Can the COVID-19 interstate travel restrictions help lift the FDA’s blood ban?

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INTRODUCTION
Optimism among health law scholars is rare in the time of coronavirus. Yet this article suggests that the crisis might be helpful in overruling one controversial health law policy that predates the virus: the Food and Drug Administration’s (FDA’s) blood donation ban for gay and bisexual men. The blood ban was developed in response to the 1980s human immunodeficiency virus–acquired immunodeficiency syndrome (HIV-AIDS) outbreak. Scholars have criticized this policy for years now as being outdated and unconstitutional. A step in the right direction occurred on April 2, 2020, when the FDA issued new recommendations to blood banks changing the 1-year deferral for donations from men who have sex with men to a 3-month deferral due to the shortage in the blood supply and after a public outcry on the issue. Yet, the policy is still problematic as it expresses disdain about sex between men. In response to the COVID-19 pandemic, states have issued travel restrictions on travelers from severely impacted states. This article argues that outside of the dwindling blood supply, experience with stigma as a result of the travel restrictions has the potential to change public perceptions about the ban. Both policies, the blood ban and the COVID-19 interstate travel restrictions, are necessary for the short term, are based on activities connected with a disease, and create stigma with respect to the affected populations. Although no one can imagine the travel restrictions continuing after the pandemic is under control, the FDA’s ban has existed for decades after the end of the AIDS crisis. Drawing parallels between the policies and their stigmatizing effects could help mobilize the public against the blood ban and eventually have it lifted entirely.

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THE FDA’S BLOOD BAN

On March 12, 2020, during the early days of the coronavirus pandemic before shelter-in-place orders had been enacted, the Red Cross turned to Twitter in an effort to encourage the public to donate blood ‘in a time where blood centers throughout the country have experienced a significant drop in donations due to #COVID19.’\(^1\) ‘Do not let #COVID19 stop you. If you are healthy, your blood donation is needed. Donating blood is safe and people should not hesitate to give’, the tweet thread declared.\(^2\) The Red Cross’s original tweet went viral: it was ‘liked’ more than 6900 times and shared more than 2800 times.\(^3\) Some people who shared the tweet, however, had a point they wished to get across to the Red Cross and the FDA, the regulator in charge of the blood donation policies. Kevin Maisto, for example, shared the public service announcement for donation with his own caption: ‘As a healthy gay man, I cannot help. Sorry!’\(^4\) Maisto and others\(^5\) were referring to a nearly four-decades-old public health policy known as the gay blood ban.

The second half of the 1980s was an era in which a connection between the HIV-AIDS, gay sex, and blood transfusions was first discovered. This was also a time that HIV testing and blood detection tools were nascent and underdeveloped. Therefore, as a necessary measure to prevent the spread of the virus, in 1985, the FDA recommended that blood banks indefinitely defer blood donations from men who had sex with men (MSM), even one time, since 1977.\(^6\) Nowadays, however, things are far different with regard to blood testing as well as HIV treatment and detection. Technological advancements in blood monitoring have significantly decreased the chances of contracting HIV through a blood transfusion from 1 in 2500 prior to 1985 to about 1 in 1.47 million

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1 American Red Cross, Over the Past Week…., Twitter, https://twitter.com/redcross/status/1238195707074547712 (Mar. 12, 2020). A week later, the Red Cross tweeted again urging potential donors to give blood, stating assuaging concerns related to recent social distancing instructions: ‘Through Mar. 18, nearly 4500 blood drives have been canceled due to #coronavirus concerns, resulting in over 150,000 fewer blood donations. Yesterday, the @Surgeon_General stressed the importance of giving blood’. American Red Cross, Through Mar. 18… Twitter, https://twitter.com/RedCross/status/1240648456055730176 (Mar. 19, 2020).

2 American Red Cross, Do Not Let #COVID19 Stop You…., Twitter, https://twitter.com/RedCross/status/1238197024257970176 (Mar. 12, 2020).

3 American Red Cross, Over the Past Week, supra note 1.

4 Kevin Masito, As a Healthy Gay Man, Twitter, https://twitter.com/kevinmaisto/status/1238518717753016320 (Mar. 13, 2020).

5 For example, legal scholar Anthony Kries wrote: ‘I’d love to help. I have a rarer blood type, I am exceedingly healthy, and I am a risk adverse individual who takes PrEP. Should be a great candidate to donate, right? Only one problem: my government bans me from giving blood because of my sexual orientation’, Anthony Michael Kreis, Id Love to Help…., Twitter, https://twitter.com/AnthonyMKreis/status/1238836790351577088 (Mar. 14, 2020); legal scholar Brian Soucek wrote ‘It’s almost as if evidence-based medical decisions might come in handy in a pandemic…’, Brian Soucek, It’s Almost As If…, Twitter, https://twitter.com/BRSoucek/status/1238575566959206402 (Mar. 13, 2020); and legal scholar Ari Waldman wrote in response to another Red Cross PSA about needing more blood donations: ‘I’d love to, but I’m a healthy gay man in a monogamous relationship, so I’m not allowed’, Ari Ezra Waldman, Id Love to, But…., Twitter, https://twitter.com/ariezrawaldman/status/1242051614610948097 (Mar. 23, 2020).

6 Brian Soucek, The Case of the Religious Gay Blood Donor, 60 WM. & MARY L. REV. 1893, 1899 (2019).
transfusions in 2015.7 HIV testing is now ubiquitous,8 and so are other novel means to prevent HIV infection, such as Pre-Exposure Prophylaxis (PrEP).9 With about 1.1 million Americans living with HIV today, with 39,000 new infections per year, and with annual numbers of new diagnoses having decreased 9% from 2010 to 2016,10 HIV remains an issue in the United States, but it is not close to what it was at the time the blood ban was put in place.

The FDA’s blood ban was amended in 2015 to recommend the deferral of blood donations from MSM in the year prior to the donation.11 This amendment was the fruit of years of lobbying and advocacy efforts by organizations such as the American Association of Blood Banks, America’s Blood Centers, the American Red Cross, and the American College of Physicians.12 Still, many scholars have argued against the modified blood ban, contending that it is discriminatory, unnecessarily stigmatizing, and unconstitutional.13

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7 Ctr. For Biologics Evaluation & Research U.S. Dep’t of Health & Human Servs., Revised Recommendations for Reducing the Risk of Human Immunodeficiency Virus Transmission by Blood and Blood Products 2 (2015), https://www.fda.gov/media/92490/download (accessed Apr. 24, 2020).
8 HIV Testing Locations, HIV.gov, https://www.hiv.gov/hiv-basics/hiv-testing/learn-about-hiv-testing/where-to-get-tested (accessed Apr. 24, 2020).
9 PrEP is a combination antiretroviral orally administered drug, developed and manufactured by Gilead Sciences (Gilead) under the brand name Truvada, that is, up to 99% successful in preventing HIV infection. In 2004, Truvada was first approved by the US FDA to treat HIV-positive patients in combination with other antiretroviral drugs, and in 2012, the FDA licensed it for use among sexually active HIV-negative individuals for PrEP. Centers for Disease Control and Prevention, PrEP, CDC.Gov, https://www.cdc.gov/hiv/basics/prep.html (page last reviewed Dec. 3, 2019).
10 Centers for Disease Control and Prevention, HIV Basic Statistics, CDC.com, https://www.cdc.gov/hiv/basics/statistics.html (page last reviewed Mar. 20, 2020).
11 The FDA also recommends to ‘defer for 12 months from the most recent contact a female who has had sex during the past 12 months with a man who has had sex with another man in the past 12 months.’ See: US Food and Drug Administration, Revised Recommendations for Reducing the Risk of Human Immunodeficiency Virus Transmission by Blood and Blood Products—Questions and Answers, https://www.fda.gov/biologicsbloodvaccines/bloodbloodproducts/questionsaboutblood/ucm108186.html (accessed Feb. 2, 2018).
12 Adam R. Pulver, Gay Blood Revisionism: A Critical Analysis of Advocacy and the ‘Gay Blood Ban’, 17 LAW & SEXUALITY 107, 118–9 (2008); AABB, Am.’s Blood Ctrs., & Am. Red Cross, Joint Statement Before the Advisory Comm. on Blood Safety and Availability, on Donor Deferral for Men Who Have Had Sex with Another Man (MSM), http://www.aabb.org/advocacy/statements/Pages/statement061510.aspx (accessed June 15, 2010); Hilary Daniel & Renee Butkus, Lesbian, Gay, Bisexual, and Transgender Health Disparities: Executive Summary of a Policy Position Paper From the American College of Physicians, Annals of Internal Medicine, https://annals.org/aim/fullarticle/2292051/lesbian-gay-bisexual-transgender-health-disparities-executive-summary-policy-position?_ga=2.144862003.602116236.1585115821-16814492.1585115821 (accessed July 21, 2015).
13 Dov Fox, The Expressive Dimension of Donor Deferral, 10 AM. J. BIOETICS 42, 43 (2010); Mathew L. Morrison, Bad Blood: An Examination of the Constitutional Deficiencies of the FDA’s ‘Gay Blood Ban’ 99 Minn. L. REV. 2363, 2390–1 (2015); Luke A. Boso, Dignity, Inequality, and Stereotypes, 92 WASH. L. REV. 1119, 1158–60 (2017); Michael Christian Belli, The Constitutionality of the ‘Men Who Have Sex with Men’ Blood Donor Exclusion Policy, 4 J.L. SOC’y 315, 362–75 (2003); Dwayne J. Bensing, Science or Stigma: Potential Challenges to the FDA’s Ban on Gay Blood, 14 U. PA. J. CONST. L. 485, 495 (2011); Viana Diaz, A Time for Change: Why the MSM Lifetime Deferral Policy Should Be Amended, 13 U. Md. L.J. RACE, RELIGION, GENDER & CLASS 134 144 (2013); Michael Varrige, Continuing Stigma: Why the FDA’s Policy Deferring Men Who Have Sex with Men from Donating Blood is Unconstitutional & a Poor Policy Choice, 69 SYRACUSE L. REV. 611 (2019).
Critics have also noted that evidence-based research points to lifting the ban altogether,\textsuperscript{14} an action already undertaken by several countries worldwide.\textsuperscript{15} For example, in 2018, Israel began a program to allow MSM to donate blood without any deferral period using the method of ‘double testing’. After collecting blood from a man who has sex with men, the plasma is tested for infectious diseases, and if found negative, it is separated, frozen, and kept in quarantine for 4 months. At the end of that period, the donor returns to give blood again, and if also negative, the frozen units are approved for transfusion. Under such conditions, blood safety is ensured, as donors are checked at two points in time.\textsuperscript{16} Italy, which eliminated MSM deferrals in 2001, takes a different approach, one of ‘individual risk assessment’ of ‘risky behaviors’. It assesses each potential donor’s risk with an extensive questionnaire whereby ‘sexual orientation is not a disqualifier; instead, sexual orientation is one component of individualized risk assessment’.\textsuperscript{17} Research concluded that this policy did not affect either the incidence or prevalence of HIV infection among blood donors (whether MSM or not).\textsuperscript{18}

Public outcries for lifting the blood ban due to the scarce blood supply during the COVID-19 crisis did not begin and end on social media. On March 26, 2020, a group of 15 US Democratic representatives sent a letter to the FDA urging the agency to ‘shift away from antiquated and stigmatizing donation policies’ and address a need for blood donations.\textsuperscript{19} Tapping into the connection between ameliorating the blood shortage and removing the ban has been undertaken before. In 2014, for example, it was estimated that lifting the ban altogether would add 360,600 potential male blood donors who would likely donate 615,300 additional pints of blood each year, a 4% increase from yearly blood donations.\textsuperscript{20}

On April 2, 2020, the FDA issued new recommendations to blood banks changing the current 1-year deferral for donations from MSM to a 3-month deferral due to the severe shortage in blood supply.\textsuperscript{21} The new policy, similar to the one currently in place

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\item \textsuperscript{14} Varrige, supra note 13, at 626–8; Russell K. Robinson & David M. Frost, The Afterlife of Homophobia, 60 Arizona L. Rev. 213, 249 (2018).
\item \textsuperscript{15} Soucek, supra note 6, at 1903; L. Glenn Cohen, Jeremy Feigenbaum & Eli Y. Adashi, Reconsideration of the Lifetime Ban on Blood Donation by Men Who Have Sex With Men, 312 JAMA 337, 338 (2014); Varrige, supra note 13, at 330–2.
\item \textsuperscript{16} Grace Guarnieri, Gay and Bisexual Men in Israel Can Now Donate Blood Without Delay, But Not in the U.S., Newsweek https://www.newsweek.com/gay-bisexual-blood-donors-israel-delay-776679 (accessed Jan. 10, 2018). Judy Siegel-Itzkovich, Gay Men Allowed to Donate Blood Through Magen David Adom in New Policy The Jerusalem Post https://www.jpost.com/Israel-News/Gay-men-allowed-to-donate-blood-through-Magen-David-Adom-in-new-policy-533355 (accessed Jan. 10, 2018); Itzchak Levy et al., Attitudes and Perceptions Among Men Having Sex with Men Towards a New Non-deferral Blood Donation Policy in Israel, 114 Vox Sanguinis 310, 311 (2019).
\item \textsuperscript{17} Cohen et al., supra note 15, at 338.
\item \textsuperscript{18} Barbara Suligoi et al., Changing Blood Donor Screening Criteria From Permanent Deferral for Men Who Have Sex with Men to Individual Sexual Risk Assessment: No Evidence of a Significant Impact on the Human Immunodeficiency Virus Epidemic in Italy, 11 Blood Transfus 441, 448 (2013).
\item \textsuperscript{19} Tammy Baldwin et al., Letter To The Honorable Robert M. Califf, MD https://www.baldwin.senate.gov/imo/media/doc/FDA%20MSM%20Blood%20Donor%20Deferral%20Policy%20Letter%2003262020_final.pdf (accessed Mar. 26, 2020).
\item \textsuperscript{20} Ayako Miyashita & Gary J. Gates, UPDATE: Effects of Lifting the Blood Donation Ban on Men Who Have Sex with Men, Williams Institute, UCLA School of Law (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Blood-Donation-Ban-MSM-Sep-2014.pdf (accessed Apr. 24, 2020).
\item \textsuperscript{21} US Department of Health and Human Services, Food and Drug Administration, Center for Biologics Evaluation and Research, Revised Recommendations for Reducing the Risk of Human Immunodeficiency Virus
in the UK, will allow MSM to donate blood if they have not had sexual contact within the last 3 months. It will be put in effect immediately to address the scarcity of blood, but the FDA expects that the recommendations set forth in this revised guidance will continue to apply outside the context of the current public health emergency, and intends to revise the recommendations permanently within 60 days after the national emergency is lifted.\(^{23}\)

Thus far, the new deferral policy has been accepted with mixed feelings among the LGBTQ community and advocates, who call it a ‘step in the right direction,’\(^ {24}\) yet emphasize that the modified ban still falls into the notion of a persistent aversion to sex between men in American law, which Russell Robinson and David Frost refer to as the ‘Afterlife of Homophobia.’\(^ {25}\)

**WHAT EXACTLY IS THE STIGMATIZING ISSUE WITH THE BLOOD BAN?**

Stereotypes have been defined in psychology literature as ‘cognitive structures that comprise the perceived or assumed characteristics of social groups.’\(^ {26}\) They contribute to the stigmatization of entire populations when a specific set of characteristics is assumed to exist among people, evoking social identity.\(^ {27}\) In other words, stereotypes are simple generalizations that associate certain traits with groups. For example, it is not that people believe that all Germans are efficient and nationalistic but that efficiency and nationalism are associated with German people.\(^ {28}\) The factual validity of stereotypes, that is, the discussion over whether stereotypes have a ‘kernel of truth’ to them, dates back to the 1930s.\(^ {29}\) Stereotypes can have a relationship with reality because

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Transmission by Blood and Blood Products—Guidance for Industry, FDA.gov https://www.fda.gov/media/92490/download (accessed Apr. 2, 2020).

22 National Health Services, Men Who Have Sex with Men, Blood.co.uk, https://www.blood.co.uk/who-can-give-blood/men-who-have-sex-with-men/ (accessed Apr. 24, 2020).

23 Revised Recommendations, supra note 21, at 2.

24 See, eg, the statement issued by Lambda Legal Defense and Education Fund, a well-known LGBTQ rights organization: ‘While [the new deferral policy is] a step in the right direction, the new guidance falls short of what many recognize as the optimal policy for enhancing the safety of the blood supply while ensuring it does not discriminate against gay, bisexual and transgender people—a policy based on the conduct of the potential donor rather than the donor’s sexual orientation or gender identity.’ Lambda Legal, FDA’s New Blood Donation Policy A Step In the Right Direction, But Falls Short, Lambdalegal.org https://www.lambdalegal.org/blog/20200402_new-blood-donation-policy-falls-short (accessed Apr. 2, 2020). A similar statement was made by Human Rights Campaign president Alphonso David: ‘While this change by the FDA is a step in the right direction, it still bases itself in bias rather than science,’ see: Elizabeth Bibi, HRC.org, https://www.hrc.org/blog/hrc-responds-to-the-fdas-updated-policy-on-so-called-blood-ban (accessed Apr. 24, 2020).

25 Robinson & Frost, supra note 14, at 216.

26 Richard D. Ashmore & Frances K. Del Boca, Conceptual Approaches to Stereotypes and Stereotyping, in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 1, 16 [David L. Hamilton, ed. 1981 (1985)].

27 Monica Biernat & John F. Dovidio, Stigma and Stereotypes, in The Social Psychology of Stigma 88, 89 (Todd F. Heatherton et al., eds., 2003).

28 ROGER BROWN, SOCIAL PSYCHOLOGY: THE SECOND EDITION 595 (1986).

29 The most famous first study on the topic was done by Katz and Braley in 1933, see: Daniel Katz & K. W. Braley, Racial Stereotypes of One Hundred College Students, 28 J. Abnormal & Soc. Psychology 280 (1933). This study was followed by others, see: Penelope J. Oakes, S. Alexander Haslam & John C. Turner, Stereotyping and Social Reality 19 (1994); Charles M. Judd & Bernadette Park, Definition and Assessment of Accuracy in Social Stereotypes, 100 PSYCHOLOGICAL REV. 109, 109 (1993); David J. Schneider, Modern Stereotype Research: Unfinished Business, in STEREOTYPES AND STEREOTYPING 419, 420 (C. Neil Macrae, Charles Stangor & Miles Hewstone, eds. 1996).
they make generic, exaggerated statements about social phenomena. Stereotypes, therefore, need not be incorrect to be considered stereotypes. At times, they describe real and salient attributes about social groups.

It is a fact that HIV incidence in Europe and North America occurred primarily among MSM. For example, in 2017, there were 38,281 new diagnoses of HIV infection reported in the USA—81% of the new diagnoses were males and 19% were females.

As a blanket policy, however, the blood ban preventing all MSMs from donating blood, and not only those who have HIV, generalizing about and constructing a social identity for those with ‘unworthy blood’, related to disgust, an emotion that lies at the root of much animus against gay men. This blanket policy is in place despite the advancement in blood testing that produces reliable, inexpensive, and fast results (within a matter of weeks).

The bottom line is that the blood ban has generalized and continues to generalize all MSM as potential carriers of infectious disease, namely HIV, creating a stigmatizing effect on that population, even when the new deferral policy ‘only requires’ 3 months of abstinence. This generalization is avoidable, however, by simply testing for those conditions via the current available technology.

**ENTER COVID-19 DOMESTIC TRAVEL RESTRICTIONS**

In March 2020, in the USA, as the rest of the world had already been dealing with a once-in-a-lifetime public health crisis—the COVID-19 pandemic—policies related to domestic travel had begun to appear in an effort to contain the virus’s spread. On March 12, President Trump said in a press conference that it is a ‘possibility’ that the administration could restrict travel within the USA if certain areas get ‘too hot’, that

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30 Erin Beeghly, *What Is a Stereotype? What Is Stereotyping?* 30 Hypatia 675, 677 (2015).
31 Judd & Park, supra note 29, at 110–1.
32 See generally: Chris Beyrer, Patrick Sullivan, Jorge Sanchez et al, *The Increase in Global HIV Epidemics in MSM, 27 AIDS 2665 (2013);* Patrick S. Sullivan et al., *Trends in Human Immunodeficiency Virus Diagnoses Among Men Who Have Sex with Men in North America, Western Europe, and Australia, 2000–2014* 28 *Annals of Epidemiology* 847 (2018). Alluding to the fact that most HIV incidents are most common within MSM has been a contentious issue even within the LGBTQ advocacy circles. In 2006, the Los Angeles Gay and Lesbian Center faced great criticism from other LGBTQ advocacy groups over its billboard campaign that proclaimed ‘HIV is a gay disease’. In defense, the Center’s heads explained that in Los Angeles, 75% of HIV cases are found among MSM. Nonetheless, other groups charged the Center with stigmatizing the gay men population, similar to the arguments made in the blood ban context. See: Pulver, supra note 12, at 127.
33 US Preventive Services Task Force, *Preexposure Prophylaxis for the Prevention of HIV Infection: US Preventive Services Task Force Recommendation Statement* 321 JAMA 2203, 2204 (2019).
34 Soucek, supra note 6, at 1937 and references there.
35 Three existing HIV tests are used to detect HIV: (i) antibody tests in blood or saliva that can take anywhere from 3 to 12 weeks to detect HIV. Those are inexpensive tests that can and are today available for in-home use; (ii) a combination HIV antibody/antigen test, which is faster and produces results within approximately 2–6 weeks. Those tests are performed in a lab; (iii) the nucleic acid test, which can detect HIV in as little as 7–28 days after exposure. Currently these tests are the most expensive and therefore not as popular; however, due to rapid technological advancement, they might become more commonly used in the not-so-distant future. See: Varrige, supra note 13, at 626–227.
is, where percentages of coronavirus are higher compared with those of the rest of the country.36

The Supreme Court acknowledged that although ‘the word “travel” is not found in the text of the Constitution . . . the “constitutional right to travel from one state to another” is firmly embedded in our jurisprudence’, and is considered a fundamental right.37

Fundamental rights are not absolute and are balanced against compelling state interests in preserving the nation’s health and welfare at the time of a pandemic.38

The 1941 Supreme Court decision Edwards v. California discusses the constitutionality of restrictions on the movement of individuals.39 Following a conviction under the California state law banning persons from transporting ‘any indigent person who is not a resident’ to the state, the Supreme Court struck down the statute, as it put an impermissible burden on interstate commerce.40 The law was put in place to allow states to take ‘precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts’,41 and it thus informs the balance between freedom of movement and economic interests, not with public health interests.42 Longstanding case law upholds states’ authority to enact laws meant to protect the public against diseases even if those restrictions cause incidental burdens on interstate commerce.43 In 1986, the Supreme Court concluded that ‘As long as a state does not needlessly obstruct interstate trade or attempt to “place itself in a position of economic isolation”, it retains broad regulatory authority to protect the health and safety of its citizens . . .’.44

Public health law experts see domestic travel bans as constitutionally problematic: ‘“Authorities” attempts to confine infected and uninfected individuals together within a cordon sanitaire would be subjected to the highest level of judicial scrutiny’.45 Nearly 120 years ago, for example, the Northern District Court of California banned a quarantine in San Francisco during a plague outbreak because it almost exclusively targeted residents of Chinese descent.46

Presidential action restricting domestic travel would be even more problematic from a federalism standpoint,47 by which under the Tenth Amendment to the Constitution

36 Dartunorro Clark, Trump: Restricting Travel in U.S. A ‘Possibility’ If Coronavirus Pandemic Gets ‘Too Hot,’ NBC News, https://www.nbcnews.com/politics/politics-news/trump-restricting-travel-u-s-possibility-if-coronavirus-pandemic-gets-n1156851 (accessed Mar. 12, 2020).
37 Saenz v Roe 526 US 489, 498 (1999); Lawrence O. Gostin & Lindsay F. Wiley, Public Health Law: Power, Duty, Restraint 149 (3rd ed., 2016).
38 Anthony Michael Kreis, Contagion and the Right to Travel, Harvard L. Rev. Blog, https://blog.harvardlawreview.org/contagion-and-the-right-to-travel/ (accessed Mar. 27, 2020); Lawrence O. Gostin, James G. Hodge Jr. & Lindsay Wiley, Presidential Powers and Response to COVID-19, JAMA, https://jamanetwork.com/journals/jama/fullarticle/2763423 (accessed Mar. 27, 2020).
39 Edwards v. California, 314 U.S. 160 (1941).
40 Id., at 171.
41 Id., at 177.
42 Kreis, supra note 38.
43 Reid v. Colorado, 187 U.S. 137 (1902); B. F. Ashell, Plff. In Err., v. State of Kansas, 209 U.S. 251 (1908).
44 Maine v. Taylor et al. 477 U.S. 131, 152 (1986).
45 Gostin et al., supra note 38.
46 Jew v. Williamson et al., 103 F. 10 (1900).
47 Gostin et al., supra note 38.
the states are entrusted with the police powers to protect the welfare, safety, and health of the public.\textsuperscript{48}

Against this background, President Trump’s statement about potentially restricting interstate travel seems unlikely to occur by the federal government. Nevertheless, at the time of this writing, governors in 21 jurisdictions had sought to reduce the number of out-of-state travelers by requiring arriving visitors to self-quarantine for 14 days through executive orders.\textsuperscript{49} In Florida,\textsuperscript{50} the quarantine only applied to those arriving to the state from the ‘too hot areas’ of New York and New Jersey.\textsuperscript{51} Texas added to the list 14-day quarantine mandates to travelers coming from Connecticut or the City of New Orleans.\textsuperscript{52} Maine and Vermont ordered residents of New York, New Jersey, and Connecticut to refrain from traveling to their states altogether.\textsuperscript{53} Those create ‘de facto travel bans for short-term visitors’.\textsuperscript{54}

\textbf{CONNECTING THE DOTS: STIGMATIZING EFFECTS OF THE BLOOD BAN AND THE COVID-19 TRAVEL RESTRICTIONS}

Both policies, the blood ban and the Covid-19 travel restrictions, were enacted to prevent an outbreak from spreading. There is no doubt that at the time the outbreak was still spreading, they were both essential for containing the virus’s spread. The blood ban

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\textsuperscript{48} US Const. amend. X.

\textsuperscript{49} Those jurisdictions are: Alaska, Arizona, Delaware, Florida, Guam, Hawaii, Kansas, Kentucky, Maine, Montana, New Mexico, North Dakota, Northern Mariana Islands, Oklahoma, Puerto Rico, Rhode Island, South Carolina, Texas, Vermont, West Virginia, and Wyoming. See: National Governors Association, Coronavirus: What You Need To Know: Domestic Travel Limitations, NGA.Org, https://www.nga.org/coronavirus/#states (accessed Apr. 24, 2020). Ten other states issued recommendations regarding interstate travels: Arkansas, Connecticut, Maryland, Massachusetts, Nebraska, Nevada, New Hampshire, Ohio, Virginia, Wisconsin. id.

\textsuperscript{50} State of Florida Office of the Governor, Executive Order No. 20–82, Flgov.com, https://www.flgov.com/wp-content/uploads/orders/2020/EO_20–82.pdf (accessed Mar. 24, 2020).

\textsuperscript{51} New York City has been declared the epicenter of the coronavirus, and New Jersey, with a population of about 9 million ranks second in the nation for coronavirus cases after New York, see: Matt Arco, N.J. Coronavirus Outbreak Hits 6,876 cases with 81 Deaths. Another 2,492 Positive Tests in Huge Single-day Increase NJ.com, https://www.nj.com/coronavirus/2020/03/nj-coronavirus-outbreak-hits-6876-cases-with-81-deaths-another-2492-positive-tests-in-huge-single-day-increase.html (accessed Mar. 26, 2020).

\textsuperscript{52} Governor Greg Abbott, Governor Abbott Issues Executive Order Mandating 14-Day Quarantine For Travelers Arriving From New York Tri-State Area, New Orleans, Texas.gov, https://texas.gov/news/post/governor-abbott-issues-executive-order-mandating-14-day-quarantine-for-travelers-arriving-from-new-york-tri-state-area-new-orleans2 (accessed Mar. 26, 2020).

\textsuperscript{53} Janet T. Mills, An Order Establishing Quarantine Restrictions on Travelers Arriving in Maine, MAINE.GOV, https://www.mainegov/p/governor/mills/sites/maine.gov.governor.mills/files/inline-files/An%20Order%20Establishing%20Quarantine%20Restrictions%20On%20Travelers%20Arriving%20in%20Maine.pdf (accessed Apr. 3, 2020); Philip B. Scott, Executive Order No. 01–20—Addendum 7: Quarantine Restrictions on Travelers Arriving in Vermont, Governor.vermont.gov, https://governor.vermont.gov/sites/scott/files/documents/ADDENDUM%207%20EXECUTIVE%20ORDER%2001-20.pdf (accessed Mar. 30, 2020).

\textsuperscript{54} Kreis, supra note 38. It is interesting to mention that in US history, decisions about quarantine were not only used to contain an outbreak but also for social and political factors, creating animosity between municipalities, counties, and states. In the mid-19th century, the two major port cities of that time, Galveston, Texas, and New Orleans, would quarantine each other not only to contain yellow fever but also to gain a competitive advantage with regard to commerce that is allowed to come by sea. See: Daniel S. Goldberg, On Ideas as Actors: How Ideas about Yellow Fever Causality Shaped Public Health Policy Responses in 19th-Century Galveston 29 CANADIAN BULLETIN MEDICAL HIST. 351, 355 (2012).
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was a necessary policy action when it was first initiated in 1983.\textsuperscript{55} Similarly, restrictions on travel in March 2020 were necessary to contain the outbreak.

Both policies rely on a specific type of behavior or activity (sex between men or residing in a state highly impacted by COVID-19). Both are blanket policies that make a generalization about entire populations and apply to all MSM and to all residents of states highly impacted by coronavirus, respectively. Neither policy uses testing. The blood ban prevents any potential MSM donor from giving blood without checking if they are HIV positive. The travel restrictions prevent a New Yorker from entering Florida without verifying whether the person has coronavirus.\textsuperscript{56}

While no one would ever suggest that restrictions keeping certain Americans from entering a state simply because they live in another should remain after the pandemic has abated and effective treatment has been developed, restrictions on blood donations have continued decades after HIV detection and prevention tools have been in place.

Granted, interstate travel is a fundamental right, whereas donating blood is not.\textsuperscript{57} Regardless of the constitutional nature of interstate travel and of the blood ban, the important commonality for our purpose is that these two blanket policies create a stigmatizing effect on the populations they restrict.

It seems inevitable that stigma against state outsiders would follow after the restrictions are put in effect. Some may argue that state residency is not clearly associated with an identity (with a few exceptions such as the “Texan cultural identity”).\textsuperscript{58} Nevertheless, I suggest that animosity against nonresidents from states highly infected by COVID-19 would likely exist due to the expressive value of the policy restrictions.\textsuperscript{59}

\textsuperscript{55} Soucek, supra note 6, at 1899.

\textsuperscript{56} In response to American passengers on a cruise ship, some of whom were diagnosed with coronavirus, who were hoping to be able to port in Fort Lauderdale, Florida Governor Ron DeSantis said: ‘We cannot afford to have people who are not even Floridians dumped into South Florida using up those valuable resources,’ see: Safia Samee Ali, \textit{Cruise Ship Passengers Desperately Plead with Florida to Allow Them in}, NBC News, https://www.nbcnews.com/news/us-news/cruise-ship-passengers-desperately-plead-florida-allow-them-n1173576?cid=sm_npd_nn_tw_ma (accessed Apr. 1, 2020).

\textsuperscript{57} Some have argued that the blood ban should be reviewed under intermediate scrutiny as violating the Equal Protection Clause. See: Soucek, supra note 6, at 1905 (‘an unfazed plaintiff here might challenge the MSM ban as facial sex discrimination, given that it distinguishes the gender of the donor and his sexual partner(s). If accepted, this claim would result in intermediate scrutiny—the same level of review that a growing number of courts now give to sexual orientation discrimination’). See also: Heather Printz, \textit{Some MSM Blood Donors Move from a Lifetime Deferral to a One-Year Ban Finally or Not Good Enough}, 21 J. HEALTH CARE L. & POL’Y 71, 98–100 (2018). Some qualitative data have also pointed to a relationship between the ability to give blood and subjective citizenship, see: Jeffery A, Bennett, \textit{Banning Queer Blood: Rhetorics of Citizenship, Contagion, and Resistance 117–8} (2015).

\textsuperscript{58} See eg, Leigh Clemons, \textit{Branding Texas: Performing Culture in the Lone Star State} 6–10 (2008); Terry G. Jordan Bychkov, \textit{The Anglo-Texan Homeland, in Homelands: A Geography of Culture and Place Across America} 131–2 (Richard L. Nostrand & Lawrence E. Estaville, eds., 2001).

\textsuperscript{59} Law has an important expressive character that reaches beyond its black-letter coercive one. Law creates a set of public meanings and shared understandings between the government and the public. It draws attention to and clarifies the behaviors it prohibits and by doing so it educated the public about what should be considered socially harmful. See eg, Cass R. Sunstein, \textit{On the Expressive Function of Law}, 144 U. PA. L. REV. 2021, 2022 (1996); Elizabeth S. Anderson & Richard M. Pildes, \textit{Expressive Theories of Law: A General Restatement}, 148 U. PA. L. REV. 1503, 1571 (2000); Deborah Hellman, \textit{The Expressive Dimension of Equal Protection}, 85 MINN. L. REV. 1, 3 n. 10 (2000); Richard H. McAdams & Janice Nadler, \textit{Coordinating in the Shadow of the Law: Two Contextualized Tests of the Focal Point Theory of Legal Compliance} 42 LAW & Soc’y REV. 865, 867 (2008).
And here is my claim. Suddenly, residents of states once thought of as thriving will be considered ‘less than’, contaminated, and a likely public health hazard. Many Americans will experience firsthand the stigmatizing effects of the travel restrictions that generalize and stigmatize entire populations. For example, New York and New Jersey have been known as the most impacted states. As a reaction, Rhode Island Governor Gina Raimondo initially announced that police had begun stopping cars with New York plates and that the National Guard would help them conduct house-to-house searches to find people who had traveled from New York and demand that they self-quarantine for 14 days. The policy was changed to resemble a 14-day quarantine similar to that of other states after criticism from the American Civil Liberties Union (ACLU). A Washington Post article, published on April 3, 2020, brought to light stories about New York residents being turned away from other states with quotes such as ‘Many people consider New Yorkers lepers’, ‘These people from New York have a lot more chance of having it. So you don’t want to get too close to them’, and ‘At any other time, I’d say [to New Yorkers], “Welcome to Maine” . . . [n]ow I want to say, “If you’d turn around right now, I’d be so happy”’. Another incident that demonstrates this type of animosity/stigmatization occurred in Maine on March 29, 2020. Residents cut down a tree and dragged it into the middle of a road in an attempt to forcibly quarantine three visitors from New Jersey, identified by the license plate, who they believed could have coronavirus.

A CALL FOR ACTION
After the coronavirus crisis is over, people will think differently about epidemics, and so I am calling for a strategic plan of action to lift the blood ban using the stigmatizing experiences of people who were affected by the interstate travel restrictions.

Research on empathy and perspective taking has shown that reflecting on personal experience relates to the tendency to take another’s perspective. This process of reflection helps elicit empathic responses for somebody in similar situations. The idea is simple yet has been empirically proven: a person who has experienced something, or

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60 Bernadette Hogan, Rhode Island Repeals Order Targeting New Yorkers after Cuomo Threatens Lawsuit, New York Post, https://nypost.com/2020/03/29/rhode-island-repeals-order-targeting-new-yorkers-after-cuomo-threatens-lawsuit/ (accessed Mar. 29, 2020).

61 Paul Schwartzman, You’re from Where? Pandemic Stigmatizes New Yorkers Fleeing City, The Washington Post, https://www.washingtonpost.com/national/coronavirus-new-yorkers-stigmatized/2020/04/03/da96b9d2-7442-11ea-a9bd-9f8b593300d0_story.html (accessed Apr. 3, 2020) (‘now America’s largest city is pandemic central, and New Yorkers have become the face of the fearsome infection—virtual pariahs whose potential arrival has spurred anxious demands for roadblocks up and down the East Coast’).

62 See: Aimee Ortiz, ‘Group of Local Vigilantes’ Try to Forcibly Quarantine Out-of-Towners, Officials Say, The New York Times, https://www.nytimes.com/2020/03/29/us/maine-coronavirus-quarantine-tree.html (accessed Mar. 29, 2020); Steve Politi, A N.J. License Plate Leads Armed ‘Vigilantes’ to Blockade Workers with Fallen Tree Amid Coronavirus Fears, NJ.com, https://www.nj.com/coronavirus/2020/03/an-nj-license-plate-leads-armed-vigilantes-to-blockade-workers-with-fallen-tree-amid-coronavirus-fears.html?utm_source=twitter&utm_content=nj_twitter_njdotcom&utm_medium=social&utm_campaign=njdotcom_sf (accessed Mar. 30, 2020).

63 See: Adam Gerace et al., ‘I Think, You Think’: Understanding the Importance of Self-Reflection to the Taking of Another Person’s Perspective, 8 J. Relationships Research 1, 4 (2017) (describing studies showing that ‘when participants are made self-aware, they take an outsider’s perspective on their own thoughts and behaviors.’); Philip L. Jackson, Andrew N. Melzoff & Jean Decety, How Do We Perceive the Pain of Others? A Window into the Neural Processes Involved in Empathy, Neuroimage 771 (2005) (showing how prior personal experience of pain elicits empathy for other people’s physical pain).
even knew someone who belongs to a marginalized or stigmatized group, and has been aware of the experience, tends to be more empathetic toward the experiences of ‘the other’ going through parallel incidents. Even the Red Cross in its PSA uses the notion of contact with someone who has benefited from a blood donation to encourage the public to give blood.

Experiences of those who have personally been affected and stigmatized by policies enacted in response to the coronavirus pandemic could be leveraged to move the needle on the blood ban policy beyond the point of needing a deferral period at all. The key is to effectively communicate to the public and to policymakers the parallels between the two policies.

FDA policies have historically been amended through public campaigns, advocacy, and lobbying efforts. This is a rare moment in history and an opportunity for advocates to act and help get people to mobilize against the blood ban and lift it completely. This opportunity is even clearer in light of the FDA’s indication that it ‘intends to revise and replace’ its guidelines based on comments and experience with the implementation within 60 days following the termination of the public health emergency.

Empirical research is needed in order to definitively show that people would associate the stigmatizing effects of interstate travel restrictions with the stigma that stems from the blood ban. This paper highlights the nonintuitive connections between these two public health policies, the first crucial step in order to provide support for overriding the blood ban. With better articulation that such blanket policy is unnecessary nowadays, there is hope that increased empathy and understanding for lifting the FDA’s blood ban altogether will follow in the post-COVID-19 era.

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64 This is according to ‘contact theory’ originally developed by Gordon Allport in 1954, which has ever since been tested many more times, Thomas F. Pettigrew & Linda R. Troop, When Groups Meet: The Dynamic of Intergroup Contact 8 (2011). In a meta-analysis of more than 515 studies on intergroup contact, Pettigrew and Tropp conclude that ‘intergroup contact contributes to reducing anxiety, and, in turn, the diminished anxiety predicts lower level of prejudice’, see id., at 81.

65 One of the tweets in the thread encouraging donations at the time of the COVID-19 pandemic read: Chances are, you know someone who has benefited from a blood transfusion, like a patient with cancer, birth delivery complications, severe infections, or going through surgery. Blood is an essential part of health care. The need is constant. American Red Cross, Chances are . . ., Twitter, https://twitter.com/RedCross/status/1238196180624039937 (Mar. 12, 2020).

66 See: Lewis A. Grossman, FDA and the Rise of the Empowered Consumer, 66 ADMIN. L. REV. 627, 651 (2014); Lewis A. Grossman, AIDS Activists, FDA Regulation, and the Amendment of America’s Drug Constitution, 42 Am. J.L. & Med. 687, 692 (2017); Charlene Galarneau, ‘The H in HIV Stands for Human, Not Haitian’: Cultural Imperialism in US Blood Donor Policy, 3 Public Health Ethics 210, 215–6 (2010); T. Joseph Mattingly II, & Linda Simoni-Wastila, Patient-Centered Drug Approval: The Role of Patient Advocacy in the Drug Approval Process 23 J. MANAGED CARE & SPECIALTY PHARMACY 1078, 1079 (2017).

67 Revised Recommendations, supra note 21, at 2.