



## TB and the Law Project

### California Tuberculosis Control Law\*

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Public health officials in California are re-examining their duties and responsibilities for tuberculosis (TB) control in light of recent litigation regarding the civil detention of a non-compliant TB patient in a county jail. The litigation concerned a monolingual Laotian immigrant, Hongkham Souvannarath, who was detained in a county jail due to noncompliance with TB-related health orders. Her incarceration involved a series of missteps by county officials who disregarded the state statutes governing civil detention and certain constitutional principles. Upon her release, Souvannarath filed two court cases. The first case cost the county \$1.2 million in settlement funds,<sup>1</sup> and the second resulted in an appeals court opinion ordering the county to cease using the county jail as a civil detention site for persistently nonadherent TB patients.<sup>2</sup>

The Souvannarath litigation exemplifies the need for public health professionals to understand the statutory and constitutional limitations on their ability to manage individuals who decline to follow public health mandates. This paper responds to this need by summarizing the legal underpinnings of communicable disease control, describing California's statutory scheme for TB control, and pointing out some areas of uncertainty relating to the TB control statute. The intended audience is health officials and their legal counsel.

#### **I. Legal basis for TB and other communicable disease control**

Public health law rests on three basic concepts: the broad *powers* vested in public health officials, the *restraints* that the Constitution and other laws place on health officials, and the specific *duties* that public health officials are obliged to carry out.<sup>3</sup>

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<sup>1</sup> See John Roemer, *Reclaiming a Soul*, Daily Journal, Apr. 30, 2001.

<sup>2</sup> See *Souvannarath v. Hadden*, 95 Cal. App. 4<sup>th</sup> 1115 (2002).

<sup>3</sup> See L. Gostin, *Public Health Law: Power, Duty, Restraint* (2000).

## **Public health police power**

The authority enjoyed by public health agencies and officials is grounded in the “police power” of the fifty states. The police power is the natural prerogative of sovereign governments to enact laws, promulgate regulations, and take action to protect, preserve, and promote public health, safety, and welfare. In the words of the California Supreme Court, “The preservation of the public health is universally conceded to be one of the duties devolving upon the state as a sovereignty, and whatever reasonably tends to preserve the public health is a subject upon which the legislature, within its police power, may take action.”<sup>4</sup>

As a legal principle, the police power comes from common law—the tradition of judicial lawmaking that spans from medieval England to the present day. In political theory, it describes the conditions under which a sovereign government can legitimately intrude upon a person’s autonomy, privacy, liberty, or property. The police power is an inherent authority of the states, and the states may delegate the police power to local governments. The California Constitution does so by declaring that “a county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”<sup>5</sup> Protecting the public from TB is an “archetypical expression of police power.”<sup>6</sup> Police-power methods routinely used in TB control include compulsory testing, reporting, treatment, isolation, and detention.

## **Limits on the authority of public health officials**

The police power does not give public health officials unlimited authority. The U.S. Constitution (and state constitutions) shield individuals from excessive government intrusion. The constitutional protections most frequently invoked to limit the exercise of the public health police power are described below.<sup>7</sup>

### Constitutional right to substantive due process

The Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution prohibits federal and state governments from depriving individuals of “life, liberty, or property without due process of law.” Life and liberty refer to individual self-determination, while property refers to an individual’s economic interests. Due process has substantive and procedural components.

Substantive due process means an individual’s right to demand that the government have an adequate justification for laws or other official actions that affect life, liberty, or property. In order to assess the adequacy of the government’s justification, a court will evaluate the relative importance of the individual and governmental interests at stake. The criteria become more demanding as the individual interest at stake becomes more significant.

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<sup>4</sup> *Patrick v. Riley*, 209 Cal. 350, 354 (1930) (upholding bovine tuberculosis control law).

<sup>5</sup> Cal. Const., Article 11, § 7.

<sup>6</sup> *Newark v. J.S.*, 652 A.2d 265, 271 (N.J. Super. Ct. Law Div. 1993).

<sup>7</sup> This section covers federal constitutional restraints. It does not address analogous restraints contained in the California Constitution.

## Rational basis test

Courts use a “rational basis” test when the individual interest is considered routine. The rational basis test asks whether a law or other official action is “reasonably related to a legitimate government interest.” This inquiry into means and ends is deferential to the judgment of public officials. It requires that the basis for legislative or other official action be plausible, but not necessarily persuasive. It further requires that there be a reasonable, but not necessarily close, relationship between the government’s objective and the means chosen to accomplish it. In the public health field, the rational basis test is most often used to evaluate regulatory schemes that affect property rights, like health inspection and licensure laws. However, it has also been applied to communicable disease control measures in California.

A convicted prostitute argued that a California law requiring that she undergo HIV testing violated substantive due process. The court applied the rational basis test on the grounds that drawing blood is a routine and minimal intrusion. The court held that the statute bore a reasonable relationship to the government’s legitimate interest in preventing the spread of disease, since convicted prostitutes are at a high risk of contracting and spreading HIV. *April Love v. Superior Court*.<sup>8</sup>

## Strict scrutiny test

At the opposite end of the spectrum from the rational basis test, a “strict scrutiny” test is used when “fundamental rights” are at stake. Fundamental rights include the right to freedom from physical confinement and to privacy in matters relating to marriage, procreation, contraception, family relationships and child rearing.<sup>9</sup> Under the strict scrutiny test, the court evaluates whether the government’s action advances a “compelling state interest,” and whether it is “narrowly tailored” in a way that represents the “least restrictive alternative.” The strict scrutiny test ensures that a given law or government action is precisely targeted at a very serious problem and has a minimal impact on an individual’s fundamental rights.

Courts generally apply strict scrutiny to public health measures that affect the right to freedom from confinement, such as isolation or quarantine. Courts are readily persuaded that the government has a compelling interest in controlling disease. In the words of one court, “The claim of ‘disease’ in a domestic setting has the same kind of power as the claim of ‘national security’ in matters relating to foreign policy. Both claims are very powerful arguments for executive action.”<sup>10</sup> So, the key issue in these cases is usually whether the government has taken a sufficiently tailored approach and has selected the least restrictive alternative.

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<sup>8</sup> 226 Cal. App. 3d 736 (1991); see also *Application of Halko*, 246 Cal. App. 2d 553 (1966) (upholding the isolation of TB patients).

<sup>9</sup> See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (addressing the right to travel); *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 926 (1992) (addressing reproductive rights).

<sup>10</sup> *Newark v. J.S.*, 652 A.2d 265, 271 (N.J. Super. Ct. Law Div. 1993).

A New Jersey court used the strict scrutiny test in upholding a city's decision to seek the involuntary hospitalization of a persistently nonadherent active TB patient who was homeless. The city had a compelling interest ("hardly any state interest is higher than protecting its citizenry from disease"), and the patient's fundamental liberty interest was at stake ("hardly any individual interest is higher than the liberty interest of being free from confinement"). The court concluded that since the patient was homeless, involuntary hospitalization was the least restrictive alternative available to ensure that he would not spread TB. *Newark v. J.S.*<sup>11</sup>

Some courts have identified heightened liberty interests that may not be labeled fundamental but that call for something like strict scrutiny. Examples include the right to refuse medical care and to non-disclosure of personal medical information. When these rights are implicated, courts take a very close look at the law or government action.

In 1905, the U.S. Supreme Court ruled for the government after balancing a compulsory smallpox vaccination law against an individual's claim that the law was "hostile to the inherent right of every free man to care for his own body and health in such way as to him seems best." *Jacobson v. Massachusetts.*<sup>12</sup>

In 1900, the San Francisco Board of Health confined residents of Chinese descent to the city unless they submitted to a bubonic plague vaccination. A resident of Chinese descent sued in part on substantive due process grounds. The court recognized that the city had a strong interest in preventing the spread of disease. However, it struck down the vaccination order in part because the order was not appropriately tailored to solve the problem. The order applied widely to unexposed persons, rather than narrowly to persons quarantined on suspicion of disease. *Wong Wai v. Williamson.*<sup>13</sup>

A New York law required physicians to report to a computerized database the identities of patients who received prescriptions for schedule III drugs. The U.S. Supreme Court upheld the law, ruling that the state's interest in using the database to prevent illegal drug use justified the privacy intrusion, since disclosure of private medical information is "part of modern medical practice" and there were safeguards against redisclosure. *Whalen v. Roe.*<sup>14</sup>

Health officials do not have to remember all the details of substantive due process. However, they should be aware that they need a strong justification to intrude on a patient's freedom of movement, bodily integrity, or privacy, and they should make every effort to minimize the impact on personal liberty.

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<sup>11</sup> 652 A.2d 265 (N.J. Super. Ct. Law Div. 1993).

<sup>12</sup> 197 U.S. 11, 26 (1905).

<sup>13</sup> 103 F. 10 (C.C. Cal. 1900).

<sup>14</sup> 429 U.S. 589 (1977).

## Constitutional right to procedural due process

“Procedural due process” has to do with the fairness of the procedures the government uses before depriving someone of life, liberty, or property. The basic concepts of procedural due process are prior notice of impending government action and a means to register objections. The specific procedures required in any given situation depend upon the individual interest at stake, the safeguards needed to avoid erroneous decisions, and the government’s interest in efficient decisionmaking.<sup>15</sup>

Procedural due process jurisprudence underwent a revolution in the late twentieth century, when the judiciary was confronted with a flood of economic and social welfare regulation. The courts were generally deferential to the substantive policy determinations of the government. However, the courts remained mindful of their role as guarantors of individual rights, so they became increasingly rigorous in their evaluations of the procedures used by the government to implement policy. The involuntary detention of mentally ill persons was ground zero for the procedural due process revolution. In a series of decisions, the U.S. Supreme Court held that before mentally-ill persons can be civilly committed, they are entitled to a range of procedural due process guarantees, including legal representation and a hearing before an impartial decision-maker. Elements of procedural due process from mental health law have found their way into TB control law by both court decision and legislation.<sup>16</sup>

A persistently nonadherent TB patient petitioned for release from involuntary detention. The West Virginia Supreme Court held that an infectious patient facing detention is entitled to similar procedural due process safeguards as someone with mental illness, including: (1) adequate written notice detailing the grounds and underlying facts on which commitment is sought; (2) the right to counsel; (3) the right to a hearing where they can cross-examine and present their own witnesses; (4) a standard of proof by clear, cogent, and convincing evidence; and (5) the right to a verbatim transcript of the proceedings for purposes of appeal. *Green v. Edwards*.<sup>17</sup>

A key issue in procedural due process jurisprudence is whether the government can restrict a person’s life, liberty, or property before that person has an opportunity to be heard. Courts generally prohibit pre-hearing deprivations except under emergency conditions involving immediate danger to public health or safety.<sup>18</sup> However, the courts have been sympathetic to mental health and communicable disease control laws that provide for “summary confinement” (i.e., the involuntary confinement prior to receiving a court order) of persons considered dangerous to themselves or the community, as long as such persons are entitled to post-confinement hearings within a reasonable time.<sup>19</sup>

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<sup>15</sup> See *Mathews v. Eldridge*, 424 U.S. 319 (1976); see also, *Machado v. State Water Resources Control Board*, 90 Cal. App. 4<sup>th</sup> 720 (2001) (finding that procedural due process did not require a hearing before the issuance of a wastewater abatement order).

<sup>16</sup> Arguably, disease control measures need not be as procedurally intensive, because mental health intervention carries a greater stigma, and communicable disease presents a more immediate risk to the community.

<sup>17</sup> 263 S.E.2d 661 (W.Va. 1980).

<sup>18</sup> See, e.g., *Phillips v. San Luis Obispo County Dept of Animal Regulation*, 183 Cal. App. 3d 372 (1986) (holding that an ordinance providing for the destruction of a dog without a prior hearing was unconstitutional, since there was no imminent risk to public safety).

<sup>19</sup> See, e.g., *Green v. Edwards*, 263 S.E.2d 661 (W.Va. 1980).

Another major issue is whether hearings must take place before a judge, or whether they may take place in an administrative hearing with the opportunity for subsequent judicial review. Although the courts have upheld administrative hearings in a variety of settings, mental health and communicable disease control laws usually provide for judicial proceedings.

### Constitutional right to equal protection

The Equal Protection Clause of the Fifth and Fourteenth Amendments guarantees that similarly situated classes of people will be treated similarly by the government. In other words, equal protection means that the government cannot arbitrarily discriminate against a group of people just because they fall into a particular category. While due process focuses on individual rights, equal protection focuses on the rights of groups.

The tests used in the equal protection context are similar to those used in the substantive due process context. The rational basis test is applied when the government is not targeting a suspicious category (known in legal parlance as a “suspect classification”).<sup>20</sup>

A nineteen year old challenged a statute outlawing the purchase of alcoholic beverages by minors. The court applied the rational basis test since age is not a suspect classification. The court ruled that the statute did not deny minors equal protection because it was reasonably related to the state’s legitimate interest in controlling youth alcohol abuse. *Gabree v. King*.<sup>21</sup>

Courts apply the strict scrutiny test when “suspect classifications” of race, national origin, or ethnicity are involved because “distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”<sup>22</sup> Strict scrutiny in equal protection cases is basically the same as strict scrutiny in substantive due process cases. A court will examine whether a law or government action that discriminates on the basis race, national origin, or ethnicity is “narrowly tailored” to further a “compelling” state interest, or is the “least restrictive alternative” to achieving a “compelling” state interest. In the equal protection context, another way of assessing whether a law or government action is “narrowly tailored” or is the “least restrictive alternative” is to look at whether it is underinclusive (i.e., it singles out an ethnic or racial group when it should be targeting a more diverse group).

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<sup>20</sup> An intermediate test, which considers whether the government’s action is “substantially related to an important state interest,” is used for classifications based on gender or legitimacy. See, e.g., *Mississippi University for Women v. Hogan*, 458, U.S. 718 (1982) (finding that a nursing school no-male admissions policy denied equal protection because it was not substantially related to an important state interest).

<sup>21</sup> 614 F.2d 1 (1st Cir. 1980).

<sup>22</sup> *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

The San Francisco Board of Health quarantined the Chinatown district in response to reports that nine residents in one block had died of bubonic plague. Residents of Chinese descent were subject to the quarantine but others within the district were free to come and go. The court struck down the quarantine as a violation of equal protection. The quarantine was underinclusive in treating similarly situated people differently for no other reason than race. *Jew Ho v. Williamson*.<sup>23</sup>

### Constitutional right to religious freedom

The “Free Exercise Clause” of the First Amendment (which applies to the states through the Fourteenth Amendment) provides that the federal and state governments shall make no laws that prohibit the free exercise of religion. The free exercise of religion means “the right to believe and profess whatever religious doctrine one desires” without government interference; however, the right of free exercise does not relieve an individual of the obligation to comply with a “valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”<sup>24</sup> In other words, a law does not infringe on an individual’s right of free exercise if the law does not specifically target religious conduct, but it happens to have an impact on the individual’s ability to practice the tenants of her religion. In the communicable disease field, individuals have invoked the Free Exercise Clause in protesting compulsory testing, vaccination, and treatment laws. Although many states grant limited religious exemptions from such laws, forcing individuals to follow the laws despite their religious beliefs would probably not violate the First Amendment.<sup>25</sup>

The state charged a mother with violating public-health oriented child labor laws by using her children to distribute religious literature. The U.S. Supreme Court ruled that the state had not infringed upon the mother’s right of free exercise because the child labor laws were generally applicable and were not targeted at her religion. Analogizing to mandatory vaccination, the Court declared: “The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.” *Prince v. Massachusetts*.<sup>26</sup>

### Constitutional right to freedom from cruel and unusual punishment

The Eighth Amendment of the U.S. Constitution prohibits “cruel and unusual punishment.” Some courts have indicated that the Eighth Amendment applies to civil detention as well as criminal confinement.<sup>27</sup>

There have been numerous Eighth Amendment challenges to the adequacy of TB control efforts in correctional facilities. The courts have ruled that although prison authorities can be

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<sup>23</sup> 103 F. 10 (C.C. Cal. 1900).

<sup>24</sup> *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 484 U.S. 872, 877 (1990).

<sup>25</sup> See Larry Gostin, *Public Health Law: Power, Duty, Restraint* 182 (2000).

<sup>26</sup> 321 U.S. 158, 166-67 (1944).

<sup>27</sup> See, e.g., *People v. Feagley*, 14 Cal.3d 338, 376 (1975) (finding that the confinement of a civilly committed, mentally disordered sex offender for an indefinite period in a prison setting violated the “cruel and unusual punishment” clauses of the California and U.S. Constitutions).

liable for failing to provide adequate medical care or a healthful, disease-free environment for prisoners, the standard of care demanded by the Eighth Amendment is minimal. Specifically, the government will be liable only if prison officials are “deliberately indifferent to serious medical needs.”<sup>28</sup> Under this standard, a single instance of medical malpractice is not an Eighth Amendment violation, but a consistent pattern of negligent or reckless conduct may constitute a violation.<sup>29</sup> Several courts have also assessed whether compulsory TB testing and treatment in prisons violates the Eighth Amendment. Inmates generally lose these cases.<sup>30</sup> It is worth noting that these cases are not directly relevant to the constitutionality of compulsory TB control measures for the general population, since prisoners have diminished liberty interests.

### Constitutional right to freedom from unreasonable search and seizure

The Fourth Amendment prohibits the “unreasonable” search or seizure of a person’s body, house, paper, or personal effects. Courts evaluate the reasonableness of a search by weighing the intrusion into individual privacy against the government’s need for information. The courts have held that medical screening and testing programs involve searches subject to the Fourth Amendment’s reasonableness requirement.<sup>31</sup> For example, taking a sputum sample pursuant to a compulsory examination order or requiring a skin test as a condition of public employment probably are considered searches.<sup>32</sup> That said, public health-related searches are almost always upheld.<sup>33</sup> Due to the relatively unobtrusive nature of TB testing and the importance of preventing the spread of a highly communicable disease, it is unlikely that TB testing would be found to violate the Fourth Amendment.

The Fourth Amendment also contains a set of requirements that officials must satisfy to obtain a warrant to search or seize property or persons. A reasonable search is allowed without a warrant if there is a special government need and a reasonable degree of individualized suspicion.<sup>34</sup> Warrantless arrests are permissible when there is both probable cause and exigent circumstances.<sup>35</sup>

### **Duties of public health officials**

The police power gives public health officials the authority but not the duty to protect public health. Their affirmative obligations are set forth in statutes. From the time of statehood,

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<sup>28</sup> *Estelle v. Gamble*, 429 U.S. 97 (1976).

<sup>29</sup> See, e.g., *Degido v. Pong*, 920 F.2d 525 (8<sup>th</sup> Cir. 1990) (finding an Eighth Amendment violation because of the prison officials’ failure to allocate organizational resources to develop and implement a communicable disease policy, the lack of a written protocol for TB testing, the failure to monitor prisoner medication compliance, and the inadequate investigation of a prison TB outbreak by the state health department).

<sup>30</sup> See, e.g., *McCormick v. State*, 105 F.3d 1059 (5<sup>th</sup> Cir. 1997) (upholding compulsory TB treatment in prison); *Hasenmeier-McCarthy v. Rose*, 986 F. Supp. 464 (S.D. Ohio 1998) (upholding compulsory TB testing in prison).

<sup>31</sup> See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (finding that a city hospital’s tests of obstetrical patients’ urine for cocaine was a search under the Fourth Amendment).

<sup>32</sup> See *Washington v. Canbra*, 165 Fed. 3d 920 (9<sup>th</sup> Cir. 1998) (unpublished opinion) (holding that a TST test can be considered a search).

<sup>33</sup> See, e.g., *April Love v. Superior Court*, 226 Cal. App. 3d 736 (1991) (holding that an HIV test of a convicted prostitute for purposes of AIDS prevention did not violate the Fourth Amendment).

<sup>34</sup> See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001).

<sup>35</sup> See *People v. Ramey*, 16 Cal. 2d 263 (1976). See also Cal. Penal Code § 836 (permitting a warrantless arrest if the criminal activity is committed in the presence of a peace officer). Section 836 would apply to a refusal to abide by a health order in a peace officer’s presence.

California law has assigned counties (and cities) front-line responsibility for communicable disease control. Currently, county boards of supervisors have an all-purpose duty to “take measures as may be necessary to preserve and protect the public health in the unincorporated areas of the county.”<sup>36</sup> County and city health officers must enforce state, county, and city statutes, regulations, and orders pertaining to public health.<sup>37</sup> Health officers must also take the necessary steps to prevent the spread of reportable communicable diseases.<sup>38</sup> In addition to their general duties in the area of communicable disease control, local public health officials have particular duties regarding certain public health hazards (e.g., domestic and wild animals) and diseases (e.g., STDs, HIV, AIDS, and TB). The TB control duties of health officials are enumerated in a special part of the Communicable Disease Prevention and Control division of the Health and Safety Code,<sup>39</sup> discussed in detail below.

### Liability for failure to carry out disease control duties

Federal and state civil rights laws provide individuals with legal remedies for violations of their constitutional rights by public entities and public employees. Public entities and their employees were traditionally immune from liability for nonperformance or negligence in fulfilling their statutory responsibilities. However, in the late twentieth century, most states reversed course and adopted government tort liability statutes. California’s Tort Claims Act allows private individuals to sue public entities and their employees for certain wrongful acts or omissions.<sup>40</sup> The Act makes public entities liable for breach of so-called “mandatory duties.” A mandatory duty is one that is *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken.<sup>41</sup> It makes public employees liable for all wrongful acts and omissions, but gives them immunity for “discretionary” acts or omissions.<sup>42</sup>

Discretionary duties are those that include “planning and policy making” and “basic policy decisions.”<sup>43</sup> To qualify for immunity based on discretionary duties, a local health department must demonstrate that it made a conscious, specific policy decision, deliberately balancing risks and advantages to the patient.<sup>44</sup> Because the majority of duties regarding the examination, treatment, and detention of TB patients are discretionary in nature, health departments and their employees are generally immune from liability for injuries that occur in

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<sup>36</sup> Cal. Health & Safety Code § 101025. Governing bodies of cities have a similar duty. Cal. Health & Safety Code § 101450.

<sup>37</sup> Cal. Health & Safety Code §§ 101030, 101470.

<sup>38</sup> Cal. Health & Safety Code § 120175.

<sup>39</sup> Specifically, part 5 of Division 105 of the Health and Safety Code (Cal. Health & Safety Code §§ 121350–121555). Chapter 1 deals with TB control, chapter 2 with pupil testing, and chapter 3 with public employee testing. This paper refers to chapter 1 as the “TB control statute.”

<sup>40</sup> See generally, Simpson, “In Time of Emergency: Liability Issues for Public Health Practitioners,” (presentation at CPHA-N 2003 annual meeting), available from the authors.

<sup>41</sup> *Haggis v. City of Los Angeles*, 22 Cal. 4th 490 (2000) (emphasis in original). The courts have construed mandatory duty liability narrowly. The statutory or regulatory mandate must oblige the public entity to perform a specific action designed to prevent a specific injury, and the entity’s misfeasance must directly cause the plaintiff’s injury.

<sup>42</sup> See *Johnson v. State*, 69 Cal. 3d 782 (1968) (finding that planning, policymaking and other basic policy decisions are discretionary).

<sup>43</sup> *Johnson v. State*, 69 Cal. 3d 782 (1968).

<sup>44</sup> Note the similarity between this standard of care and the “individualized assessments” of a patient’s circumstances as required by California Health and Safety Code section 121367.

the performance of TB control duties. Since the statutes describe the communicable disease control duties of public health agencies and their employees in broad, permissive terms (e.g., “use every available means to investigate disease, and issue any orders deemed necessary to protect public health”), the courts seldom find agencies and employees liable for decisions about the best way to prevent or control disease.

Jones contracted TB, allegedly from Czapky, in 1957. He sued county and state health officials under government liability statutes claiming that they failed to conduct adequate monitoring to ensure Czapky’s compliance with a quarantine order confining him to his residence. The court ruled against Jones, holding that is a discretionary duty to set the terms of a quarantine. The court found that the officials had made a reasonable policy decision, so they could not be held liable even if the terms of the quarantine may have turned out to be lacking. *Jones v. Czapky*.<sup>45</sup>

Government Code section 855.4 provides immunity from liability for “injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease.” Section 855.6 provides immunity for injury caused by failure to make an examination for the purpose to determine whether a person has a disease that would “constitute a hazard to the health or safety of himself or others.” The California Law Revision Commission’s comments on these sections indicate that 855.4 was intended to provide immunity for quarantine and 855.6 was intended to immunize public health examinations such as TB examinations. Despite these immunity statutes, the courts have allowed cases to proceed where public officials were not engaged in discretionary planning and policymaking, but were alleged to have been negligent in performing an operational function, such as a medical procedure.

A police officer asked a county medical center to perform an HIV test on the blood of a mentally-disturbed person with self-inflicted stab wounds. The officer was exposed while assisting in the person’s civil commitment. The county erroneously tested for hepatitis instead of HIV, discarded the sample, and released the patient. The court held that the officer could bring a lawsuit against the county for damages under the Tort Claims Act caused by anguish due to uncertainty about his HIV status, because the performance of the test was not an immune exercise of discretion. *Smith v. County of Kern*.<sup>46</sup>

## **II. Federal role in TB control**

Although TB control falls mainly under state and local jurisdiction, the Constitution gives the federal government certain powers in this area. First, under its exclusive authority over immigration and naturalization, the federal government serves as the gatekeeper for aliens with active TB seeking to enter the United States.<sup>47</sup> It can exclude an alien with active TB from

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<sup>45</sup> 182 Cal. App. 2d 192 (1960).

<sup>46</sup> 20 Cal. App. 4th 1826 (1993).

<sup>47</sup> See U.S. Const., Article I, § 8.

immigration or entry on a non-immigrant visa.<sup>48</sup> Aliens suspected of active TB can be detained at the border, repatriated, or deported.<sup>49</sup> The federal government requires applicants for immigration to have a medical examination that includes a chest x-ray. Consular officials may require medical examinations for non-immigrant visa applicants suspected of being medically ineligible.<sup>50</sup> Second, the federal government is the sole regulator of foreign and interstate commerce, and can use this authority for communicable disease control. For example, CDC can inspect, detain, quarantine, or take other measures at U.S. ports to prevent the importation of communicable diseases, including active TB.<sup>51</sup> CDC can also take whatever measures it deems necessary to prevent the interstate spread of TB and other communicable diseases if it finds that state and local officials are not doing enough.<sup>52</sup> Lastly, CDC provides support to state and local TB control authorities under the federal government's constitutional power to tax and spend for the public welfare.<sup>53</sup>

### **III. Current California TB control statute**

The California TB control statute recognizes that the power to control TB rests within three levels of the public health infrastructure: CDHS, local health departments, and local health care facilities. It delegates mandatory and discretionary duties to each level.

#### **Powers and duties of CDHS**

CDHS has a range of responsibilities for communicable disease, including TB control. Mandatory duties include examining the causes of communicable diseases, establishing a list of reportable diseases (of which TB is one), acting as the lead agency for TB response, working with local health departments to identify detention sites, and maintaining a program for the control of TB.<sup>54</sup> CDHS also has discretion to advise local health officers, adopt regulations about isolation and quarantine, and require inspection, disinfection, isolation, or quarantine when necessary to protect the public health.<sup>55</sup> The TB control statute places CDHS in an administrative, supervisory, and support role, leaving the bulk of the on-the-ground work to local health departments. Specifically, it provides for CDHS to maintain a TB control program and states that CDHS is the "lead agency" for all TB control and prevention activities at the state level.<sup>56</sup> It authorizes CDHS to provide an annual subvention to health departments that maintain local TB control programs consistent with state standards.<sup>57</sup>

#### **Powers and duties of local health officers**

Local health officers bear primary responsibility for TB control in California. They are charged with both mandatory and discretionary duties. Section 121365 obliges local health officers to use every available means to investigate reported or suspected cases of active TB in

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<sup>48</sup> 8 U.S.C.A. § 1182; see also, 42 C.F.R. § 34.2.

<sup>49</sup> See 8 U.S.C.A. § 1222.

<sup>50</sup> See 22 C.F.R. § 41.108.

<sup>51</sup> See 42 C.F.R. pt. 71.

<sup>52</sup> See 42 C.F.R. pt. 70.

<sup>53</sup> See U.S. Const., Article I, § 8.

<sup>54</sup> Cal. Health & Safety Code §§ 120125, 120130, 121357, 121358(b), 121350.

<sup>55</sup> Cal. Health & Safety Code §§ 100180, 120130, 120145.

<sup>56</sup> Cal. Health & Safety Code §§ 121350, 121357.

<sup>57</sup> Cal. Health & Safety Code §§ 121450-121460.

their jurisdiction. Under section 121364, they have discretion to perform a compulsory examination of persons they have reasonable grounds to believe are at heightened risk of TB exposure. Moreover, under section 121365 they have broad discretionary duty to issue orders deemed necessary to protect the public health or the health of any individual, such as:

- order of detention for purposes of examination;
- order to complete a prescribed course of medication and if necessary, to follow infection control precautions;
- order to follow a course of directly observed therapy (DOT) (if an active TB patient is unable or unwilling to complete a prescribed course of medication);
- order of detention in a health or other treatment facility if a person is substantially likely to have infectious TB and to transmit the disease;
- order of detention in a health or other treatment facility if (1) a person has active TB and shows no evidence of having completed treatment and (2) there is a substantial likelihood, based on past or present behavior, that the patient cannot be relied upon to complete treatment and follow infection control precautions;
- order for the exclusion from attendance at the workplace; and
- order for home isolation.

### **Powers and duties of health care providers and facilities**

Private health care providers and facilities are also on the front line of TB control. Health care providers have a mandatory duty to report to the local health officer (1) when they encounter a suspected or actual active TB patient and (2) when the patient ceases treatment for TB.<sup>58</sup> They have a mandatory duty to maintain written documentation of an active TB patient's adherence to an individual treatment plan.<sup>59</sup> In addition, a health care provider who treats an active TB patient is required either to examine all household contacts or refer them to the local health officer for examination.<sup>60</sup> Finally, health facilities have a mandatory duty not to discharge or release a suspected or actual active TB patient until a written treatment plan has been approved by the health officer.<sup>61</sup>

### **Statutory limits on the powers and duties of TB control professionals**

The powers and duties of TB control professionals in California can significantly interfere with constitutional rights. For example, an isolation or detention order would seriously impede an individual's movement. An order to complete a prescribed course of medication might offend a patient's right to religious freedom. To protect the rights of patients, the California legislature built checks and balances into the TB control statute, breaking the constitutional principles down into a set of action steps for TB control professionals to follow.

### Contents of health orders

Since TB control related health orders often implicate heightened or fundamental liberty interests (including the rights to bodily integrity, privacy, and travel), these health orders must

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<sup>58</sup> Cal. Health & Safety Code § 121362.

<sup>59</sup> Cal. Health & Safety Code § 121362.

<sup>60</sup> Cal. Health & Safety Code § 121363.

<sup>61</sup> Cal. Health & Safety Code § 121361.

incorporate basic due process principles. Any TB control related health order must state the legal authority on which the order was based.<sup>62</sup> In addition, it must include an individualized assessment of the person's situation or behavior that justifies the order and either (1) the less restrictive alternatives that were attempted and were unsuccessful or (2) the less restrictive alternatives that were considered and rejected, and why they were rejected.<sup>63</sup> By making health officers walk through the individualized assessment and the less restrictive alternatives, the TB control statute basically guides health officers through the most rigorous type of substantive due process analysis (i.e., the strict scrutiny test).

### Special civil detention procedures

Because civil detention entails an extreme deprivation of liberty, the civil detention process in the TB control statute involves extra procedural due process measures. A local health officer can detain without prior court authorization under section 121365, but sections 121366 and 121367(b) gives detainees the following rights:

- Upon a detainee's request, the local health officer must apply for a court order authorizing continued detention within 72 hours of the request.
- Whether or not a detainee makes a request, a court order is required for detentions of more than 60 days.
- The health officer must seek further court review of a detention within 90 days of the initial court order and within 90 days of each subsequent court review.
- The health officer must prove the necessity of the detention by "clear and convincing" evidence.
- A person subject to detention has the right to counsel and to have counsel provided.
- Each health order must advise the detainee of his or her rights regarding release requests, court orders, court review, and legal representation.
- Each health order must be accompanied by a separate notice that explains the detainee's right to request release; that lists the phone number the detainee may call to request release; that explains the detainee's right to counsel; and that informs the detainee that, at the detainee's request, the health officer will notify two individuals of the detention.<sup>64</sup>
- A detainee may only be detained for the amount of time necessary to fulfill the purpose of the detention.

This checklist represents a legislative effort to promulgate standard operating procedures for detention that meet or exceed constitutional requirements.

### Location of detention

Section 121358(a) of the TB control statute provides that "individuals detained through the tuberculosis control, housing, and detention program shall not reside in correctional facilities." The court in *Souvannarath v. Hadden* interpreted this to mean that civil detention pursuant to the TB control statute cannot take place in a correctional facility.<sup>65</sup> This holding is binding on all lower courts in California. The court in that case did not consider the

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<sup>62</sup> Cal. Health & Safety Code § 121367(a).

<sup>63</sup> Cal. Health & Safety Code § 121367.

<sup>64</sup> Cal. Health & Safety Code §§ 121366, 121367.

<sup>65</sup> See *Souvannarath v. Hadden*, 95 Cal. App. 4<sup>th</sup> 1115 (2002). The case is discussed at length in Section V below.

constitutionality of Souvannarath's incarceration, but due process and Eighth Amendment issues were raised in another case that ended in the county's payment of \$1.2 million in settlement funds.<sup>66</sup>

### Interpreters

The TB control statute mandates that "language interpreters and persons skilled in communicating with vision and hearing impaired individuals shall be provided" for the purposes of executing TB related investigations and orders.<sup>67</sup> As such, TB control workers who interact with the public ought to try to make sure that they are understood. In addition, it would prudent to translate health orders (either verbally or in writing) for non-English speakers.<sup>68</sup>

### Involuntary treatment

The TB control statute has several prohibitions relating to compulsory testing and treatment. Section 121369(b) provides that nothing in sections 121365, 121366 or 121367 "shall be construed to permit or require the forcible administration of any medication without a prior court order." Section 121365(b) and (c) authorize orders requiring active TB patients to complete a course of medication or undergo DOT, with the caveat that the section "does not allow the forcible or involuntary administration of medication." Section 121365(a) authorizes health officers to order the detention of patients for examination, but the section explicitly "does not authorize the local health officer to mandate involuntary anergy testing."

### Religious exemption

With limited exception, "no examination or inspection shall be required of any person who depends exclusively on prayer for healing in accordance with the teachings of any well recognized religious sect, denomination, or organization and claims exemption on that ground."<sup>69</sup> Moreover, such person "shall not be required to submit to any medical treatment, or to go to or be confined in a hospital or other medical institution; provided, he or she can be safely quarantined and/or isolated in his or her own home or other suitable place of his or her choice."<sup>70</sup>

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<sup>66</sup> See *Souvannarath v. County of Fresno*, Civ. F-99-6655 (E.D. Cal. 1999) (second amended complaint).

<sup>67</sup> Cal. Health & Safety Code § 121369(a).

<sup>68</sup> The law does not require health orders to be written in a native language, so long as translators are provided. However, it would be sensible to supply written translations both to assure the patient's comprehension and to have hard evidence that the patient was duly notified of the contents of the order.

<sup>69</sup> Cal. Health & Safety Code § 121370.

<sup>70</sup> Cal. Health & Safety Code § 121370. Courts have ruled that states are not constitutionally obliged to offer religious exemptions. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002). Nonetheless, the California legislature decided to provide the exemption to those belonging to "well recognized" religions. It is worth noting that the religious exemption may be subject to challenge by sincerely religious individuals who do not belong to a "well recognized" religion. In order to avoid a constitutional challenge, a health officer might consider applying the religious exemption to a genuinely religious person regardless of whether the person seeking the exemption belongs to a "well recognized" religion.

## **Criminal sanctions for failure to comply with TB related health orders**

A health order issued under the TB control statute has teeth because failure to comply is a misdemeanor under Health and Safety Code section 120280.<sup>71</sup> A misdemeanor is a non-felony crime punishable by a fine and/or imprisonment in the county jail for a period of up to six months, unless otherwise specified by a particular law.<sup>72</sup> Anyone who violates a TB related health order may be prosecuted. Once charged, the person leaves the civil system. This is important because civil and criminal detainees are subject to different standards of due process and different types of confinement.

The TB control statute has special rules for violations of health orders issued under section 121365. The health officer is required to report violations of section 121365 orders to the district attorney.<sup>73</sup> Upon receipt of a report, the district attorney is supposed to prosecute the violation.<sup>74</sup> If a persistently nonadherent active TB patient is convicted of a misdemeanor for failing to comply with a section 121365 order, the court may order the offender to be confined for up to one year.<sup>75</sup> Section 120280 states that the confinement may take place in “any appropriate facility, penal institution, or dwelling approved for the specific case by the local health officer.” As an alternative to confinement, the court may place the offender on probation for up to two years upon condition that the offender comply with the 121365 order.<sup>76</sup> The court can terminate probation and order the confinement of an offender who violates the terms of probation.<sup>77</sup>

## **IV. Legislative history of the California TB control statute**

### **Early TB control laws**

California has had a TB control statute since the early 1900s. The version adopted in 1957 gave local health departments lead responsibility for TB control.<sup>78</sup> It required local health officers to investigate suspected TB cases and authorized them to examine persons reasonably suspected of active TB and isolate or quarantine active cases if necessary. The procedure for doing so was to serve a written examination, quarantine or isolation order on the person.<sup>79</sup> Unlike the current TB control law, there was no statutory provision for the health officer to apply to court for civil enforcement of an order.<sup>80</sup> However, if a person violated a quarantine or isolation order, the health officer was required to notify the local district attorney.<sup>81</sup> Violation of an examination or isolation order was a misdemeanor, punishable by confinement until

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<sup>71</sup> Section 120280 cross-references the TB control statute, but it is located in a different part of the California Code.

<sup>72</sup> Cal. Penal Code §§ 17, 19.

<sup>73</sup> Cal. Health & Safety Code § 121365.

<sup>74</sup> Cal. Health & Safety Code § 120300.

<sup>75</sup> Cal. Health & Safety Code § 120280.

<sup>76</sup> Cal. Health & Safety Code § 120280.

<sup>77</sup> Cal. Health & Safety Code § 120280.

<sup>78</sup> Cal. Health & Safety Code § 3285 (1957).

<sup>79</sup> Cal. Health & Safety Code § 3285 (1957 & 1993).

<sup>80</sup> Compare Cal. Health & Safety Code § 3285(f) (1957 & 1993) with § 121365 (2003).

<sup>81</sup> Cal. Health & Safety Code § 3285(f) (1957).

compliance with the order but no longer than six months.<sup>82</sup> The district attorney was required to prosecute if requested by the health officer.<sup>83</sup>

California law appears to have authorized state funding to counties for treatment of TB patients since 1915.<sup>84</sup> The 1957 law provided for the state health department to lease “any facilities it deems necessary to care for persons afflicted with active contagious tuberculosis who violate the quarantine or isolation orders of the health officer,” with the cost of care in state-leased facilities deducted from the county subsidy.<sup>85</sup>

## **1975 amendments**

In 1975, the legislature adopted a provision authorizing CDHS to distribute an annual subvention to local health departments that maintain a TB control program consistent with standards and procedures established by the department. This provision remains in the TB control law to this day.<sup>86</sup>

## **1993 reforms: AB 803 (Gotch)**

The intent of the Gotch bill was to modernize the California TB control statute. TB incidence had increased significantly in the United States in the 1980s, and there was a prevailing sense that California needed to redouble its TB control efforts. Additionally, it was recognized that the society expected and the courts would eventually require that TB patients receive procedural due process protections not unlike those afforded mentally ill persons.

In 1992, a California TB Elimination Task Force (CTETF) was convened by CDHS, CCLHO, the California Tuberculosis Controllers Association, and the American Lung Association of California. In 1994, CTETF released a Strategic Plan for Tuberculosis Control and Elimination with a number of recommendations for improving TB control in California. AB 803 was introduced as a direct consequence of CTETF. The Health Officers Association of California (HOAC) sponsored the bill, and supporters included CCLHO and ALAC. The resulting law comprises the bulk of the current TB control statute.

From the early stages of the legislative process, AB 803 included the procedural due process provisions relating to TB orders and detention that, with minor modifications, are a key feature of the current statute.<sup>87</sup> While authorizing health officers to detain persons without a court order, the bill also included a provision, new to California TB control law, authorizing local health officers to apply to court for civil enforcement of TB orders. It deleted the requirement in existing law that local health officers notify the district attorney of violations of TB orders, but kept the existing provision making it a misdemeanor to violate a TB order and

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<sup>82</sup> Cal. Health & Safety Code § 3351 (1957 & 1993).

<sup>83</sup> Cal. Health & Safety Code § 3355 (1957 & 1993).

<sup>84</sup> See *County of Sacramento v. Chambers*, 33 Cal. App. 142 (1917) (finding that a state subsidy to counties for TB treatment was not an unconstitutional transfer of a state function to a local government or a gift of public funds).

<sup>85</sup> Cal. Health & Safety Code § 3295 (1957). The current law appears to provide for CDHS to lease the facilities it deems necessary for persons convicted of a § 120280 misdemeanor. See Cal. Health & Safety Code § 121390 (2003).

<sup>86</sup> Cal. Health & Safety Code § 121450 (2003).

<sup>87</sup> AB 803 was introduced as a spot bill. It was replaced on April 15, 1993 with the procedural due process provisions. This paper refers to the April 15th version as the original Gotch bill.

requiring prosecution if requested by the health officer.<sup>88</sup> Thus, AB 803 appears to have originally been intended to give health officers a range of enforcement options. The Assembly Committee on Health report on AB 803 indicated that Assemblyman Gotch intended to establish a procedure “more in tune with current civil rights expectations that allow for gradually more restrictive measures for persistently nonadherent patients who threaten to spread infection because they do not respond to specific treatment orders. . . .” The Assembly Ways and Means Committee analysis stated that the new procedures for enforcement would generate savings by “preventing the use of misdemeanor penalties and incarceration in jail.”

However, after AB 803 passed the Assembly, the Senate deleted the procedural due process provisions and the mandatory referral for prosecution provision was put back in.<sup>89</sup> The ACLU objected and the procedural due process provisions were reinstated, but mandatory referral for prosecution was not taken out.<sup>90</sup> Assemblyman Gotch apparently continued to prefer civil proceedings. The final Senate committee report on the bill quoted him as stating, “Isolation of an infectious TB patient is not an accusation, but rather to be used by medical professionals to treat TB and preserve the public’s health.”<sup>91</sup>

There were many other amendments during the legislative process, particularly relating to the reporting obligations of health facilities and the authority and responsibility of CDHS, local health officers, and the state Department of Corrections with respect to prisoners with TB.

### **1994 clean-up legislation: AB 804 (Gotch)**

AB 804 was introduced at the same time as AB 803. HOAC sponsored and CCLHO supported it. AB 804 originally addressed financing and reimbursement issues. Early versions required CDHS to develop a plan for housing and treatment facilities for TB patients, since a key CTETF concern was prolonged acute care hospitalization of TB patients due to the lack of community-based housing facilities. There were also provisions for CDHS to create a plan for regional detention facilities. However, this language was watered down during the course of the legislative process and eventually removed altogether. After AB 803 was enacted, the legislature used AB 804 to make minor wording changes in the new statute. AB 804 was enacted in September 1994.

### **Funding for housing and detention of TB patients**

Numerous efforts were made over the next several years to pass legislation authorizing CDHS to provide funding for local health departments for facilities to house homeless TB patients. In the 1995–1996 session, housing and detention facility provisions similar to the early versions of AB 804 were proposed in AB 476 (Escutia). At the same time, AB 553 (Escutia) proposed a CDHS contingency fund for secured housing for persistently nonadherent TB patients. One purpose was to keep patients needing detention out of local jails. Both bills died at the end of 1996, apparently because legislators concluded that CDHS already had the authority to fund local TB control efforts, and funds for housing homeless and persistently nonadherent TB patients had been appropriated in annual budget acts during this period. In 1997, SB 274

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<sup>88</sup> See AB 803, as amended April 15, 1993.

<sup>89</sup> See AB 803, as amended July 12, 1993.

<sup>90</sup> See AB 803, as amended July 17, 1993.

<sup>91</sup> Senate Rules Committee, Committee Report for 1993 California Assembly Bill No. 803 (September 9, 1993).

(Watson) proposed authorizing CDHS to provide funds to local health departments for secured housing for persistently nonadherent TB patients, so that the local agencies could implement their civil detention orders. Once again, the legislation did not pass. However, the 1997–1998 budget trailer bill, SB 391 (Solis), included a provision setting a deadline of January 1, 1998 for CDHS to identify sites throughout the state where each local health department should send persistently nonadherent TB patients.<sup>92</sup>

### **Prohibition on detaining TB patients in correctional facilities**

SB 391 also provided that individuals detained through “the tuberculosis control, housing, and detention program” could not reside in correctional facilities, nor could funds under that program be disbursed to correctional facilities. However, this prohibition “should not be interpreted to prohibit the institutionalization of criminals with tuberculosis in correctional facilities.”<sup>93</sup> The SB 391 Assembly and Senate Committee Reports stated that the effect of this provision was to “stipulate that individuals housed through a specified tuberculosis control program shall not reside in correctional facilities, while not precluding the incarceration of criminals under law.” The meaning of this language, codified in section 121358, was considered by the Fifth District Court of Appeal in the *Souvannarath* case.

### **V. The Souvannarath Case**

The *Souvannarath* decision has generated considerable attention in the public health community. The underlying factual situation is troubling, and the mistakes made by the health department are sobering. Moreover, the court’s interpretation of the statutory prohibition on detaining TB patients in jail facilities has been controversial.

### **Factual background**

The Court of Appeal found the facts to be as follows: Hongkham Souvannarath was a monolingual Laotian immigrant with multi-drug-resistant TB. In January 1998, she was diagnosed with TB and ordered by the Fresno County health officer to undergo treatment at a local chest clinic. In July 1998, the health officer concluded that she was not complying with the treatment program. He served her with an examination order requiring appearance at the chest clinic. When Souvannarath failed to appear, the health officer issued another order directing that she be detained in county jail until completion of a prescribed course of treatment (for up to two years). The order did not contain the findings and notices required by the TB control statute for detention orders. The next day, Souvannarath was served with the order and simultaneously removed at gun point to the county jail. There, she was strip-searched and was placed in a safety cell for three days because a Hmong officer interpreted her statement that she was afraid to die as a suicide threat. The safety cell had no water, heat, light, bed, or toilet. Thereafter, Souvannarath was housed in the infirmary where she was expected to clean up after other inmates. Souvannarath was eventually placed in the general inmate population where she was subject to the same treatment as the other inmates. She had limited visiting hours with her family, she could make only collect calls, and she was shackled whenever she was taken from the jail to outside treatment facilities. Although the TB control statute requires a post-detention

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<sup>92</sup> Cal. Health and Safety Code § 121358.

<sup>93</sup> Cal. Health and Safety Code § 121358.

judicial proceeding within at least sixty days, the health officer did not apply for court review for ten months. The costs of Souvannarath's detention in county jail were paid from funds other than the state TB control subvention. When the health officer finally applied for judicial review, the parties negotiated an agreement for Souvannarath's unconditional release.

Upon her release, Souvannarath brought two separate court cases. The first was an action for monetary damages for various alleged civil rights and constitutional violations in connection with her treatment and detention. That case settled before trial for \$1.2 million.<sup>94</sup> In the second case, Souvannarath asked the court to order the county to stop using the county jail as a civil detention site for persistently nonadherent TB patients. The trial court ruled in Souvannarath's favor,<sup>95</sup> and the Fifth District California Court of Appeal affirmed.<sup>96</sup> The Fifth District's holding is binding on all lower state courts.

### **Jail prohibition issue**

The Court of Appeal analyzed California Health and Safety Code section 121358, which provides:

- (a) Notwithstanding any other provision of law, individuals housed or detained through the tuberculosis control, housing, and detention program shall not reside in correctional facilities, and the funds available under that program with regard to those individuals shall not be disbursed to, or used by, correctional facilities. This section shall not be interpreted to prohibit the institutionalization of criminals with tuberculosis in correctional facilities.
- (b) The department shall work with local health jurisdictions to identify a detention site for persistently nonadherent tuberculosis patients appropriate for each local health jurisdiction in the state. The department shall notify all counties of their designated site by January 1, 1998.

The court concluded that the statute prohibits the use of the county jail as a civil detention site for patients like Souvannarath. The court began its analysis by deciding that the word "program" in Section 121358(a) refers to a two-level, statewide program for TB control which the legislature enacted in the TB control statute. In the court's view, civil detention by local health officers is part of this "program," and is therefore subject to the jail prohibition. Stated differently, the jail prohibition limits the discretion that section 121366 previously gave local health officers to detain TB patients in "a hospital or other appropriate place," which could include a jail.

Second, the court determined that the legislative history supported its interpretation. The Legislative Counsel's Digest accompanying SB 391 (the legislation that enacted section 121358) stated that: "[E]xisting law requires the department and each county to administer a tuberculosis control, prevention, and detention program. This bill would prohibit individuals housed under this program, other than criminal offenders, from residing in correctional facilities." The court

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<sup>94</sup> See John Roemer, "Reclaiming a Soul," Daily Journal, Apr. 30, 2001.

<sup>95</sup> *Souvannarath v. Hadden*, No. 633425-4 (Cal. Super. Ct. June 10, 1999).

<sup>96</sup> *Souvannarath v. Hadden*, 95 Cal. App. 4<sup>th</sup> 1115 (2002).

read the phrase “this program” in the second sentence to include detentions authorized under the TB control statute.

Fresno County countered that the proponents of section 121358 merely intended to prevent counties from using CDHS funds for detention in correctional facilities. The court rejected this argument by closely scrutinizing the wording and sentence structure of the statute. It found that the jail prohibition and the funding prohibition in 121358(a) were separate prohibitions with equal dignity. The county’s interpretation would edit out the jail prohibition language. Moreover, it concluded that the last sentence of 121358(a), which saves the institutionalization of criminals in correctional facilities from the jail prohibition, would be unnecessary if the statute only contained a funding prohibition. Undeterred, the county argued that statements in the Department of Finance and CDHS Enrolled Bill Reports (internal administration reports on SB 391), which cited health officers’ objections to including a jail prohibition in the bill, could indicate that the administration saw the final version of the bill as exclusively a funding prohibition. The court rejected this approach too, concluding that the statements were inconsistent with the balance of the legislative history and the health officers’ concerns were most likely disregarded by the legislature.

### **Procedural due process issue**

One part of the Court of Appeal decision is “unpublished,” which means that it cannot be used as precedent in any California court. This part of the decision addresses the county’s future compliance with the TB control statute. After Souvannarath filed her lawsuit, the county developed new forms and documents to bring itself into compliance. It claimed in court that these actions made a judicial order requiring compliance unnecessary. The Court of Appeal disagreed. It expressed doubt that the county’s actions were anything more than paper compliance, since there was minimal evidence that the health department had changed its standard operating procedures to implement the new forms. The court’s suspicion was aroused by testimony from health department officials demonstrating ignorance of the TB control statute and the basic concepts of procedural due process. The court said that public health officials “must be held to know the basic provisions of the laws which empower them and govern the exercise of their particular offices and duties.”<sup>97</sup>

## **VI. Questions about the California TB control statute**

By and large, California’s TB control statute represents a coherent and comprehensive scheme. However, there are some areas where the statutory language is unclear. In addition some parts of the statutory scheme have been thrown into question in the *Souvannarath* decision.

### **Multiple enforcement mechanisms**

There are three enforcement mechanisms that a health department may be able to use to ensure that a patient complies with a TB-related order: administrative, civil, and criminal. The language and history of the statute leave it unclear whether administrative enforcement actually

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<sup>97</sup> *Souvannarath v. Hadden*, No. F035228, at 14 (Cal. Ct. App. Jan. 3, 2002) (reprinted at <http://www.court.info.ca.gov/opinions/documents/F035228.PDF>).

exists, and whether the three mechanisms are alternatives with equal status or whether each is intended to be used in different circumstances. The discussion of enforcement mechanisms that follows uses the example of a section 121365(e) order for detention of a persistently non-adherent patient with active tuberculosis disease.

Administrative Enforcement: Section 121366 states that a health officer may detain a persistently nonadherent patient in a health or other treatment facility without first obtaining a court order. It is possible that this statement means that the legislature has granted the health officer the coercive power of the state (i.e., the power to forcibly compel an individual's behavior against their will). When administrative agencies are granted such a power, they have what is called "summary enforcement power."<sup>98</sup> Administrative agencies usually do not have summary enforcement powers. Instead, they generally must apply to a court to enforce their administrative orders.

Civil Enforcement: Section 121365 provides that the local health officer may "make application to a court for enforcement" of any orders issued by that officer.<sup>99</sup> In other words, if a patient violates a detention order, the health officer can "borrow" the enforcement authority of a civil court by asking it to issue a ruling requiring that the patient follow the order. If the patient were to violate the court ruling, the patient would be guilty of contempt of court, which is a misdemeanor in California.<sup>100</sup>

Criminal Enforcement: The criminal enforcement mechanism is outlined in sections 121365, 120280, and 120300. Section 121365 requires the health officer to notify the district attorney upon receiving information that an order has been violated.<sup>101</sup> Section 120280 makes the violation of an order a misdemeanor. Section 120300 requires the district attorney to prosecute violations. If convicted, the individual may be sentenced for up to two years in a penal institution.

There are at least two problems generated by the statutory language regarding enforcement. First, the statutory scheme does not make it clear whether health officers possess summary TB control enforcement powers.<sup>102</sup> The statement in section 121366 that health

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<sup>98</sup> Since public health officials are not peace officers, the actual exercise of summary enforcement power would require the cooperation of local law enforcement, most likely the sheriff's department.

<sup>99</sup> Cal. Health & Safety Code § 121365.

<sup>100</sup> See Cal. Penal Code § 166(a)(4).

<sup>101</sup> See Cal. Health & Safety Code § 121365 ("Upon the receipt of information that any order has been violated, the health officer shall advise the district attorney of the county in which the violation has occurred, in writing, as shall submit to the district attorney the information in his or her possession relating to the subject matter of the order, and of the violation or violations.").

<sup>102</sup> There are some California court decisions and Attorney General opinions stating that public health officials can initiate summary enforcement proceedings without a court order. A 1919 Court of Appeal decision stated that summary quarantine by a health officer without a prior judicial order was not improper. (*In re Johnson*, 40 Cal. App. 242 (1919)). It was apparently common practice in California during the first half of the twentieth century for health officials to summarily enforce quarantine and treatment orders with the help of law enforcement personnel, and even when they doubted the wisdom of such orders, the courts do not appear to have questioned the summary enforcement process. (See, e.g., *In re Martin*, 83 Cal. App. 2d 164 (1948) and cases cited therein.) In a 1957 opinion dealing primarily with the appropriateness of isolating persistently nonadherent TB patients in jail, the California Attorney General said that "it has long been established that health officers have the power to quarantine and isolate afflicted persons without resort to court procedures." (30 Atty. Gen. Ops. 229 (1957)). In *Application of Halko*, 246 Cal. App. 2d 553 (1966), a patient detained at Mira Loma Hospital pursuant to an isolation order escaped. He was

officers may detain a patient without a prior court order implies the existence of summary enforcement power. However, the presence of explicit civil and criminal enforcement mechanisms in section 121365 could be interpreted to signify that no other enforcement mechanisms exist.<sup>103</sup>

Second, the statute does not indicate when civil or criminal judicial enforcement mechanisms should be pursued. The choice between proceeding on the civil or criminal side is not trivial. A criminal conviction carries a lifelong stigma. The initiation of criminal prosecution redirects the government's interaction with the TB patient away from the humane goals of individual treatment and community protection and toward punishment. A patient who is convicted of a misdemeanor becomes a criminal detainee, and thus loses some of the due process protections that the TB control statute provides to civil detainees (including the 90-day judicial review of continued detention under section 121366, the limits on duration of detention under section 121368, and the involuntary treatment prohibitions in sections 121365 and 121369).

Additionally, it is conceivable that the constitutionality of criminal prosecution for violation of a TB order could be challenged. In *People v. Lockheed Shipbuilding and Construction Company*, the Court of Appeal held unconstitutional a statutory scheme under which noncompliance with an administrative order regarding industrial injuries was made a misdemeanor.<sup>104</sup> The statute did not provide an opportunity for administrative or judicial review

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captured, convicted of a misdemeanor, and returned to Mira Loma. The health officer began serving successive six-month isolation orders. The patient filed a habeas corpus petition alleging that continuous detention without judicial review denied due process. The court denied the petition on the grounds that the statutory provision for isolation was reasonable and necessary to protect public health. The health officer's administrative enforcement authority was not addressed directly, but the holding is consistent with the decisions cited above in downplaying the judicial role in issuance of TB orders. On the other hand, in 1960, the Attorney General was asked whether a local health officer could initiate civil proceedings to enforce a TB order. (36 Atty. Gen. Ops. 28 (1960)). Without referring to the 1957 opinion, the Attorney General's office said health officers had two enforcement options. They could initiate civil proceedings in court to obtain an injunction against violating the order. (An injunction is a court order directing a party to do or refrain from doing a particular act.) If the individual failed to comply, they could return to court to obtain a civil contempt order. Alternatively, if the person failed to comply with the health order, the health officer could ask the district attorney to prosecute the person for a misdemeanor violation. (If convicted and confined, the person could dispute the validity of the order in a habeas corpus proceeding, which is a special court proceeding to determine the validity of a confinement.) According to the Attorney General, the second option was preferable because less expensive and time-consuming (presumably because only one court proceeding was needed to confine a persistently nonadherent person). Although the opinion does not say so, one could infer that between 1957 and 1960, the Attorney General changed his mind and concluded that health officials could not enforce their orders administratively.

<sup>103</sup> Uncertainty about administrative enforcement is not unique to California. A commentator has noted similar questions raised by health officers about Washington state's TB statute. See Vincler & Gordon, *Legislative Reform of Washington's Tuberculosis Control Law: the Tension between Due Process and Protecting Public Health*, 71 Washington Law Review 989 (1996). The Washington Attorney General specifically declined to offer an opinion as to whether Washington law authorized administrative enforcement. He concluded that the TB statute probably did so, but he could not predict whether the courts would uphold it. See 20 Ops Wash. Atty. Gen. 5 (1993).

<sup>104</sup> 35 Cal. App. 776 (1973). The California Labor Code authorized the Division of Industrial Safety to make just and reasonable orders respecting the cause of industrial injuries. There was no provision for notifying the employer or for a prior or subsequent hearing. Lockheed was prosecuted for violating an order. The court ruled that the absence of a pre- or post-order hearing denied due process. In doing so, it said that a criminal proceeding would not be an adequate substitute for a due process hearing. What seems to have troubled the court was the possibility that Lockheed would not have any opportunity in the criminal proceeding to present evidence rebutting the findings in

of the validity of the administrative order. The court held the scheme unconstitutional on due process and equal protection grounds. To be sure, the statutory scheme for TB control is different from the industrial injury scheme in *Lockheed Shipbuilding* because it provides greater due process safeguards. However, it bears some similarity in that a criminal prosecution can follow immediately on the heels of the service of the order and can short-circuit a civil hearing process. *Lockheed Shipbuilding* suggests potential vulnerability in a statutory scheme under which a civil proceeding can abruptly shift into a criminal prosecution.

The legislative history is murky as to whether civil or criminal enforcement is preferred. However, it is possible to infer a legislative preference for criminal prosecution from the fact that health officers *may* apply to court for civil enforcement of an order but *must* set the criminal process in motion by notifying the district attorney when an order is violated. If this preference for criminal enforcement is an accurate reading of the statutory scheme, it is ironic that the legislature would have enacted extensive procedural due process provisions with an intent to protect the rights of TB patients in a way that is “more in tune with current civil rights expectations” while simultaneously creating an easy way for local officials to opt out of these provisions.

It might be possible to reconcile these provisions through creative interpretation. For example, one might read section 121365 as requiring a health officer to bring violations of *court* orders (rather than *health* orders) to the attention of the district attorney. This would enable the health officer to keep proceedings on the civil side up to the point where a patient has defied a court order. In addition, one might interpret the summary enforcement language in section 121366 as creating an administrative enforcement scheme that is only available when a patient has violated an existing detention order. A health officer would have to follow the civil or criminal route for violations of all other TB-related health orders (such as isolation, direct observed therapy, and exclusion from work.) Unfortunately, while interpretations like these might lead to outcomes somewhat more consistent with the apparent legislative intent, they struggle for consistency with the literal wording of the statute.

It may be worth considering whether to modify the TB control statute to clarify the intent of these provisions. For example, the local health officer’s summary enforcement power with respect to detention could be clearly indicated by adding a provision to section 121366 to the effect that, “Local law-enforcement agencies shall, if requested by the local health officer, carry out the local health officer’s detention order.” The local health officer could be given discretion to choose between civil and criminal enforcement if section 121365 were modified to provide that, “The local health officer may, in his or her discretion, make application to a court for enforcement of the orders or, upon receipt of information that any order has been violated, advise the district attorney of the county in which the violation has occurred.”

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the administrative order. (Citing *In re Halko*, 246 Cal. App. 2d 553 (1966), the court analogized Lockheed’s predicament to that of a TB patient facing detention. According to the court, the TB patient at least had the right to obtain an examination by a physician of his own choosing as a way to contest the order.) The court also concluded that the statutory scheme denied equal protection because it authorized the Division of Industrial Safety to create “special legislation” defining the actions of a single employer as a crime.

## Placing persistently nonadherent TB patients in correctional facilities

The appropriateness of using jails to detain persistently nonadherent patients has long been debated in California.<sup>105</sup> However, the *Souvannarath* case represents the first time the courts have blocked health officers from doing so. The case might not have a great deal of practical significance if non-correctional facilities were available in every county for detention of persistently nonadherent TB patients. However, it appears that non-correctional facilities are only readily available in Los Angeles County.<sup>106</sup>

Regardless of the public policy debate surrounding the use of jails to detain persistently nonadherent patients, the Court of Appeal's interpretation of section 121358 is open to criticism. The interpretation turns on the notion that the word "program" in the jail prohibition refers to all the state and local TB control activities authorized by the TB control statute. Actually, the TB control statute contains separate references to the state program for the control of TB and to local TB programs.<sup>107</sup> The fact that CDHS is named the "lead agency" does not merge the two.<sup>108</sup> Arguably, section 121358's reference to the "program" in the singular is a reference only to the state program. If the legislature had meant that all local TB control activities would be covered by 121358, it might more logically have referred to "programs." If accepted by the courts, this alternate interpretation would collapse the jail prohibition into the funding prohibition.

Since *Souvannarath* was civilly detained, the Court of Appeal only decided whether the jail prohibition applied to civil detention. However, the jail prohibition could be interpreted to apply to *any* detention arising out of an order authorized under the TB control statute, including criminal detention. In other words, the "program" could be viewed as embracing criminal prosecution as well as civil detention. The phrase "notwithstanding any other provision of law" in section 121358 could be read as superseding the provision in section 120280 allowing confinement of the convicted person in a penal institution. Convicted TB patients would not be released from detention because section 120280 also allows their confinement in other appropriate facilities or dwellings approved by the health officer.<sup>109</sup> If this interpretation of the statute were adopted by the courts, it would prompt a crisis in counties that do not have non-correctional facilities available for detention. The risk of such an outcome could be forestalled by amending the final sentence of section 121358(a) to provide that: "This section shall not be interpreted to prohibit the institutionalization in correctional facilities of persons convicted of a violation of section 120280."

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<sup>105</sup> The Attorney General's 1957 TB opinion said that local health officers could quarantine individuals with active TB in a local jail facility if "no better suitable facility" is available for such purpose. For judicial opinions approving quarantine of persons with venereal disease in jail facilities, see *In re Martin*, 83 Cal. App. 2d 164 (1948), and cases cited therein; see also 4 Ops. Atty. Gen. 146 (1944).

<sup>106</sup> Two facilities in California accept TB patients for long-term detention and treatment—Los Angeles County's High Desert Hospital and Cordilleras Mental Health Center, a privately-operated facility in San Mateo County primarily serving mental health patients. In preparing this article, the authors received mixed information about the practical and financial impact on counties in other parts of California of transporting TB patients to these facilities for detention.

<sup>107</sup> Compare § 121350 with 121455.

<sup>108</sup> In fact, § 121357 makes CDHS the lead agency only at the state level.

<sup>109</sup> The savings clause for institutionalization of criminals would be interpreted only to apply to persons who are criminals first and TB patients second, that is to clarify that § 121358 does not require that prisoners be released to non-correctional settings if they contract TB.

## Involuntary testing and treatment

The involuntary testing and treatment prohibitions in the TB control statute were added to the Gotch bill at different points in the legislative process, and perhaps as a result, they do not quite fit with one another. Section 121369(b), which was in the original version of the Gotch bill, states that nothing in sections 121365, 121366, and 121367 “shall be construed to permit or require the forcible administration of any medication without a court order.” However, sections 121365 (b) and (c) (relating to health orders to complete treatment and to follow a course of DOT) prohibit health departments from the “forcible or involuntary administration of medication.” These provisions were inserted into the Gotch bill when it was amended to address the ACLU’s concerns.

The provisions relating to involuntary treatment are legally problematic. If the purpose of section 121369(b) is to *authorize* civil courts to issue or enforce involuntary treatment orders, the law should be explicit. As it stands, the language of section 121369(b) only *implies* that civil courts have the authority to issue and/or enforce involuntary treatment orders. The statute provides no mechanism for a health officer or other interested party to petition a court to issue an involuntary treatment order, nor does it provide a mechanism for a health officer to issue an involuntary treatment order that might be reviewed by a court, nor does it provide a mechanism for anyone to implement an involuntary treatment order once it has been issued. Sections 121365(b) and (c) provide an added complication. These sections expressly prohibit involuntary treatment under health orders to complete treatment or to follow a course of DOT, and it is not clear whether section 121369(b) is meant to override these prohibitions. Because the statute is unclear as to the status of and procedures for compelled treatment, the most viable way to force someone to take his or her medications would be to convict the patient of a misdemeanor in criminal court. Because prisoners have diminished constitutional liberty interests, correctional facilities are generally able to administer involuntary treatment.<sup>110</sup>

One solution to this problem would be to amend sections 121365(b) and (c) to conform with section 121369(b) by prohibiting involuntary treatment “without a prior court order.” An amendment could include detailed procedures for obtaining such a court order.

Another concern regarding involuntary treatment relates to anergy testing.<sup>111</sup> Section 121365(a) which was added by the Gotch cleanup bill AB 804, states that the local health officer may not “mandate involuntary anergy testing.” Although it is apparently no longer a recommended diagnostic tool, anergy testing is no more intrusive than other skin tests that the health officer has the authority to perform. Generally, the legislature defers to the professional judgment of health professionals regarding the use of diagnostic procedures. It is troubling to have the legislature dictate to health officers specific diagnostic tools that may or may not be used.

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<sup>110</sup> See the discussion of the Eighth Amendment in Section I above.

<sup>111</sup> Individuals with suppressed immune systems may not respond normally to conventional tuberculin skin tests. Anergy testing is a way of gauging their responsiveness to antigen skin tests by administering standard skin tests for childhood diseases.

## **Procedural due process for non-detention orders**

A curious feature of the TB control statute is the limited procedural due process provisions for non-detention orders, such as examination, treatment, DOT, workplace exclusion, and isolation orders. For example, the notice of legal rights and subsequent hearing provisions of sections 121367 and 121366 only apply to detention orders. Although the statute provides for notice,<sup>112</sup> it lacks a mechanism for individuals to obtain an administrative or judicial hearing as well. This absence may create a constitutional vulnerability.

## **VII. Conclusion**

TB control officials should make every effort to secure voluntary compliance with their requests. Doing so respects individual self-determination, maximizes resources, and maintains good community relations. Incentives and warnings can be used to cajole persistently nonadherent individuals. However, there will always be some patients who are unable or unwilling to obey requests made by TB officials. In addition, the highly infectious character of active TB means that immediate enforcement mechanisms may sometimes be needed for individuals who, if enough time were available, could be persuaded to submit voluntarily.

As long as tuberculosis remains at current levels in California, the TB control statute should provide local health officials with an effective tool kit to achieve the foregoing purposes in a manner consistent with individual rights. However, if the overall incidence or number of serious outbreaks increased dramatically, weakness in the statutory scheme could adversely affect the public health community's response capability. Uncertainty about statutory interpretation, heavy reliance on judicial review and enforcement, and legal restrictions on detention facilities could bog down the program. While such an increase is unlikely, events like the unfolding SARS outbreak are a reminder that communicable diseases do not stand still for human institutions.

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<sup>112</sup> See § 121364(b) (mandating notice of examination order) and 121367(a) (mandating notice of 121365 orders).