, at 222.

²¹⁴ Martha Falconer, *Work of the Section on Reformatories and Houses of Detention*, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF SOCIAL WORK 668, 668 (1918).

²¹⁵ *Ex parte McGee*, 185 P. 14, 17 (Kan. 1919).

²¹⁶ *Dowling v. Harden*, 88 So. 217, 217 (Ala. Ct. App. 1921).

jails and penitentiaries are not made or designated for their detention.”²¹⁷ It wasn’t punishment; it was public health.

D. *The Implications*

Yet surely the treatment these women—and the persons arrested were nearly all women—received at the hands of the police felt an awful lot like punishment. For one thing, the facilities in which they were incarcerated were often as unpleasant as—if not worse than—jails or prisons. According to a 1922 study by Mary Macey Dietzler, an ISHB agent, of the thirty-two detention hospitals that received federal funds to quarantine women, seventeen—more than half—had barbed wire, armed guards, both, or constant police supervision.²¹⁸ In one facility (not included in Dietzler’s survey, as it did not receive federal monies), new inmates were quickly acclimated to a culture of “strict discipline,” according to journalist Franklin Hichborn.²¹⁹ Medical treatment began immediately. In spite of Hichborn’s approving article, even he had to concede, “As one approaches it from the outside, the high board fence with its barbed-wire top and the formalities of entering the outer gate give the sense of oppression which one feels on entering a prison.”²²⁰ Even reformatories, which reformers designed to be enlightened alternatives to prisons, had a dark side—they allowed officials to lock up greater numbers of women than ever before. “In the course of saving fallen women,” historian Nicole Hahn Rafter wrote, “the founders of women’s reformatories institutionalized a double standard, one that made it possible to incarcerate women for minor offenses for which men were not subject to lengthy punishment by the state.”²²¹

More importantly, once inside these prison-like structures, the women were subjected to cruel (and ineffective) treatment. Arriving at many facilities, presumed prostitutes were given a rudimentary IQ test; those who were judged to be substandard—“feeble-minded”—were often sterilized.²²² This was the era of eugenics, and the idea of mixing “moral deficiency” and “mental deficiency” and, ultimately, identifying and then neu-

²¹⁷ *Id.*

²¹⁸ DIETZLER, *supra* note 62, at 75.

²¹⁹ Franklin Hichborn, *The Anti-Vice Movement in California: Rehabilitation*, 6 Soc. Hygiene 365, 369–70 (1920).

²²⁰ *Id.* at 369.

²²¹ RAFTER, *supra* note 62, at xxii.

²²² No one has investigated this process at length. For some fragmentary evidence, see WENDY KLINE, *BUILDING A BETTER RACE: GENDER, SEXUALITY, AND EUGENICS FROM THE TURN OF THE CENTURY TO THE BABY BOOM* 47–54 (2001); Christopher Capozzola, *The Only Badge Needed is Your Patriotic Fervor: Vigilance, Coercion, and the Law in World War I America*, 88 J. AM. HIST. 1354, 1373 (2002); Ann R. Gabbert, *Prostitution and Moral Reform in the Borderlands: El Paso, 1890–1920*, 12 J. HIST. SEXUALITY 575, 593–94 (2003).

tralizing female “morons,” was prevalent.²²³ Virtually all of the leaders of the American Plan were eugenicists.²²⁴ Many women were subjected to solitary confinement or corporal punishment.²²⁵ Officials coerced other women into submitting their bodies to “experimental surgeries.”²²⁶

²²³ See KLINE, *supra* note 222, at 33–34. See *id.* at 19–44 for a broader historical argument showing the connection between the eugenics campaign and reformist concerns about immoral female sexuality, leading up to Kline’s eventual comment that, “[w]ith the U.S. entry into World War I, the female high-grade moron not only was a threat to the family and the race but was now also seen as a threat to national security,” *id.* at 44. For more summary, see JAMES W. TRENT, JR., *INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES* 160–63 (1994).

²²⁴ William F. SNOW, head of the ASHA and chief of the CTCA’s Division of Social Hygiene, was the vice president of the American Eugenics Society. PIVAR, *supra* note 42, at 131. Maude Miner, head of the CPWG, carefully noted “inherited strains of degeneracy” in patient files at the reformatory she ran as a younger woman. ROSEN, *supra* note 34, at 22. Charles Eliot, President of Harvard University and honorary President of the ASHA, prominently linked social hygiene with eugenics. See BRIAN DONOVAN, *WHITE SLAVE CRUSADES: RACE, GENDER, AND ANTI-VICE ACTIVISM, 1887–1917*, at 137 (2006). C.C. Pierce, the assistant surgeon general, and David Starr Jordan, an early leader in the ASHA, were the guests of honor at an event hosted by the Race Betterment Foundation in 1915. ALEXANDRA MINNA STERN, *EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA* 47–48 (2005). Ethel Sturges Dummer, a long-time official in the CTCA, was profoundly affected by the philosophy of eugenics. ETHEL STURGES DUMMER, *WHY I THINK SO: THE AUTOBIOGRAPHY OF AN HYPOTHESIS* 55 (1937). John D. Rockefeller, Jr., who bankrolled the ASHA and the Bureau of Social Hygiene, was interested in eugenics and linked prostitution and venereal disease with feeble-mindedness. RAFTER, *supra* note 62, at 70. Katharine Bement Davis, a leader in the reformatory movement and later the CTCA, embraced eugenics. PIVAR, *supra* note 42, at 122 (discussing Davis’ plan to use psychometric testing to separate the “feeble-minded” from the general prostitute population at Bedford Reformatory). Prince A. Morrow, the intellectual forefather of social hygiene, called eugenics the “youngest and most beautiful branch of biological science.” Prince A. Morrow, *Eugenics and Venereal Diseases*, 27 *DIETETIC & HYGIENIC GAZETTE* 1, 3 (1911).

²²⁵ DIETZLER, *supra* note 62, at 215. Miriam Van Waters looked at twenty-four state training schools for girls and young women, six reformatories, and eight private institutions, see Van Waters, *supra* note 212, at 362; many such institutions, including Sleighton Farms (Pennsylvania), Samarcand Manor (North Carolina), the Sauk Centre (Minnesota), the Virginia State School for Colored Girls, and the Lansing State Farm for Women (Kansas), were used to house women under the American Plan. See DIETZLER, *supra* note 62, at 190, 196, 200, 219; Janke, *supra* note 52, at 215–81. In spite of her generally positive outlook of the institutions she studied, Van Waters found:

Flogging is still practised in nearly half of the institutions studied. The most frequent causes of flogging are running away and sex perversions. Starvation, or limited diet is found in two-thirds, the restricted diet lasting from a period of a few days to a period of months. Solitary confinement in black cells is still used. Isolation behind bars, or within steel cages is found; some form of segregation or “meditation” being almost universal. Other punishments are cold-water baths, doses of drugs that produce nausea, drenching the body with a stream from a fire hose, tying up and other forms of physical restraint. Shaving the heads, suspension from school, deprivation of medical attention, and nameless and terrible punishments are still found, survivals of the spirit of retaliation, fear and stupidity.

Van Waters, *supra* note 212, at 374.

²²⁶ Janke, *supra* note 52, at 211. Janke recounts a report that

Of course, women were not passive recipients of this treatment. One method of resistance was simply filing suit—a powerful political act—yet challenging their internment in court was not the only means of resistance women had. Many attempted escape. In one year, eight women escaped from the detention house in Hattiesburg, Mississippi; nine women fled the city hospital’s locked ward in San Francisco; ten women managed to break out of Fairmont Hospital’s quarantine cottage in Kalamazoo, Michigan.²²⁷ “The Hospice,” a detention facility in Jacksonville, Florida, witnessed a remarkable eighty escapes in just two years, from 1919 to 1921.²²⁸ Across the country and over many years, hundreds or perhaps thousands of women escaped. Some women took this resistance to an extreme—the literal destruction of their sites of detention. In one wing of the Louisville jail, quarantined women staged a riot about once a week.²²⁹ Of the forty-three detention houses and reformatories for infected women funded by the federal government, five were destroyed by fires (some almost certainly set by inmates).²³⁰ Quarantined inmates burned down the City Farm of Houston, Texas not just once, but twice.²³¹

This brutal treatment, and the resistance to it, were natural outcomes of the American Plan. In order to begin to understand the Plan, it is important to grasp the extent of the cruelty these women endured. Without such understanding, any story of the Plan is robbed of its human element, and thus the power for the history to affect us on a personal level. Further, resistance was as much a part of the Plan as the cruelty was. Such resistance took many forms: riots, escape attempts, even arson. Filing a lawsuit was also a kind of resistance—a direct challenge to the authority of the women’s captors and the laws that enabled the incarceration regime. As the American Plan continued beyond World War I and its immediate aftermath, cruelty would continue—but so would resistance.

II: THE BAND MARCHES ON

Traditional coverage of the American Plan usually cuts the narrative short in the early 1920s. Writing as early as 1937, Bascom Johnson, an intellectual forefather of the American Plan, implied that the Plan effectively

women incarcerated at Ward L of the County Hospital [in San Francisco] were taking part in a [‘compulsory surgical intervention [and] cauterization’] prompted by ‘previous unsatisfactory results in the treatment of chronic gonorrhoea.’ . . . Supposedly these surgeries never happened without the ‘consent of the patient,’ but [the official’s] report reveals that those who refused to participate had an additional six months attached to their sentence.

Id. (quoting CTCA representative Allison French).

²²⁷ DIETZLER, *supra* note 62, at 107, 132–33.

²²⁸ *Id.* at 107.

²²⁹ Janke, *supra* note 52, at 178–79.

²³⁰ DIETZLER, *supra* note 62, at 3.

²³¹ *Id.* at 170–71.

died after the ISHB, the federal agency that distributed funds to states and municipalities to detain, isolate, and treat venereally infected women, lost funding:

In 1923 Congress lopped off funds for the Interdepartmental Social Hygiene Board and President Harding closed its doors. Federal aid to the states in combating syphilis and prostitution was no longer available. Many states and cities decreased or discontinued activities which were vital to the repression of the traffic in prostitution. Slowly, many cities slipped backward.

Then came the depression with further curtailment of police, social, and health activities in most cities and states. The pressure of action against prostitutes and their agents further decreased.²³²

No historian has ever surveyed the states to see how they continued to arrest, examine, and quarantine women under laws passed at the behest of the CTCA and ISHB. But the American Plan could and did continue on the local level for years, in the form of state and local authorities enforcing state and local laws, using enforcement measures they had developed during World War I, and imprisoning women in a variety of facilities.

The ISHB lost its funding²³³ as World War I ended and its accompanying fervor declined. Doctors had begun to agitate against government control of venereal disease treatment.²³⁴ In a January 1921 editorial, the *Journal of the American Medical Association* embraced this agitation and condemned the ISHB as requiring “a growing personnel, a bureaucratic system of centralized administration, the distribution of federal money for state and local activities, and the control or dictation from Washington of state and local policies.”²³⁵ In spite of vociferous opposition from ISHB leaders, Congress eliminated the ISHB’s funding and transferred its activities to the DVD.²³⁶

²³² BASCOM JOHNSON, *PROSTITUTION IN THE UNITED STATES* (1937) (on file in Folder 08, Box 212, Legal and Protective Measures, Legal Reference Files, Prostitution and Prostitution Regulation Histories, American Social Health Association Records, Social Welfare History Archives, University of Minnesota Libraries).

²³³ The loss of the ISHB’s funding, according to Thomas Storey, its executive secretary, was “a disaster!” Letter from Thomas A. Storey, Sec’y, ISHB, to agents of the ISHB (Feb. 7, 1921) (on file in Box 1, Entry 30, Record Group 90, National Archives, College Park, Maryland).

²³⁴ Rockafellar, *supra* note 34, at 496–97 (“After the war, private physicians grew more critical of the public health service efforts [to diagnose and treat venereal disease] [T]here was considerable fear of ‘state medicine’ in the postwar period”).

²³⁵ I.H. Dillon, *The Passing of the Interdepartmental Social Hygiene Board*, 76 JAMA 117, 117 (1921).

²³⁶ The DVD would gain national notoriety decades later as the body that devised the Tuskegee syphilis experiments. JAMES JONES, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT* 130–31 (1993). One important legacy of the American Plan that no scholar has yet examined are its links to Tuskegee. Many of the key figures in Tuskegee got their start in the USPHS administering the American Plan, including Surgeon General Hugh Cumming, Joseph Earle Moore, and O.C. Wenger. FURMAN, *supra* note 55, at 335–42; SUSAN REVERBY, *EXAMINING TUSKEGEE: THE INFAMOUS SYPHILIS STUDY AND ITS LEGACY*

“The demise of the Interdepartmental Social Hygiene Board marked the first critical sign of the decline in efforts to combat venereal disease after the war,” wrote Brandt.²³⁷ Though many claimed the DVD could continue the ISHB’s work, “the Division’s budget was merely ten percent of the Board’s.”²³⁸ With such a limited budget, the DVD ceased all of the ISHB’s most hands-on activities.²³⁹ By late 1922 the ISHB’s chairman removed its name from all government mailing lists, and by 1923 it closed its doors.²⁴⁰

After the ISHB’s demise, the federal government may no longer have had any official supervision over the American Plan, but it did occasionally try to monitor the Plan’s progress, and the records it created provide some insight into how the Plan survived on a local level. On December 12, 1925, Assistant Surgeon General Mark White, chief of the DVD, wrote to every state department of health, inquiring into the laws and regulations governing their programs to control venereal disease.²⁴¹ Every state responded; many cited difficulties getting local doctors to cooperate.²⁴² Physicians’ opposition to government intervention in medicine, it would seem, was flourishing. Yet nearly all states informed White that they were continuing to enforce the iterations of the CTCA’s model law.²⁴³ A decade later, in 1935, another Assistant Surgeon General wrote to a Tennessee doctor, informing him,

In all the States except Nevada and Massachusetts, health officers are given the power either by law or board of health regulation to place in quarantine and to hold until no longer infectious, persons

136–44 (2009). Figures involved in the World War II administration of the Plan, as well as Tuskegee, include Raymond Vonderlehr, Surgeon General Thomas Parran, and Taliaferro Clark. BRANDT, *supra* note 10, at 125–26; CLARKE, *supra* note 10, at 81; HEGARTY, *supra* note 14, at 22; JONES, *supra*, at 57–60; REVERBY, *supra*, at 46–47, 53.

²³⁷ BRANDT, *supra* note 10, at 123.

²³⁸ *Id.*

²³⁹ The DVD lost nearly all of its funding, decreasing from \$4 million in 1920 to less than \$60,000 in 1926, making action virtually impossible. PARASCANDOLA, *supra* note 11, at 74. By 1926, the DVD “seemed like a dying operation.” *Id.*

²⁴⁰ See Letter from M.W. Ireland, Surgeon Gen., U.S. Army, to the DVD (Sept. 8, 1922) (on file in Box 3, Entry 30, Record Group 90, National Archives, College Park, Maryland) (requesting ISHB be removed from all mailing lists); Letter from Mark J. White, Assistant Surgeon Gen., USPHS, to C.R. Horner (Aug. 16, 1923) (on file in Box 1, Entry 30, Record Group 90, National Archives, College Park, Maryland) (confirming that all ISHB activities ceased on June 30, 1923).

²⁴¹ White’s original letter does not appear to be in the National Archives, yet many responses to it referred to his letter and the date it was sent. See Letter from W.J.V. Deacon, Dir., Mich. Dep’t of Health Bureau of Records & Statistics, to Mark J. White, Assistant Surgeon Gen., USPHS (Dec. 16, 1925) (on file in Box 224, Entry 42, Record Group 90, National Archives, College Park, Maryland) (“In response to your letter of December 12”); Letter from Albert Pfeiffer, Dir., N.Y. Dep’t of Health Div. of Soc. Hygiene, to Mark J. White, Assistant Surgeon Gen., USPHS (Dec. 4, 1925) (on file in Box 224, Entry 42, Record Group 90, National Archives, College Park, Maryland) (“Replying to your communication of December 12”).

²⁴² See Letters to Mark J. White, Assistant Surgeon Gen., USPHS (Dec. 1925 and Jan. 1926) (on file in Box 224, Entry 42, Record Group 90, National Archives, College Park, Maryland).

²⁴³ *Id.*

suffering from a venereal disease whose conduct may be such as to make them dangerous to the public health.²⁴⁴

This latter threshold of “danger” to the public health may seem new, but, for the most part, it was not. Dangerous conduct is a highly subjective judgment; in practice, the standard of imprisoning those whose conduct spread infection—essentially promiscuous individuals—had long been part of the American Plan, and did not much hamper enforcement measures.²⁴⁵

The steady flow of cases that reached appellate courts during and after the demise of the ISHB further attests to the continuity of the American Plan. In January 1922, a sheriff in Missoula, Montana quarantined a woman infected with gonorrhea; the Supreme Court of Montana decided that, while the woman was entitled to a hearing on her continuing detention, in this case the state had sufficient proof that she was an infected prostitute, and thus it could continue to isolate her until she was cured or it was safe to release her into the community.²⁴⁶ In October 1922, police in Akron, Ohio arrested a woman on charges of solicitation (without a warrant), found that she was infected, and quarantined her in the Woman’s Detention Home of Akron; relying on *Johnston*, the Supreme Court of Ohio, like the court in Montana, ruled that this was acceptable.²⁴⁷ “The power to so quarantine in proper case and reasonable way,” the Court declared, “is not open to question.”²⁴⁸

In the mid-1920s, a few interested parties actually began suing governments to force them to continue enforcing the American Plan. In 1923, the city physician of Wichita, Kansas sought a writ of mandamus to force the Sedgwick County sheriff and Board of Commissioners to isolate a woman he had determined to be infected with a venereal disease.²⁴⁹ Since the physician’s authority “as a health officer to issue an order is not open to dispute,”

²⁴⁴ Letter from John McMullen, Assistant Surgeon Gen., DVD, to J.H. Adler, Doctor, W. State Hosp., Bolivar, Tenn. (Jan. 25, 1935) (on file in Folder 409.2, Box 224, Entry 42, Record Group 90, Records of the Division of Venereal Diseases, part of the Records of the Public Health Service, 1912–1968, National Archives, College Park, Maryland).

²⁴⁵ In January 1918, the USPHS sent a memorandum to the health officers in all fifty states specifying people subject to quarantine as including: “(a) Those who desire cure and can afford treatment. . . . (b) Those who desire cure and can not afford treatment. . . . (c) Those who are careless or willful in the distribution of these infections through promiscuity.” C.C. Pierce, *The Public Health Service Campaign Against Venereal Diseases*, 5 SOC. HYGIENE 415, 417–18 (1919). The third group was apparently broad enough to encompass nearly everyone isolated under the Plan, as few would have volunteered for it. Discussing this third group, the memorandum called for compulsory “physical examination of all persons entering jails or other public institutions.” *Id.* Apparently anyone subject to arrest was “careless or willful” enough to merit reasonable suspicion. Bascom Johnson, another ASHA and government official, wrote, “The conviction of any person in the courts of a sex offense involving promiscuity has always afforded ample ground for health departments to invoke the quarantine law” Bascom Johnson, *The Functions of Law and Law Enforcement in Combating Venereal Diseases*, 8 SOC. HYGIENE 163, 166 (1922).

²⁴⁶ *Ex parte Caselli*, 204 P. 364, 365 (Mont. 1922).

²⁴⁷ *Ex parte Company*, 139 N.E. 204, 204–06 (Ohio 1922).

²⁴⁸ *Id.* at 206.

²⁴⁹ *Nyberg v. Bd. of Comm’rs*, 216 P. 282, 282 (Kan. 1923).

the court ruled, the sheriff should execute the order at once and the Board of Commissioners should pay for the imprisonment.²⁵⁰ In another case from 1925, also in Kansas, the state sued Sedgwick County to force it to pay for the transportation of Sedgwick women to and from the state quarantine hospital; once again, the Court ordered that Sedgwick County pay.²⁵¹ Courts thus ensured the continued existence of the American Plan.

Cases continued to appear across the country, though it would be tedious to discuss all of these in any level of detail. As a matter of illustration, courts ruled against women seeking release from quarantine in California in 1925, in New York in 1930, and in Kansas in 1931.²⁵² As late as 1940, a Texas woman was arrested, examined, and quarantined as a syphilitic prostitute; she sued, claiming she should have been accorded a postponement of the hearing to prove she was not infected, as she had not had enough time to challenge her internment.²⁵³ “We think the record clearly shows that the relator knew why she was being restrained,” the Court of Criminal Appeals of Texas wrote coldly.²⁵⁴ “Hence she should have been prepared for the hearing at the time she applied for the writ of habeas corpus.”²⁵⁵

Of course, not all courts ruled against the petitioner. In 1924, the health officer of Jackson, Mississippi summoned a woman named Pearl Mitchell to be examined for venereal disease.²⁵⁶ When Mitchell refused, she was taken into custody.²⁵⁷ The Supreme Court of Mississippi ruled that “[t]he health officer cannot require, under the terms of the statute, such [a suspected] person to appear before him. He must go to the person and make demand upon the person at his place of business or residence.”²⁵⁸ Similarly, in 1930, Cincinnati police arrested a woman in her home, alleged she was a prostitute, and isolated her; an Ohio Common Pleas Court ruled that this action was “without legal authority” and “illegal and void,” because the municipal police and a clerk, as opposed to the health commissioner, had carried it out.²⁵⁹

²⁵⁰ *Id.* at 282–83. The court charged, “it should be clear to the sheriff that he ought to execute the order at once, and present his voucher to the board of county commissioners in the usual way.” *Id.* at 283.

²⁵¹ *State ex rel. Griffith v. Conner*, 237 P. 385, 385–86 (Kan. 1925).

²⁵² *In re Fisher*, 239 P. 1100 (Cal. Ct. App. 1925); *People v. Johnson*, 169 N.E. 619 (N.Y. 1930); *In re Hooper v. Henderson*, 294 P. 678 (Kan. 1931). *See also In re Application of King*, 16 P.2d 694 (Cal. Ct. App. 1932); *Ex parte Lewis*, 42 S.W.2d 21 (Mo. 1931).

²⁵³ *Ex parte Gilbert*, 135 S.W.2d 718, 718 (Tex. Crim. App. 1940).

²⁵⁴ *Id.*

²⁵⁵ *Id.* For years following *Gilbert*, courts would continue to uphold the incarcerations of women arrested for having venereal disease or “reasonable suspicion” of having venereal disease. *See Reynolds v. McNichols*, 488 F.2d 1378, 1380 (10th Cir. 1973); *Ex parte Kilbane*, 67 N.E.2d 22, 23 (Ohio C.P. 1945); *State v. Hutchinson*, 18 So. 2d 723, 726 (Ala. 1944).

²⁵⁶ *Jackson v. Mitchell*, 100 So. 513, 513 (Miss. 1924).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 514.

²⁵⁹ *In re Jarrell*, 28 Ohio N.P. (n.s.) 473, 480 (Ohio N.P. 1930).

Yet even in these cases, courts only went so far in protecting the rights of women. The Mississippi court, while expressing concerns with the enabling statute, only granted Mitchell's writ because the public health authorities had not sought her out, but rather compelled her to report to them, a violation of the statute.²⁶⁰ Likewise, the Ohio court wrote, "the public requires that one so afflicted [with venereal disease] shall be quarantined" and only granted the alleged petitioner's writ because she had been isolated by the wrong authorities.²⁶¹ Thus, even when ruling on the side of the petitioner, courts nonetheless concretized the broad right of the government to quarantine or isolate those infected with (or suspected of being infected with) venereal disease.

In sum, courts in the interwar years ruled, without exception, that local public health authorities, acting properly, could detain those they reasonably suspected of having venereal disease, examine them, and imprison the infected ones for compulsory treatment. These actions were enabled under the state's police power, and courts were extremely amenable to public health justifications for the use of such power.²⁶² While there certainly was markedly less enforcement during these years, enforcement did continue, as the case record attests. So far as I can tell, between 1922—the demise of the ISHB—and 1941—the American entrance into World War II—appellate courts ruled against infected individuals seeking release from quarantine fourteen times; only twice did courts (Ohio's and Mississippi's) rule in the favor of the petitioners.²⁶³ This may not seem like a significant number, yet, as I will discuss below, I found that between 1942 and 1945—years when the secondary record confirms that thousands of women across the country were incarcerated²⁶⁴—appellate courts saw only twelve cases.²⁶⁵ Apparently,

²⁶⁰ *Jackson*, 100 So. at 514.

²⁶¹ *Jarrell*, 28 Ohio N.P. (n.s.) at 480.

²⁶² *See, e.g., In re Hooper v. Henderson*, 294 P. 678 (Kan. 1931); *People v. Johnson*, 169 N.E. 619 (N.Y. 1930); *In re Fisher*, 239 P. 1100 (Cal. Ct. App. 1925). *See also Ex parte Gilbert* 135 S.W.2d 718 (Tex. Crim. App. 1940); *In re Application of King*, 16 P.2d 694 (Cal. Ct. App. 1932); *Ex parte Lewis*, 42 S.W.2d 21 (Mo. 1931).

²⁶³ *See* the following cases in which courts explicitly upheld the state's authority to isolate and quarantine: *In re Application of King*, 16 P.2d 694 (Cal. Ct. App. 1932); *In re Fisher*, 239 P. 1100 (Cal. Ct. App. 1925); *Ex parte Clemente*, 215 P. 698 (Cal. Ct. App. 1923); *Ex parte Hooper*, 294 P. 678 (Kan. 1931); *Ex parte Hollowell*, 215 P. 450 (Kan. 1923); *Ex parte Irby*, 215 P. 449 (Kan. 1923); *Commonwealth ex rel. Lawton v. Gordon*, 247 S.W. 45 (Ky. 1923); *Duncan v. Lexington*, 244 S.W. 60 (Ky. 1922); *Ex parte Lewis*, 42 S.W.2d 21 (Mo. 1931); *In re Caselli*, 204 P. 364 (Mont. 1922); *People v. Johnson*, 169 N.E. 619 (N.Y. 1930); *People ex rel. Krohn v. Thomas*, 231 N.Y.S. 271 (N.Y. Sup. Ct. 1928); *Ex parte Company*, 139 N.E. 204 (Ohio 1922); *Ex parte Gilbert* 135 S.W.2d 718 (Tex. Crim. App. 1940). Only in *Jackson v. Mitchell*, 100 So. 513, 513 (Miss. 1924), and *In re Jarrell*, 28 Ohio N.P. (n.s.) 473, 480 (C.P. 1930), did the courts find in favor of those subjected to restrictive measures.

²⁶⁴ HEGARTY, *supra* note 14, at 12, 70.

²⁶⁵ *See State ex rel. Kennedy v. Head*, 185 S.W.2d 530 (Tenn. 1945); *Ex parte Kilbane*, 67 N.E.2d 22 (Ohio C.P. 1945); *State v. Hutchinson*, 18 So. 2d 723 (Ala. 1944); *Huffman v. District of Columbia*, 39 A.2d 558 (D.C. 1944); *People ex rel. Baker v. Strautz*, 54 N.E.2d 441 (Ill. 1944); *State ex rel. Bayer v. White*, 19 So. 2d 47 (La. 1944);

only a miniscule fraction of women incarcerated challenged their captivity and then appealed the decision.

III: THE FEDERAL GOVERNMENT RETURNS

The American entrance into World War II provided the impetus for a revitalization of the American Plan, especially as a federal program. As historian Marilyn Hegarty wrote:

As the United States mobilized for war once again, state officials gathered to discuss expected problems regarding female sexuality. They looked back in time and reviewed past records and reports as sources to draw from in shaping the emerging campaign to repress prostitution and prevent venereal disease in the current crisis.²⁶⁶

To Hegarty, the repressive campaign of the 1940s was a reinvention of the American Plan, a “new effort to repress prostitution and prevent venereal disease.”²⁶⁷ Or, as historian John Parascandola put it, it was “a repetition of what had happened in World War I.”²⁶⁸ And, indeed, federal officials called on William F. Snow and Bascom Johnson, both of whom had played roles in ASHA, CTCA, and ISHB, for informal advice about how to best utilize law enforcement to repress prostitution.²⁶⁹ Johnson even served for a few months as interim director of the new federal program overseeing the repressive policies.²⁷⁰

Yet this interpretation—of a “repetition”—is not entirely accurate. The federal government certainly moved to repress prostitution during World War II with new vigor, but this was not so much a new movement as it was an elaboration of an ongoing campaign—one that had been in continuous operation since the First World War. The federal government relied again on local law enforcement, which in turn depended on decades-old laws and enforcement procedures, and merely continued (with somewhat greater enthusiasm and better funding) work that had never stopped.

In 1939, the War Department, Navy Department, state public health representatives, ASHA, and Federal Security Agency (FSA)—a cabinet-level department created that year to house a number of agencies, including the USPHS and the Civilian Conservation Corps—met and outlined a fed-

In re Threatt, 151 P.2d 816 (Okla. Crim. App. 1944); *Ex parte James*, 181 S.W.2d 83 (Tex. Crim. App. 1944); *Varholy v. Sweat*, 15 So. 2d 267 (Fla. 1943); *Noland v. Gardner*, 136 P.2d 233 (Kan. 1943); *Ex parte Brown*, 139 P.2d 196 (Okla. Crim. App. 1943); *City of Little Rock v. Smith*, 163 S.W.2d 705 (Ark. 1942).

²⁶⁶ HEGARTY, *supra* note 14, at 9.

²⁶⁷ *Id.* at 43.

²⁶⁸ PARASCANDOLA, *supra* note 11, at 122.

²⁶⁹ HEGARTY, *supra* note 14, at 47.

²⁷⁰ *Id.* at 14.

eral approach to protecting the military from venereal disease.²⁷¹ In 1941, officials created a new office within the FSA, the Social Protection Division (SPD), to repress prostitution.²⁷² The first head of the SPD was Eliot Ness, the Prohibition agent and investigator who had risen to fame by helping to indict Al Capone.²⁷³

The SPD under Ness moved quickly to locate prostitutes who supposedly preyed on soldiers—"camp followers" or "victory girls," as they were known. "Uncle Sam is not taking camp followers for granted," Ness wrote in 1942.²⁷⁴ "Local alibis are not accepted if they imply a continuing venereal disease danger to soldiers and sailors."²⁷⁵ The SPD pushed local law enforcement to increase surveillance.²⁷⁶ "So vigorous is the Federal attack on the prostitute," Ness claimed, "that local police power in this field can be forfeited to the Federal Department of Justice if local authorities don't 'crack down.'"²⁷⁷ Yet very quickly, as Hegarty notes, all women—not just prostitutes—were considered potential disease-carriers.²⁷⁸ As Ness saw it, "Syphilis is not, however, a military disease . . . Keeping the Army in trim is a hometown problem."²⁷⁹ In hometowns across the nation, Ness and the SPD demanded that suspicious women be arrested, examined, and quarantined for treatment.²⁸⁰ Thousands were imprisoned.²⁸¹ "Not since World War I had prostitution been so vigorously repressed in the United States," wrote Brandt.²⁸²

Once again, federal agents, state authorities, and municipal police scoured the streets, looking for and often arresting suspicious women.²⁸³ Unlike in the early program, the federal government did not have to push state and local authorities to pass their own laws authorizing them to enforce the Plan; states had already passed these laws, and they simply continued to enforce them. Hegarty recounted one case in which a waitress in Leesville, Louisiana, was arrested for vagrancy, apparently because police saw her din-

²⁷¹ *Id.* at 13 (consisting of the "Eight Point Agreement," establishing measures for the control of venereal disease to protect the armed forces).

²⁷² See PARASCANDOLA, *supra* note 11, at 116.

²⁷³ *Id.* at 118 ("It is ironic that his new job involved combating venereal disease, as his old nemesis Al Capone was by then suffering from syphilitic dementia.").

²⁷⁴ Eliot Ness, *Venereal Disease Control in Defense*, 22 ANNALS AM. ACAD. POL. & SOC. SCI. 89, 91 (1942). See also PARASCANDOLA, *supra* note 11, at 118–19.

²⁷⁵ Ness, *supra* note 274, at 89.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ HEGARTY, *supra* note 14, at 24 ("The breadth of the campaign against 'disease-spreading' women expanded rapidly. Large numbers of supporters of repression advocated policies that increased suspicion regarding wartime women's activities at the same time that women's visibility in public spaces had also increased.").

²⁷⁹ Ness, *supra* note 274, at 89.

²⁸⁰ BRANDT, *supra* note 10, at 167.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ HEGARTY, *supra* note 14, at 16–18.

ing alone.²⁸⁴ She was held in jail for seven days, until city officials succeeded in convincing her to commit herself to an isolation hospital.²⁸⁵ However, once the woman arrived, she tested negative for venereal disease, and she was hastily released.²⁸⁶ Many women were not so lucky. The jails once again became overcrowded.²⁸⁷ Most of the nation's reformatories had closed by the start of World War II, so the government could not rely on those institutions as it had during World War I and for the decade after.²⁸⁸ Because of the lack of suitable facilities, and at Ness's urging, the USPHS created "rapid treatment centers" across the country.²⁸⁹ By the end of the first year in 1943, the government had established twenty of these; by 1947, forty-seven rapid treatment centers were in operation—many, as Parascandola noted, located near military training camps or war industry cities.²⁹⁰

Like reformatories a generation before, rapid treatment centers were meant to be different—an alternative to jail.²⁹¹ As their name suggested, the centers' chief appeal was, obviously, their rapidity. Women—and a few men—who were taken to these centers were given the newly discovered sulfa drugs—excellent for treating gonorrhea—as well as older arsenic-bismuth therapy for syphilis.²⁹² However, as the war went on, newly discovered penicillin became increasingly available.²⁹³ Penicillin was a remarkably effective treatment for syphilis, and it signaled the death of painful mercury injections: treatment—actual, effective treatment—went much faster.²⁹⁴ Sometimes patients were held for four to eight weeks—for "observation"—but the USPHS made clear that the maximum stay should not surpass ten weeks.²⁹⁵ Social hygienists, including Walter Clarke, a prominent official in the ASHA since World War I, were exultant:

One of the finest things now being done for these girls as well as to the professional prostitute is the establishment of rapid treat-

²⁸⁴ *Id.* at 138.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ BRANDT, *supra* note 10, at 167.

²⁸⁸ RAFTER, *supra* note 62, at 82. Rafter argues that reformatories closed in large part because of the financial exigencies of the Depression, the "swing toward conservatism" following World War I, and because the reformatory movement had largely "realized its fundamental goal of separate prisons for women," even if those prisons were lacking in moral training. *Id.*

²⁸⁹ PARASCANDOLA, *supra* note 11, at 120–21.

²⁹⁰ *Id.* at 121.

²⁹¹ See *id.* at 127–28. In one case, Assistant Surgeon General Raymond Vonderlehr complained that a rapid treatment center was surrounded by high fences with locked gates and used barbed wire charged with electricity. *Id.* at 127. In addition, the facility contained many women with criminal charges against them. Vonderlehr worried that these features gave the center "the characteristic of a penal institution, rather than a medical center with a rehabilitation program." *Id.*

²⁹² *Id.* at 121.

²⁹³ BRANDT, *supra* note 10, at 170–71.

²⁹⁴ PARASCANDOLA, *supra* note 11, at 121–22.

²⁹⁵ *Id.*

ment centers It is possible in cases of early syphilis and in cases of gonorrhea, to cure a very large percentage, perhaps as large as 80 per cent [sic] in a short period of time, even as short as fifteen days.²⁹⁶

The shorter time spent in isolation—attributable to the improved medical treatment—marked the single largest change World War II brought to the American Plan. Though there certainly were exceptions, women no longer spent extended periods of time behind bars, forced to take injections of mercury and other chemicals that wrought havoc on the body. Nonetheless, many women were still arrested, examined, and held against their will.²⁹⁷ In some places, women arrested on morals charges languished in jail until health officers got around to examining them; they sometimes also remained in jail until there were enough of them to “make a load” to transport to the treatment facility.²⁹⁸ In spite of the worries of some USPHS officials, the rapid treatment centers were often remarkably similar to the prison-like detention homes and reformatories that housed women during and after World War I—with locked gates, barbed wire, and electric-charged fences.²⁹⁹ Raymond Vonderlehr, the head of the DVD, worried about the “prostitute prison camp aspect.”³⁰⁰

He was not the only one. On June 13, 1942, Little Rock police arrested a woman named Billie Smith, charging her with violating ordinances against immorality and prostitution.³⁰¹ Following Smith’s conviction, the city health officer examined her and found her to be infected with gonorrhea and “ordered [her] quarantined in the public health center.”³⁰² On June 16, 1942, Smith filed for a writ of habeas corpus, alleging that she would be transferred to a “concentration camp.”³⁰³ The court dismissed her petition, ruling that Smith’s diseased status “affects the public health so intimately and so insidiously, that consideration of delicacy and privacy may not be permitted to thwart measures necessary to avert the public peril.”³⁰⁴ Smith’s invocation

²⁹⁶ Walter Clarke, *Social Hygiene in the War*, 40 ROCKY MTN. MED. J. 591, 595 (1943).

²⁹⁷ As Marilyn Hegarty recounted:

SPD statistics indicated that during a six-month period [in 1942], approximately 7,500 women and girls had been arrested in fifteen states on charges of prostitution or on more general morals charges. Although we will probably never know just how many women were arrested, apprehended, incarcerated, or unjustly accused, these partial numbers give us another clue to the vast scale of the repression effort.

HEGARTY, *supra* note 14, at 147.

²⁹⁸ *Id.* at 145.

²⁹⁹ See PARASCANDOLA, *supra* note 11, at 127–28.

³⁰⁰ *Id.* at 127.

³⁰¹ *City of Little Rock v. Smith*, 163 S.W.2d 705, 705 (Ark. 1942).

³⁰² *Id.* at 706.

³⁰³ *Id.*

³⁰⁴ *Id.* at 708 (quoting *Ex Parte McGee*, 185 P. 14, 16 (Kan. 1919)).

of the phrase “concentration camp”—the only indication we have of her own voice—reveals a notable degree of worldliness. It also suggests that women being held against their will under the auspices of the American Plan connected themselves to a larger pattern of resistance against governmental violence and disdain. Once again, some women would resist the Plan through escape attempts.³⁰⁵

Between 1942 and 1945, the years bookending American involvement in World War II, appellate courts across the country heard twelve cases brought by individuals incarcerated under the American Plan. In ten of these cases, the courts ruled against the petitioners seeking release;³⁰⁶ in only two did they rule in favor of the petitioners.³⁰⁷ These American Plan cases reveal a pattern that is remarkably consistent with the cases of the past. The courts affirmed the right of the state to isolate venereally infected individuals as a valid exercise of its police power. One court called such practices “vital to human existence” and argued that “the police power of the state was of necessity extended to the question involved in no uncertain manner”;³⁰⁸ another claimed “[t]he enactment and enforcement of necessary and appropriate health laws and regulations is a legitimate exercise of the police power which is inherent in the State and which it cannot surrender.”³⁰⁹ As they had before, courts also endorsed the forced examination and imprisonment of those reasonably suspected of having venereal disease. In a 1944 case, the Supreme Court of Illinois blessed a law allowing for the compulsory examination of anyone reasonably suspected of carrying venereal disease;³¹⁰ in clarifying “reasonable suspicion,” the court wrote, “It is most reasonable to suspect that both of the petitioners, if carrying on the practice of prostitution, are indiscriminate and promiscuous in their bodily contacts and are natural subjects and carriers of venereal disease.”³¹¹

And, again, even when courts ordered the release of incarcerated individuals, they did so while simultaneously affirming the state’s right to isolate infected individuals or those reasonably suspected of having venereal disease. In *State v. Hutchinson*, the Supreme Court of Alabama granted the

³⁰⁵ See, e.g., *State ex rel. Kennedy v. Head*, 185 S.W.2d 530, 530 (Tenn. 1945).

³⁰⁶ *State ex rel. Kennedy v. Head*, 185 S.W.2d 530 (Tenn. 1945); *Ex parte Kilbane*, 67 N.E.2d 22 (Ohio C.P. 1945); *In re Threatt*, 151 P.2d 816 (Okla. Crim. App. 1944); *Ex parte James*, 181 S.W.2d 83 (Tex. Crim. App. 1944); *People ex. rel. Baker v. Strautz*, 54 N.E.2d 441 (Ill. 1944); *State ex rel. Bayer v. White*, 19 So. 2d 47 (La. 1944); *Varholy v. Sweat*, 15 So. 2d 267 (Fla. 1943); *Noland v. Gardner*, 136 P.2d 233 (Kan. 1943); *Ex parte Brown*, 139 P.2d 196 (Okla. Crim. App. 1943); *City of Little Rock v. Smith*, 163 S.W.2d 705 (Ark. 1942). It is worth mentioning that in one of the cases in which the court dismissed a woman’s appeal, the court did so on the grounds that she had already been released, so the issue was moot. Thus, the court did not rule on the acceptability of forced isolation or reasonable suspicion. *Bayer*, 19 So. 2d at 47–48.

³⁰⁷ *State v. Hutchinson*, 18 So. 2d 723 (Ala. 1944); *Huffman v. District of Columbia*, 39 A.2d 558 (D.C. 1944).

³⁰⁸ *Ex parte James*, 181 S.W.2d at 84.

³⁰⁹ *Varholy*, 15 So. 2d. at 269.

³¹⁰ *People ex. rel. Baker*, 54 N.E.2d at 444–45.

³¹¹ *Id.* at 444.

habeas petition of a man arrested for vagrancy, as the charge of vagrancy alone was not enough to constitute reasonable suspicion, and, furthermore, the state could not confine suspected individuals in a jail.³¹² Nonetheless, the court affirmed the right of the state to isolate under its police power, writing, "That the Legislature may, under the police powers, establish quarantine to prevent the spread of contagious and infectious diseases, is too well established by adjudication and grounded in common sense to be longer questioned or doubted."³¹³

In *Huffman v. District of Columbia*,³¹⁴ a female federal employee was accosted by three soldiers as she was walking home, one of whom she allegedly transmitted gonorrhea to in a subsequent sexual encounter.³¹⁵ For this reason, the municipal health officer sought to test the woman for venereal disease; when the woman refused, she was prosecuted for violating the statute allowing for compulsory examination.³¹⁶ The court overturned her conviction because it concluded that the evidence against her was "completely insufficient" to establish a reasonable suspicion of infection with venereal disease.³¹⁷ In the same case, the court still affirmed the power of the state to examine in cases of "reasonable suspicion," merely pointing out that the state did not have reasonable suspicion in this limited case.³¹⁸

IV. THE DECLINE

By the 1950s and 1960s, cases challenging internments under the American Plan reaching the appellate courts had slowed to a drip. Yet as late as 1962, the ASHA still published model social hygiene laws, urging states to pass legislation allowing authorities to examine those women "reasonably believed" to be infected and to isolate infected individuals.³¹⁹ In 1950, Oklahoma police arrested a man and a woman having an affair; health offi-

³¹² *Hutchinson*, 18 So. 2d at 726.

³¹³ *Id.* at 725.

³¹⁴ 39 A.2d 558 (D.C. 1944).

³¹⁵ *Id.* at 559.

³¹⁶ *Id.* Significantly, in this case, the court also raised the idea that venereal disease did not "constitute[] an immediate threat to the public health. A case of smallpox, for example, with potential danger to the whole community, may require summary action for the protection of the public health. But gonorrhea is communicable only under very limited circumstances . . ." *Id.* at 562. This was a meaningful development, probably enabled by the improved treatment for venereal disease. However, the court only used this statement to argue that gonorrhea did not merit "summary action"—yet it still could merit action, assuming that "orderly procedure" was followed. *Id.*

³¹⁷ *Id.* at 561–62.

³¹⁸ *Id.*

³¹⁹ DIV. OF LEGAL AND PROTECTIVE SERVS., AM. SOC. HYGIENE ASS'N, *Principal Provisions of Laws and Regulations for the Control and Prevention of the Venereal Diseases with a Brief Interpretative Summary of Their Use in Dealing With This Problem*, in FORMS AND PRINCIPLES OF STATE SOCIAL HYGIENE LAWS, at D-I (1962) (on file in Box 124, 3AMS/D/51/05, Records of the Association for Moral & Social Hygiene, Women's Library, London School of Economics).

cials tested the pair for venereal disease, and both results were negative.³²⁰ Nonetheless, the two were held in isolation for forty-eight hours pending a second confirmatory test.³²¹ The Criminal Court of Appeals of Oklahoma called this action “a subterfuge in order to give them a few days imprisonment in the city jail” because of their moral perfidy, and ordered petitioners’ release.³²²

It is possible to see in this decision an emerging focus on civil rights. During these years, the war was over and “camp followers” were no longer such a pressing concern; further, venereal disease was, by then, treatable. For these reasons, it seems likely that courts were more inclined to respect the rights of the accused. Such an evolution in the recognition of civil rights was occurring on the national stage. In 1952, the Supreme Court unanimously overturned the conviction of a man who had been physically forced to yield to an examination for illegal drug possession.³²³ More famously, in 1963, the Court held in *Gideon v. Wainwright*³²⁴ that all criminal defendants had the right to counsel, even if they could not afford to pay,³²⁵ and in *Miranda v. Arizona*,³²⁶ in 1966, the Court clarified the rights of those in police custody.³²⁷ Many of the women arrested decades earlier under the American Plan had not been afforded these rights;³²⁸ now, the Court demanded them.

Nevertheless, judgments against purportedly infected women or those accused of prostitution persisted. The last case that I could locate in which an individual challenged a law allowing for detention, along with mandatory examination and treatment, in cases of syphilis or gonorrhea was *Reynolds v. McNichols*, in 1973.³²⁹ In that case, Roxanne Reynolds, a twenty-seven-year-old self-identified model and prostitute was arrested and taken to the Denver city jail on November 29, 1970 after being “in the company of a male person not her husband.”³³⁰ Following a blood test and a shot of penicillin, however, Reynolds was able to leave on bond.³³¹ For the next year and a half, the police repeatedly issued Reynolds “walk-in” orders, requiring her to report to the Department of Health and Hospitals for examination and potential treatment.³³² After three such orders and injections to treat gonorrhea, Reynolds refused.³³³

³²⁰ *Hill v. Hilbert*, 222 P.2d 166, 168 (Okla. Crim. App. 1950).

³²¹ *Id.*

³²² *Id.* at 169.

³²³ *Rochin v. California*, 342 U.S. 165, 172–73 (1952).

³²⁴ 372 U.S. 335 (1963).

³²⁵ *Id.* at 344–45.

³²⁶ 384 U.S. 436 (1966).

³²⁷ *Id.* at 498–99.

³²⁸ CONNELLY, *supra* note 99, at 143.

³²⁹ 488 F.2d 1378 (10th Cir. 1973).

³³⁰ *Id.* at 1380.

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

About two months after her refusal, Reynolds was arrested again for prostitution.³³⁴ The police brought her to the city jail and charged her with solicitation and prostitution, giving her the choice to remain in jail for forty-eight hours (during which she would be examined for venereal disease and, if necessary, treated) or simply take penicillin and immediately be eligible for release.³³⁵ Reynolds opted for the latter.³³⁶ She later filed a civil rights suit in federal court against the city, claiming that Ordinance 735, the ordinance under which she had been held, violated her Fourth and Fourteenth Amendment rights.³³⁷ The Tenth Circuit summarized:

The legislative intent behind enactment of Ordinance 735 was to attempt to bring under control, and lessen, the incidence of venereal disease in Denver by determining and treating the source of such infection. The evidence before the trial court showed, incidentally, that the incidence of venereal disease had reached virtually epidemic proportions. To that end, the police were empowered under prescribed conditions to detain in jail certain persons 'reasonably suspected' of being infected with a venereal disease, examine them for the presence of a venereal disease, and treat them for the same, if necessary. Such persons thus detained were ineligible for release on bond until the examining process was completed, which, according to the evidence, took forty-eight hours.³³⁸

The Tenth Circuit ruled that the limited involuntary detention of persons suspected of having venereal disease was constitutional:

The principal thrust of the ordinance is aimed at bringing under control the *source* of communicable venereal disease. To that end, the city authorities are empowered to examine and treat those reasonably suspected of having an infectious venereal disease. It is not illogical or unreasonable, and on the contrary it is reasonable, to suspect that known prostitutes are a prime source of infectious venereal disease. Prostitution and venereal disease are no strangers.³³⁹

Citing several American Plan cases, including the case of Billie Smith and that of the Welch sisters, the court noted that this power had been upheld numerous times, across the country.³⁴⁰

³³⁴ *Id.* at 1381. Reynolds claimed that she was merely talking about prostitution, but had not yet performed any transaction. *Id.*

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.* at 1382.

³⁴⁰ *Id.*

This case gets at the crux of the collective judicial response to the American Plan. Though courts sometimes released individuals for technical reasons or when they deemed the state's suspicion to be unreasonable, courts almost never fundamentally questioned the state's police power in cases of venereal disease or valid "reasonable suspicion" of venereal disease.

V. THE LAWS PERSIST

By the mid-1970s, at least according to the judicial record, the American Plan appears to have largely ended.³⁴¹ No longer would women be routinely stopped, examined, and isolated for venereal disease. During this era, too, prostitutes began demanding better treatment from the state, some even calling for the decriminalization of their labor.³⁴² In 1973, for example, Margo St. James, a prominent sex workers' rights activist, founded Call Off Your Old Tired Ethics (COYOTE), a sex workers' rights organization, which agitated against San Francisco's mandatory examination and three-day venereal disease quarantine for persons arrested for prostitution.³⁴³ In large part because of COYOTE's activism, a judge temporarily enjoined the practice, acknowledging that it was selectively enforced.³⁴⁴ The federal endorsement of quarantine for venereal disease also disappeared around this time. Whereas a 1962 Executive Order had reaffirmed the placement of syphilis and gonorrhea on a list of diseases warranting quarantine,³⁴⁵ a 1983 Executive Order amended the previous one, eliminating both syphilis and gonorrhea.³⁴⁶

The court cases may have stopped, but the CTCA's most enduring legacy—the laws it so successfully pushed the states to pass—remained. Indeed, they remain—in some form—to this day. Every single state has a law on its books that allows state or public health authorities to determine the

³⁴¹ As noted above, *Reynolds v. McNichols*, 488 F.2d 1378 (10th Cir. 1973), is the last case I was able to identify in which an individual challenged her detention on the basis of suspected venereal disease.

³⁴² See generally A VINDICATION OF THE RIGHTS OF WHORES (Gail Pheterson ed., 1989); Valerie Jenness, *From Sex as Sin to Sex as Work: COYOTE and the Reorganization of Prostitution as a Social Problem*, 37 SOC. PROBLEMS 403, 406 (1990).

³⁴³ See Jenness, *supra* note 342, at 407–08.

³⁴⁴ *Id.* at 408.

³⁴⁵ Exec. Order No. 11,070, 27 Fed. Reg. 12,393 (Dec. 14, 1962) (listing the following diseases as warranting quarantine: anthrax, chancroid, chickenpox, cholera, dengue, diphtheria, favus, gonorrhea, granuloma inguinale, hemolytic streptococcal infections, infectious encephalitis, leprosy, lymphogranuloma venereum, meningococcus, meningitis, plague, poliomyelitis, psittacosis, relapsing fever (louse-borne), ringworm of the scalp, smallpox, syphilis, trachoma, tuberculosis, typhoid fever, typhus, and yellow fever).

³⁴⁶ Exec. Order No. 12,452, 48 Fed. Reg. 56,927 (Dec. 27, 1983) (listing the following diseases as warranting quarantine: cholera or suspected cholera, diphtheria, infectious tuberculosis, plague, suspected smallpox, yellow fever, and suspected viral hemorrhagic fevers—Lassa, Marburg, Ebola, Congo-Crimean, and others not yet isolated or named). This Executive Order has since been amended, though the venereal diseases remain absent. See Exec. Order No. 13,295, 68 Fed. Reg. 17,255 (Apr. 4, 2003).

diseases that are suitable for quarantine; most allow state officials to examine those reasonably suspected of carrying diseases that have been deemed sufficiently dangerous.³⁴⁷ In other words, if state authorities decided to renew the American Plan tomorrow, they would likely face political backlash for going against modern public health practice and more rigorous judicial scrutiny, but would also have law on the books and an unrefuted history of public health oppression to draw upon. Consider the law of the state of Washington. Title 70, Chapter 24 of the Revised Code of Washington is entitled, “Control and Treatment of Sexually Transmitted Diseases.”³⁴⁸ Section 24 of Chapter 24 allows “state and local public health officers or their authorized representatives” to examine people “reasonably believed to be infected with or to have been exposed to a sexually transmitted disease.”³⁴⁹ The section continues to state that “[o]rders or restrictive measures directed to persons with a sexually transmitted disease shall be used as the last resort when other measures to protect the public health have failed”³⁵⁰

By “restrictive measures,” the law’s authors meant quarantine or isolation. Section 70 more directly addresses particular issues of isolation. It reads:

For the purpose of carrying out this chapter, the board shall have the power and authority to designate facilities for the detention and treatment of persons found to be infected with a sexually transmitted disease and to designate any such facility in any hospital or other public or private institution, other than a jail or correctional facility, having, or which may be provided with, such necessary detention, segregation, isolation, clinic and hospital facilities as may be required and prescribed by the board³⁵¹

This is consistent with decades-old judicial rulings that stated that, as venereally infected persons are not criminals, they cannot be held in jail.³⁵²

This law can be traced directly to one passed on March 14, 1919, during the CTCA-inspired push for repressive legislation.³⁵³ Section 2 of the 1919 law stated that “[s]tate, county and municipal health officers, or their authorized deputies” may “make examination of persons reasonably suspected of being infected with venereal disease of a communicable na-

³⁴⁷ See *infra* Appendix B.

³⁴⁸ WASH. REV. CODE § 70.24 (2015).

³⁴⁹ *Id.* § 70.24.024(1).

³⁵⁰ *Id.* § 70.24.024(2).

³⁵¹ *Id.* § 70.24.070.

³⁵² See, e.g., *Dowling v. Harden*, 88 So. 217, 217 (Ala. Ct. App. 1921) (cautioning that “persons affected with disease are not for that reason criminals, and jails and penitentiaries are not made or designated for their detention”); *Ex Parte McGee*, 185 P. 14, 17 (Kan. 1919) (noting that “interned persons are in no sense confined in the penitentiary, and are not subject to the particular obloquy which attends such confinement”).

³⁵³ Act of Mar. 14, 1919, ch. 114, 1919 Wash. Sess. Laws 277.

ture”³⁵⁴ The statute continued, “when in the judgment of the state commissioner of health, it is necessary to protect the public health, to isolate or quarantine persons infected with venereal disease of such communicable nature.”³⁵⁵ Section 8 read:

For the purpose of carrying out the provisions of this act the state board of health shall have the power and authority, from time to time . . . to establish at such place or places as it shall deem necessary quarantine stations and clinics for the detention and treatment of persons found to be infected and to establish any such quarantine station and clinic in connection with any county or city jail, or in any hospital or other public or private institution having, or which may be provided with, such necessary detention, segregation, isolation, clinic and hospital facilities as may be required and prescribed by the board³⁵⁶

The current law eerily echoes the 1919 law—as one would expect, since the current law is simply an amended version of the 1919 one.³⁵⁷ One notable difference is that the 1919 law allowed infected persons to be held in jails, while the current law does not;³⁵⁸ another difference is that the modern law emphasizes more strongly that quarantine should be used only as a “last resort.”³⁵⁹ Significantly, the level of judicial scrutiny with regard to quarantine has changed since 1919. As Jorge Galva, Christopher Atchison, and Samuel Levey noted:

Approaches to orders of quarantine are emblematic of the changes ushered in by the Warren Court. The treatment of quarantine moved from a presumption of constitutional validity to strict scrutiny for constitutionality. Under traditional police power doctrine, the remedy against quarantine was limited to a subsequent petition for habeas corpus that did not allow the detained individual to break quarantine until the petition was decided. Quarantine is now reviewed under heightened procedural protections under the Fifth and Fourteenth amendments.³⁶⁰

³⁵⁴ *Id.* § 2, 1919 Wash. Sess. Laws at 278.

³⁵⁵ *Id.*

³⁵⁶ *Id.* § 8, 1919 Wash. Sess. Laws at 280–81.

³⁵⁷ Compare WASH. REV. CODE § 70.24.024(1) (2015), and *id.* § 70.24.070, with Act of Mar. 14, 1919, ch. 114, § 2, 1919 Wash. Sess. Laws 277, 278, and *id.* § 8, 1919 Wash. Laws at 280–81.

³⁵⁸ Compare WASH. REV. CODE § 70.24.070 (2015) with Act of Mar. 14, 1919, ch. 114, § 8, 1919 Wash. Sess. Laws 277, 280–81.

³⁵⁹ Compare WASH. REV. CODE § 70.24.024(2) (2015) with Act of Mar. 14, 1919, ch. 114, § 2, 1919 Wash. Sess. Laws 277, 278.

³⁶⁰ Jorge E. Galva, Christopher Atchison & Samuel Levey, *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REP. 20, 22 (2005).

In spite of these changes, the wording of the law has changed very little: the language remains intentionally flexible, in order to adapt to whatever public health emergencies may arise. Furthermore, such language continues to endow authorities with the power to compel an examination when they “reasonably believe” it is necessary; this wording may enable authorities to act based on stereotypes or prejudices, since individual perceptions of reasonableness vary.

This is true across the country. Some states have altered their quarantine laws more so than others,³⁶¹ yet the power to examine and isolate someone infected with a condition deemed sufficiently dangerous by public health authorities—almost always founded on reasonable suspicion—remains. Legal scholar Reva Siegel has written about “preservation through transformation,” a process through which contested practices or meanings that reformers have sought to change are refashioned in “a more contemporary, and less controversial,” manner.³⁶² As we shall see, this has been the manner in which much of the philosophy, and a few of the practices, of the American Plan has been preserved.

Certainly, public health authorities might reject the idea that the philosophy of the American Plan has survived or that they would ever reinstitute such punitive measures applied toward venereal or other diseases. However, it is worth noting that public health authorities in the past also emphasized their wisdom, assuring critics that they were too careful and respectful of the

³⁶¹ Texas provides an example of a state that has changed its law significantly. In 1918, Texas enacted a statute enabling, among other measures:

All city, county, or other health officers shall use every available means to ascertain the existence of, and to investigate all cases of syphilis, gonorrhoea, and chancre within their several territorial jurisdictions, and to ascertain the sources of such infections. Local health officers are hereby empowered and directed to make such examinations of persons reasonably suspected of having syphilis, gonorrhoea or chancre as may be necessary for carrying out the provisions of this law. Owing to the prevalence of such diseases among prostitutes and persons associated with them, all such persons are to be considered within the above class. . . . Local health officers are authorized and directed to quarantine persons who have, or are reasonably suspected of having syphilis, gonorrhoea, or chancre, whenever, in the opinion of said local officer, or the State Board of Health, or its executive officer, quarantine is necessary for the protection of the public health.

TEX. REV. CIV. STAT. art. 4445, § 3, 4(1) (1925) (enacted 1918).

Today, this statute has qualified such practices with considerably more respect for civil liberties, eliminating language specifically addressing venereal disease:

If the department or a health authority has reasonable cause to believe that an individual is ill with, has been exposed to, or is the carrier of a communicable disease, the department or health authority may order the individual, or the individual’s parent, legal guardian, or managing conservator if the individual is a minor, to implement control measures that are reasonable and necessary to prevent the introduction, transmission, and spread of the disease in this state.

Tex. Health & Safety Code Ann. § 81.083(b) (West 2014).

³⁶² Reva Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996). Thanks to Deborah Brake for pointing me toward this concept and this article.

rights of the accused ever to seriously impinge upon civil liberties. An instructional manual published in 1920 by one of the federal agencies running the American Plan directed that investigations under the Plan be “careful and guarded . . . taking great care that no mistakes are made.”³⁶³ Agents in the field similarly cautioned utmost care. “It is recognized that great care must be exercised when [physicians’ reports] indicate as infecting agents other persons than known prostitutes,” wrote a public health officer stationed in Newport News, Virginia, in 1918, “but when evidence accumulates it should be possible by social service methods to cure an infection and possibly effect a moral reform.”³⁶⁴ Newport News, in reality, featured a highly repressive campaign, aimed at any woman infected with venereal disease, not just those women supposedly known to be prostitutes.³⁶⁵

Public health officers of years past likewise rejected assertions that the American Plan was discriminatory. For example, in 1919, one government official wrote to another, in exasperation, “Many persons seem to have the erroneous impression that the American Plan contains a discrimination on this point [of law enforcement]”³⁶⁶ In a 1920 letter, one female ASHA official assured a critic that there was a “vast difference” between old laws that she considered discriminatory and the new American Plan laws that, “as fully as you and [I] could wish,” were non-discriminatory.³⁶⁷ This example is particularly relevant, as the official was emphasizing the difference between the discriminatory laws of the past and the supposedly nondiscriminatory laws of the present. Such assurances—and the harsh realities they belied—demonstrate that we must be skeptical of calls by public health authorities that repressive measures are necessary or claims that such measures are being used in a careful manner.

A. *The Long American Plan*

The precedents set by American Plan cases and the laws left over from the American Plan are not just quietly occupying forgotten places in dusty legal texts. Authorities have attempted to use them to justify the restriction

³⁶³ INTERDEPARTMENTAL SOC. HYGIENE BD., MANUAL FOR VARIOUS AGENTS OF THE BOARD 51 (1920).

³⁶⁴ S.B. Grubbs, *Extra-Cantonment Zone Sanitation: Newport News, Va., and Vicinity*, 33 PUB. HEALTH REP. 308, 316 (1918).

³⁶⁵ DIETZLER, *supra* note 62, at 180–84; Commission on Training Camp Activities, *supra* note 53, at 47–48; Draper, *supra* note 61, at 643–44; Janke, *supra* note 52, at 124–25; Rockafellar, *supra* note 34, at 510–11.

³⁶⁶ Letter from Paul Popenoe, Exec. Sec’y, ASHA, to C.C. Pierce, Assistant Surgeon Gen., USPHS (Dec. 15, 1919) (on file in Folder 409.1, Box 224, Entry 42, Record Group 90, National Archives, College Park, Maryland).

³⁶⁷ Letter from Anna Garlin Spencer to Edith Houghton Hooker (Dec. 18, 1920) (on file in Folder 403, Box 25, A-127, Ethel Sturges Dummer Papers, Schlesinger Library, Radcliffe).

of another group of infected persons: those with HIV/AIDS.³⁶⁸ Beginning in the early 1980s, American public health officials began noticing what appeared to be a rare skin cancer among gay men.³⁶⁹ More cases presented themselves, and the Centers for Disease Control and Prevention (CDC) formed a task force in 1981 to study the growing epidemic.³⁷⁰ Early on, the CDC discussed the condition in terms of “the 4-H risk groups,” as it believed that the principal sufferers were Haitians, hemophiliacs, heroin users, and homosexuals.³⁷¹ Later, the press—as well as scientists and officials—began calling the condition GRID (gay-related immune deficiency).³⁷² Yet it quickly became clear that HIV/AIDS was not limited to these few populations and that it had become a public health nightmare.³⁷³

Shortly after the general population realized that the AIDS epidemic was not going away, calls began for mass examinations and quarantine. By 1985, more than a quarter of Americans favored quarantine for AIDS patients.³⁷⁴ A Massachusetts physician called on the government to quarantine patients who refused to cease their “irresponsible” behavior,³⁷⁵ a call echoed by several prominent medical organizations and groups of physicians.³⁷⁶ “This is not a civil rights issue,” wrote Washington neurologist Richard Restak in 1985, arguing in favor of forced segregation, “this is a medical

³⁶⁸ Medically speaking, HIV/AIDS, syphilis, and gonorrhea share several key similarities and differences. All of the conditions are spread primarily through sexual contact. It is difficult to spread syphilis, and impossible to spread gonorrhea, through needle sharing, but that remains one of the primary transmission mechanisms for HIV/AIDS. Molly E. Kent & Frank Romanelli, *Reexamining Syphilis: An Update on Epidemiology, Clinical Manifestations, and Management*, 42 ANNALS PHARMACOTHERAPY 226, 227 (2008); *Gonorrhea*, CENTERS FOR DISEASE CONTROL, <http://www.cdc.gov/std/gonorrhea/STDFact-gonorrhea.htm>, archived at <http://perma.cc/A2C6-99QR>. With proper medical care, all three conditions can be managed, though this was not the case for HIV/AIDS in the 1980s, as Brandt wrote in a new chapter to his book in 1987. BRANDT, *supra* note 10, at 188–89 (“Given the absence of effective treatments and the inability to render non-infectious those who carry [HIV], the only current means of controlling the epidemic are preventive measures.”).

³⁶⁹ BRANDT, *supra* note 10, at 183.

³⁷⁰ RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC* xvii (2007).

³⁷¹ THERI A. PICKENS, *NEW BODY POLITICS: NARRATING ARAB AND BLACK IDENTITY IN THE CONTEMPORARY UNITED STATES* 95 (2014); Mary Irvine, *From “Social Evil” to Public Health Menace: The Justifications and Implications of Strict Approaches to Prostitutes in the HIV Epidemic*, 43 BERKELEY J. SOC. 63, 64 (1998); see also SANA LOUE, *GENDER ETHNICITY, AND HEALTH RESEARCH* 53 (1999).

³⁷² BRANDT, *supra* note 10, at 184.

³⁷³ *Id.* at 191–93.

³⁷⁴ Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1281 (1986).

³⁷⁵ Wendy E. Parmet, *AIDS and Quarantine: The Revival of An Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 54 n.4 (1985). Prominent conservatives, such as Jerry Falwell, the director of Moral Majority (later the Liberty Foundation), also pushed for mass quarantine of infected homosexuals. *Id.*

³⁷⁶ See, e.g., *New York State Soc’y of Surgeons v. Axelrod*, 572 N.E.2d 605, 606 (N.Y. 1991).

issue.”³⁷⁷ Some legal scholars too pushed for quarantine.³⁷⁸ And state legislatures across the nation began proposing laws to realize this goal.

One such bill, which attracted an extraordinary amount of attention, was California Proposition 64, also known as the LaRoche Initiative. On November 4, 1986, California became the first state in the nation to put the issue of quarantine for HIV/AIDS to a popular vote.³⁷⁹ Proposition 64 was proposed by an organization with the apt name PANIC (Prevent AIDS Now Initiative Committee), which sought to legally declare AIDS an “infectious, contagious, and easily communicable disease” and force the government to establish quarantine camps for AIDS patients; such patients would also be banned from teaching in—or attending—public schools.³⁸⁰ More than half a million Californians signed a petition to put Proposition 64 before the voters.³⁸¹ Eventually, the Proposition failed by a margin of seventy-one to twenty-nine percent.³⁸²

This did not stop other, similar proposals across the country. As scholar and activist Beth Bergman wrote in 1987, “In response to widespread fear, legislators nation-wide have introduced AIDS-related bills calling for the testing of those ‘suspected’ of infection, and the quarantining of known AIDS carriers under broad-based state police powers over public health.”³⁸³ Bergman continued:

The language of these bills is strikingly similar and frequently identical to that of quarantine and testing provisions written nearly a century ago. These antiquated provisions were created in an era when syphilis was considered synonymous with filth, and when some presumed that women carried gonorrhea regardless of whether or not they had ever been exposed. Where medicine and science were lacking, citizens, legislatures, and courts based their actions on cultural stereotypes.³⁸⁴

³⁷⁷ Richard Restak, *Should AIDS Victims Be Segregated From the Rest of Society?: Yes*, HARTFORD COURANT, Sept. 15, 1985, at C1.

³⁷⁸ See, e.g., Edward A. Fallone, *Preserving the Public Health: A Proposal to Quarantine Recalcitrant AIDS Carriers*, 68 B.U. L. REV. 444 (1988). Fallone later ran, unsuccessfully, for a seat on the Wisconsin Supreme Court. Patrick Marley, *Patience Roggensack Defeats Edward Fallone for Second Term on State Supreme Court*, MILWAUKEE J. SENTINEL, Apr. 2, 2013, <http://www.jsonline.com/news/statepolitics/patience-roggensack-defeats-edward-fallone-for-second-term-on-state-supreme-court-r99c59d-201148441.html>, archived at <http://perma.cc/FW84-NFZK>.

³⁷⁹ See Charles Petit, *California to Vote on AIDS Proposition*, 234 SCIENCE 277, 277 (1986).

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² Christopher P. Toumey, *Conjuring Medical Science: The 1986 Referendum on AIDS/HIV Policy in California*, 11 MED. ANTHROPOLOGY Q. 477, 491 (1997).

³⁸³ Beth Bergman, *AIDS, Prostitution, and the Use of Historical Stereotypes to Legislate Sexuality*, 21 J. MARSHALL L. REV. 777, 777 (1988).

³⁸⁴ *Id.*

As Bergman was writing, several states had proposed bills requiring testing for those reasonably suspected of carrying the virus and fifteen states were considering bills to impose criminal sanctions against HIV/AIDS carriers who knowingly infected another.³⁸⁵

In 1987, Surgeon General C. Everett Koop wrote, "No one will argue [with the statement] that the AIDS epidemic must be contained, and any public health measure that will effectively help to accomplish this goal should be adopted. Neither quarantine nor mandatory testing for the AIDS antibody will serve that purpose."³⁸⁶ Yet in the first decade of the epidemic, twenty-five states revised their public health statutes to provide "for conditions under which individuals who engaged in behaviors that could spread disease could be restricted or quarantined," in the words of public health experts Ronald Bayer and Amy Fairchild-Carrino.³⁸⁷ Nineteen of these states enacted laws "criminalizing HIV transmission-related behavior."³⁸⁸ No law mandating mass quarantine passed.

In their 1993 study, Bayer and Fairchild-Carrino found only a handful of cases of actual isolation or quarantine of HIV/AIDS patients. As they wrote:

Advocates of the use of public health powers to quarantine typically, although not always, recognized that much of the public health law on quarantine was archaic, the product of an earlier period in the history of medicine, and that it failed to include due process protections and to specify whether isolation or quarantine should be used only after other less restrictive measures had been exhausted.³⁸⁹

Yet quarantine did occur. The few cases Bayer and Fairchild-Carrino found in their study included the detention of a number of prostitutes and a fourteen-year-old boy who was known to frequent gay bars. These were individuals who allegedly had psychiatric problems or were known to be particularly "recalcitrant."³⁹⁰

When quarantined individuals or those compelled to submit to an examination challenged their treatment in court, judges frequently ruled against them, often invoking American Plan precedent. In San Francisco in

³⁸⁵ *Id.* at 802, 816.

³⁸⁶ C. Everett Coop & Michael Samuels, *The Surgeon General's Report on AIDS, in AIDS: PRINCIPLES, PRACTICES, AND POLITICS* 9 (Inge B. Corless & Mary Pittman-Lindeman eds., 1989).

³⁸⁷ Ronald Bayer & Amy Fairchild-Carrino, *AIDS and the Limits of Control: Public Health Orders, Quarantine, and Recalcitrant Behavior*, 83 AM. J. PUB. HEALTH 1471, 1472 (1993).

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 1471.

³⁹⁰ The state's justification for utilizing quarantine or isolation measures in these cases was that individuals known to be infected had specifically refused to comply with state orders to cease sexual intercourse. *Id.* at 1473.

1990, for instance, several women were convicted of prostitution and forced to undergo an HIV test. They refused, and their case, *Love v. Superior Court*,³⁹¹ eventually reached the Court of Appeal of California. The court decided that the state's interest in preventing AIDS outweighed the invasion of privacy and ruled against the petitioners.³⁹² In its decision, the court cited *Ex Parte Johnston*,³⁹³ the 1919 case that deemed the "isolation of one afflicted with a contagious or infectious disease" to be "reasonable and proper, indeed the usual, measure taken to prevent the increase and spread thereof."³⁹⁴ In many subsequent cases—several of them citing *Love v. Superior Court*—courts nationwide upheld mandatory testing based on certain types of crimes.³⁹⁵ In one such case, a man who was involved in a physical altercation with police officers in which it was "possible" there was blood-to-blood exposure was forced to submit to an examination, even though he showed no outward signs of HIV/AIDS, nor was there any reason to suspect he was infected.³⁹⁶ Courts also upheld convictions (resulting in imprisonment) for knowingly transmitting HIV/AIDS to others through intimate contact or failing to disclose HIV status to an intimate partner.³⁹⁷

And instances of isolation of HIV-positive individuals may have occurred that were never reported as such. In 1991, for example, Minnesota authorities committed a man as a psychopathic personality. He challenged his detention, and the Court of Appeals of Minnesota eventually reversed the commitment on the grounds that he was committed because of his HIV-positive status, not because he was a psychopathic personality.³⁹⁸ In Bayer's and Fairchild-Carrino's study, which extended to 1992, they did not include Minnesota as a state that had ever quarantined someone with HIV/AIDS.³⁹⁹

It would be a stretch to call the movement to quarantine or isolate HIV/AIDS patients (and the few cases of actual quarantine or isolation) a direct

³⁹¹ 226 Cal. App. 3d 736 (Cal. Ct. App. 1990).

³⁹² *Id.* at 746–48.

³⁹³ 180 P. 644 (Cal. Ct. App. 1919).

³⁹⁴ *Id.* at 645.

³⁹⁵ See *People v. McVickers*, 840 P.2d 955 (Cal. 1992) (various sexual crimes with a minor); *Fosman v. State of Florida*, 664 So. 2d 1163 (Fla. Dist. Ct. App. 1995) (sexual battery); *People v. Adams*, 597 N.E.2d 574 (Ill. 1992) (prostitution).

³⁹⁶ *Adams v. State*, 498 S.E.2d 268, 270, 272 (Ga. 1998).

³⁹⁷ See *People v. Russell*, 630 N.E.2d 794 (Ill. 1994) (criminalizing a knowing HIV carrier's transmission of the HIV virus to another person through intimate contact); *People v. Jensen*, 586 N.W.2d 748 (Mich. Ct. App. 1998) (criminalizing a knowing HIV carrier's unprotected sex with another person without informing him or her); *Carter v. State*, 803 So. 2d 1191 (Miss. Ct. App. 1999) (criminalizing a knowing HIV carrier's failure to notify intimate partners of HIV-positive status). Laws criminalizing HIV/AIDS transmission or failure to disclose one's status to an intimate partner remain on the books in many states, even today. See ASS'N OF NURSES IN AIDS CARE, POSITION STATEMENT: HIV CRIMINALIZATION LAWS AND POLICIES PROMOTE DISCRIMINATION AND MUST BE REFORMED 1 (2014), archived at <http://perma.cc/P6U9-GFA2>.

³⁹⁸ *In re Stilinovich*, 479 N.W.2d 731, 735 (Minn. Ct. App. 1992).

³⁹⁹ Bayer & Fairchild-Carrino, *supra* note 387, at 1475 (listing the states that had utilized quarantine as Indiana (5), Alabama (1), Florida (1), South Carolina (1), Michigan (1), and Oklahoma (1)).

continuation of the American Plan. The Plan dealt with syphilis and gonorrhea, not HIV/AIDS. Furthermore, many of the individuals examined or quarantined for HIV/AIDS were prosecuted based on new HIV/AIDS-specific laws. And it would appear that most of those convicted on HIV/AIDS-related charges were accorded somewhat greater due process protections than were victims of the American Plan; none that I could find, for instance, were coerced via threat into going to a detention hospital, as Nina McCall was in 1918.⁴⁰⁰ Yet in many respects the two campaigns are similar, and the response to HIV/AIDS is an obvious intellectual, legislative, and judicial successor to the American Plan. Both campaigns instituted penalties—quarantine and mandated treatment—for sexually transmitted infections; both campaigns relied on stereotypes.

Stereotypes profoundly shaped the American Plan's enforcement. Public health officials considered virtually all prostitutes to be venereally infected.⁴⁰¹ Foreign-born and non-white women were arrested and incarcerated at greater rates, as officials considered them to be disproportionately infected.⁴⁰² These same stereotypes shaped public fears of HIV/AIDS. The stigma and discrimination faced by homosexuals, drug users, and other marginalized populations are evidence of the public's willingness to embrace these stereotypes.⁴⁰³ Another similarity is that, under the American Plan, promiscuous women were thought to be necessarily infected and dangerous to soldiers—a threat to national security.⁴⁰⁴ Promiscuity, in and of itself, was sufficient to merit incarceration.⁴⁰⁵ Likewise, the panic surrounding HIV/AIDS “mobilised and reinforced” stereotypes of “gay men as promiscuous

⁴⁰⁰ Transcript of Record at 5–6, *Rock v. Carney*, 185 N.W. 798 (Mich. 1921) (No. 17) (on file with the Archives of Michigan).

⁴⁰¹ See Johnson, *supra* note 207, at 119 (identifying prostitution as the “most prolific source of syphilis and gonorrhea infection”).

⁴⁰² RUTH M. ALEXANDER, *THE “GIRL PROBLEM”: FEMALE SEXUAL DELINQUENCY IN NEW YORK, 1900–1930*, at 4 (1995) (describing how the inmates at women's reformatories were primarily from “working-class, immigrant, and African-American homes”); BRISTOW, *supra* note 10, at 160–61 (discussing popular belief in the higher rates of venereal disease among black women); CLEMENT, *supra* note 160, at 209–10 (discussing the disproportionate arrest of black women for prostitution); PARASCANDOLA, *supra* note 11, at 37–38 (discussing the widespread view of the “sexual immorality” of blacks and the belief that immigrants were infected with venereal disease).

⁴⁰³ See BRANDT, *supra* note 10, at 192–95.

⁴⁰⁴ ODEM, *supra* note 12, at 121 (“According to military and government pronouncements, promiscuous girls posed a serious danger to soldiers through the spread of venereal disease.”). Abraham Flexner, an experienced vice investigator and renowned author of reports on prostitution, wrote, “We must emphasize the fact that venereal disease is inevitably attendant upon sexual promiscuity.” ABRAHAM FLEXNER, *PROSTITUTION IN EUROPE* 391 (1914). Four years later, Henrietta Additon, an official within the CTCA, wrote that the “‘charity girl’—the girl who goes with the soldier in return for dinners, automobile rides or any present he may give her” is “usually promiscuous, and, therefore, usually diseased.” Henrietta Additon, *Work Among Delinquent Women and Girls*, 79 ANNALS AM. ACAD. POL. & SOC. SCI. 152, 155 (1918).

⁴⁰⁵ Johnson, *supra* note 207, at 166–67 (“The conviction of any person in the courts of a sex offense involving promiscuity has always afforded ample ground for health departments to invoke the quarantine law, and a large number of prostitutes and an increas-

disease carriers who pose a threat to the nation,” in the words of sociologist Christian Klesse.⁴⁰⁶

Furthermore, as with the American Plan, the HIV/AIDS epidemic saw the stigmatization and increased policing of prostitutes. A 1985 study by the United States Army, for example, “confirmed” that several male soldiers had acquired the infection from prostitutes (mostly German ones).⁴⁰⁷ However, other researchers noted that soldiers had a motivation to lie about drug use or same-sex activities, other behaviors that could lead to HIV transmission, and that German prostitutes actually had very low rates of HIV infection at this time.⁴⁰⁸ Two years later, in 1987, the New York City Health Commissioner “signaled a dramatic turnabout in local policy and a departure from the state health regulations, when in late 1987 he called for mandatory testing of prostitutes and a ‘heavy crackdown on all forms of prostitution,’” in the words of scholar Mary Irvine, “even after the New York City Department of Health had maintained that there was no connection between prostitution and HIV transmission to men.”⁴⁰⁹

Years later, the CDC would apologize for its use of the “4-H” risk group classification.⁴¹⁰ Yet the existence of this classification in the first place testifies to the strength of stereotyping among public health officials, as well as members of the public. By focusing ire and police scrutiny on already stigmatized populations—prostitutes, immigrants, homosexuals, drug users—authorities may actually have worsened the epidemic. The “criminalization of ‘knowing’ exposure,” Irvine wrote, “is likely to steer prostitutes away from voluntary testing, since the results may make the difference between a misdemeanor and a felony charge.”⁴¹¹ The philosophy and practice of policing the sex lives of stigmatized groups has a long history and has always produced dispiriting results. In the United States, it is inescapably part of the long American Plan.

B “Reasonable and Medically Necessary”

In 2013, Kansas legislators considered a measure which proposed to modify the wording of Kansas Statute 65-128, a public health law originally passed in 1917, during the nationwide push for American Plan-enabling legislation.⁴¹² It was, recall, the same statute under which Pauline and Fern

ing number of their customers have been quarantined by health departments during the last three years after such preliminary action by police and courts.”).

⁴⁰⁶ CHRISTIAN KLESSE, *THE SPECTRE OF PROMISCUITY: GAY MALE AND BISEXUAL NON-MONOGAMIES AND POLYAMORIES* 59 (2007).

⁴⁰⁷ Irvine, *supra* note 371, at 65 n.5.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 66.

⁴¹⁰ PICKENS, *supra* note 371, at 95.

⁴¹¹ Irvine, *supra* note 371, at 84.

⁴¹² H.B. 2183, 85th Leg., Reg. Sess. (Kan. 2013).

Welch were quarantined in 1947.⁴¹³ The law had originally established that the state board of health could designate which diseases were “infectious, contagious or communicable” and make procedures “for the isolation and quarantine of such diseases and persons afflicted with or exposed to such diseases”⁴¹⁴ As late as 2013, this law authorized the secretary of health and environment to make procedures “for the isolation and quarantine of such diseases and persons afflicted with or exposed to such diseases”⁴¹⁵ Yet Bill 2183 proposed some changes. Among other alterations, the bill sought to eliminate the following language from the existing statute:

As used in K.S.A. 65-118, 65-119, 65-122, 65-123, 65-126 and 65-129, and amendments thereto, ‘infectious or contagious disease’ means any disease designated by the secretary of health and environment as an infectious or contagious disease in accordance with subsection (a) but the infectious or contagious disease acquired immune deficiency syndrome [AIDS] or any causative agent thereof [HIV] shall not constitute an infectious or contagious disease for the purposes of K.S.A. 65-118, 65-119, 65-122, 65-123, 65-126 and 65-129⁴¹⁶

This section, an unusually enlightened outlier from the reactionary legislation of the era, had been added to § 65-128 in 1988. The bill would replace that language with the following:

The secretary of health and environment is authorized to issue such orders and adopt rules and regulations as may be medically necessary and reasonable to prevent the spread and dissemination of disease injurious to the public health, including, but not limited to, providing for the testing for such diseases and the isolation and quarantine of persons afflicted with or exposed to such diseases.⁴¹⁷

In other words, Kansas legislators proposed removing an exemption from quarantine for HIV/AIDS patients and leaving the authority up to the secretary of health and environment. A number of LGBTQ advocates and public health experts were outraged. That the bill might lead to a quarantine of potential AIDS patients was “not so far-fetched,” Michael Weinstein, the president of the AIDS Healthcare Foundation, told *The Daily Beast*.⁴¹⁸ “It is 2013. Why is it necessary to raise the specter of a quarantine?”⁴¹⁹

⁴¹³ Welch v. Shepherd, 196 P.2d 236, 241 (Kan. 1948).

⁴¹⁴ KAN. STAT. ANN. § 65-128 (1923).

⁴¹⁵ KAN. STAT. ANN. § 65-128 (Supp. 2013).

⁴¹⁶ *Id.*

⁴¹⁷ H.B. 2183, 85th Leg., Reg. Sess. (Kan. 2013).

⁴¹⁸ David Freedlander, *Kansas Quarantine Bill Has HIV/AIDS Advocates Up in Arms*, DAILY BEAST (Apr. 2, 2013), <http://www.thedailybeast.com/articles/2013/04/02/kansas-quarantine-bill-has-hiv-aids-advocates-up-in-arms.html>, archived at <http://perma.cc/MJG3-BLAR>.

⁴¹⁹ *Id.*

Trying to assuage fears, Charlie Hunt, a state epidemiologist at the Kansas Department of Health and Environment, claimed:

The concerns about quarantine and isolation related to HIV are completely unwarranted. Existing law states that any isolation or quarantine actions have to be reasonable and medically necessary, and neither of those are [sic] relevant for HIV. So our position all along has been that it wouldn't be legal, and besides, that was never our intention behind the bill.⁴²⁰

Certainly Hunt's response seems reasonable. Public health authorities do not seem to be eager to imprison HIV/AIDS patients. Yet, if nothing else, the lesson of the American Plan is that judgments about which repressive actions are "reasonable" or "medically necessary" are highly subjective ones. Especially when a disease is stigmatized—as syphilis, gonorrhea, and HIV/AIDS all were and are—the danger of authorities acting on stereotypes or failing to respect privacy is very real. Though these authorities may not believe they are making decisions based on prejudice or disregard for civil rights, the history of quarantine and isolation for venereal disease is a history that demands that we in the present exercise caution.

CONCLUSION

It is likely that very few Kansans are aware of the original use of chapter 65, section 128 of the Kansas Statutes, the law that passed in 1917 and that still exists, in amended form, today. Yet Kansas, as well as every other state in country, passed laws that allowed authorities to invasively examine individuals who had been subjectively determined to be reasonably suspected of having a venereal infection and detain these individuals if they had such an infection. Courts routinely upheld these laws and the internments they authorized. This program lasted for more than six decades—far longer than anyone has alleged before. In the past, historians have written about parts of the American Plan—its origins, its early years, its resurrection on the federal level during World War II. Yet no one has ever traced it from beginning to end. Nor has anyone examined it with sufficient depth, adequately tracing the lives of the women (and very few men) who were rounded up and quarantined under its auspices.

The American Plan is not an aberration, and it is not divorced from the present. Modern policymakers, commentators, public health officials, and, most importantly, members of the public, should be fully educated about the Plan in order to better assess state public health practices today and in the future. The American Plan teaches us to view repressive measures, such as quarantine or isolation, with a healthy serving of skepticism. More impor-

⁴²⁰ *Id.*

tantly, the legacy of the American Plan survives today—in the laws it created, in the practices it refined, and in the philosophy it reflected and promoted. Each time a new health threat enflames public fears—be that threat syphilis or HIV/AIDS—the Plan subtly rears its head. As William Faulkner put it, “The past is never dead. It’s not even past.”⁴²¹

Kansas House Bill 2183 passed, and on April 17, 2013, the governor signed it into law.⁴²²

⁴²¹ WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1950).

⁴²² H. JOURNAL, 85th Leg., Reg. Sess. 881 (Kan. 2013). See also Tim Carpenter, *Brownback Signs Concealed-Carry Reform*, *TOPEKA CAPITAL-J.* (Apr. 17, 2013), <http://cjonline.com/news/2013-04-17/brownback-signs-concealed-carry-reform>, archived at <http://perma.cc/9RLN-GXBM>.

APPENDIX A

- Alabama: ALA. CODE §§ 1103–10 (1923) (enacted 1919).
- Alaska: ALASKA COMP. LAWS §§ 1663, 1667–68 (1933) (enacted 1919).
- Arizona: ARIZ. REV. CODE §§ 2696–97 (1928) (enacted 1903).
- Arkansas: ARK. STAT. §§ 5161–64 (1919) (enacted 1919).
- California: CAL. POL. CODE § 2979 (Deering 1923) (enacted 1872).
- Colorado: COLO. COMP. LAWS §§ 1075–82 (1921) (enacted 1919).
- Connecticut: CONN. GEN. STAT. §§ 2377, 2422 (1930) (enacted 1918).
- Delaware: DEL. REV. CODE § 778 (1935).
- Florida: FLA. CM. STAT. § 2320(14) (1925) (enacted 1919).
- Georgia: GA. CODE §§ 88-501 to -505 (1933) (enacted 1918).
- Hawaii: HAW. REV. LAWS § 933 (1925) (enacted 1911).
- Idaho: IDAHO CODE §§ 38-501 to -507 (1932) (enacted 1921).
- Illinois: ILL. REV. STAT. ch. 65a, ¶¶ 65–68 (1922) (enacted 1919).
- Indiana: IND. ACTS § 9960b (1921).
- Iowa: IOWA CODE §§ 2280–316 (1924).
- Kansas: KAN. REV. STAT § 65-128 (1923) (enacted 1917).
- Kentucky: KY. STAT. § 2049 (1922).
- Louisiana: LA. GEN. STAT. §§ 3434–40 (1932) (enacted 1918).
- Maine: ME. REV. STAT. ch. 22, §§ 134–39 (1930) (enacted 1917).
- Maryland: MD. ANN. CODE art. 43, §§ 32–43 (1939).
- Massachusetts: Massachusetts had enabling legislation for more than a century before. *See* MASS. GEN. LAWS ch. 111, § 111 (2013) (enacted 1827); ch. 111, § 6 (enacted in 1907). And even where there was no specific law, the local board of health would resort to “quarantine if necessary.” *See* Alec Nicol Thompson, *The Massachusetts Plan*, 5 SOC. HYGIENE 317, 318 (1919).
- Michigan: MICH. COMP. LAWS §§ 6631–33 (1929) (enacted 1919).
- Minnesota: MINN. GEN. STAT. § 5345 (1923).
- Mississippi: MISS. ANN. CODE SUPP. § 4884 (1921).
- Missouri: MO. REV. STAT. §§ 9015–16 (1929) (enacted 1919).
- Montana: MONT. REV. CODES §§ 2562–70 (1935) (enacted 1919).
- Nevada: NEV. COMP. LAWS §§ 5259–60 (1929) (enacted 1919).
- New Hampshire: N.H. PUB. LAWS § 22 (1925) (enacted 1919)
- New Jersey: N.J. REV. STAT. §§ 26:4-27 to -37 (1937) (enacted 1918).
- New Mexico: N.M. STAT. ANN. § 110-201 to -206 (1929).
- New York: N.Y. CONSOL. LAWS ANN. CM. SUPP. §§ 343-m-t (1920) (enacted 1918)
- North Carolina: N.C. CODE §§ 7191–96 (1927) (enacted 1919).
- North Dakota: N.D. REV. CODE § 23-0707 (1943) (enacted 1919).
- Ohio: OHIO CODE ANN. §§ 4428–30 (1936) (enacted 1919).
- Oklahoma: OKLA. STAT. tit. §§ 4487–95 (1931) (enacted 1921).
- Oregon: OR. CODE §§ 59-701–03 (1930) (enacted 1919).
- Pennsylvania: PA. DIG. STAT. LAW §§ 3851, 4223–24, 4413 (1920).
- Rhode Island: R.I. GEN. LAWS §§ 2321–30 (1923) (enacted 1921).

South Carolina: S.C. CODE LAWS §§ 438-42 (1922) (enacted 1919).

South Dakota: S.D. COMP. LAWS §§ 7674-A to -F (1930) (enacted 1919).

Tennessee: TENN. CODE §§ 5813-24 (1932) (enacted 1921).

Texas: TEX. REV. CIV. STAT. art. 4445 (1925) (enacted 1918).

Utah: UTAH REV. STAT. §§ 35-1-18, 35-4-36 to -40 (1933) (enacted 1898).

Vermont: VT. PUB. LAWS §§ 5313-14, 5317, 5319 (1933) (enacted 1919).

Virginia: VA. CODE §§ 1554b-1554m (1942) (enacted 1920).

Washington: WASH. COMP. STAT. ANN. §§ 6100-08 (Remington 1922) (enacted 1919).

West Virginia: WEST VA. CODE ch. 150, § 32 (1923) (enacted 1920).

Wisconsin: WIS. STAT. § 143.07 (1923) (enacted 1921).

Wyoming: WYO. REV. STAT. §§ 103-216, -233 to -237 (1931) (enacted 1921).

APPENDIX B⁴²³

- Alabama: ALA. CODE §§ 22-11A-13 to -14, -16 to -18 (2006).
Alaska: ALASKA STAT. § 18.15.385 (2005).
Arizona: ARIZ. REV. STAT. § 36-789 (2002).
Arkansas: ARK. CODE ANN. §§ 14-262-101 to -104 (1998 & Supp. 2013).
California: CAL. HEALTH & SAFETY CODE §§ 120175, 120195–240 (Deering 2012).
Colorado: COLO. REV. STAT. § 25-1-506 (2012).
Connecticut: CONN. GEN. STAT. §§ 19a-131 to -131d, -221 (2011).
Delaware: DEL. CODE ANN. tit. 16, § 704 (2003).
Florida: FLA. STAT. ANN. §§ 384.27–.28 (West 2014).
Georgia: GA. CODE ANN. §§ 31-17-1 to -3 (2014).
Hawaii: HAW. REV. STAT. §§ 325-1 to -4, -6, -8 to -9 (2014).
Idaho: IDAHO CODE ANN. §§ 39-601 to -604 (2011 & Supp. 2014).
Illinois: 410 ILL. COMP. STAT. 325 / 7 (2012).
Indiana: IND. CODE ANN. § 16-41-15-3 (West 2015).
Iowa: IOWA CODE §§ 139A.3A–.6, .9 (2007).
Kansas: KAN. STAT. ANN. § 65-128 (Supp. 2013).
Kentucky: KY. REV. STAT. ANN. § 214.020 (West 2006).
Louisiana: LA. REV. STAT. ANN. §§ 40:5, 40:7, 40:15 (2012 & Supp. 2015).
Maine: ME. REV. STAT. tit. 22 §§ 802, 807, 812 (Supp. 2014).
Maryland: MD. CODE ANN., HEALTH–GEN. §§ 18-905 to -906 (2009 & Supp. 2014).
Massachusetts: MASS. GEN. LAWS ch. 111, §§ 6, 7, 95 (2012).
Michigan: MICH. COMP. LAWS ANN. §§ 333.2451, .2453 (2001 & Supp. 2014).
Minnesota: MINN. STAT. § 144.419 (2014).
Mississippi: MISS. CODE ANN. § 41-23-27 (2013).
Missouri: MO. REV. STAT. § 192.020 (Supp. 2013).
Montana: MONT. CODE ANN. § 50-18-107 (2013).
Nebraska: NEB. REV. STAT. §§ 71-502 to -502.02 (2009).
Nevada: NEV. REV. STAT. § 441A.160 (2013).
New Hampshire: N.H. REV. STAT. ANN. § 141-C:18 (2005).
New Jersey: N.J. STAT. ANN. §§ 26:4-35 to :4-37 (West 2007).
New Mexico: N.M. STAT. ANN. § 24-1-3 (LexisNexis Supp. 2003).
New York: N.Y. PUB. HEALTH LAW § 2305 (McKinney 2012).
North Carolina: N.C. GEN. STAT. §§ 130A-41, -145 (2013).
North Dakota: N.D. CENT. CODE ANN. § 23-07-06 (West 2012).
Ohio: OHIO REV. CODE ANN. §§ 3707.04, .08 (2012).

⁴²³ To create this appendix, I consulted an excellent list created by the National Conference of State Legislatures as a jumping-off point. See *State Quarantine and Isolation Statutes*, NAT'L CONFERENCE OF STATE LEGISLATURES (Nov. 29, 2014), <http://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx>, archived at <http://perma.cc/84XQ-DYZ5>.

Oklahoma: OKLA. STAT. tit. 63, § 1-530 (Supp. 2015).

Oregon: OR. REV. STAT. § 433.121 (2013).

Pennsylvania: 28 PA. CONS. STAT. §§ 27.60–.65, .82–.88 (2014).

Rhode Island: R.I. GEN. LAWS § 23-11-3 (2008).

South Carolina: S.C. CODE ANN. §§ 44-29-90 to -115 (2002).

South Dakota: S.D. CODIFIED LAWS §§ 34-23-4 to -5, -13 (2011).

Tennessee: TENN. CODE ANN. §§ 68-10-105 to -106 (2013).

Texas: TEX. HEALTH & SAFETY CODE ANN. §§ 81.083 (West Supp. 2014).

Utah: UTAH CODE ANN. §§ 26-6-3, -6b-1 to -3 (LexisNexis Supp. 2013).

Vermont: VT. STAT. ANN. tit. 18, §§ 1004–1004a (2012).

Virginia: VA. CODE ANN. §§ 32.1-48.02., -48.08 to -48.013 (2011).

Washington: WASH. REV. CODE §§ 70.24.024, .070 (2015).

West Virginia: W. VA. CODE ANN. §§ 16-4-2, -21 (West 2011).

Wisconsin: WIS. STAT. §§ 252.06, .11 (2011–2012).

Wyoming: WYO. STAT. ANN. §§ 35-4-103 to -104 (2013).