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## Characterization and Disease: Homosexuals and the Threat of AIDS

A joke in bad taste: "What's the hardest thing about telling your mother you have AIDS? Persuading her you're Haitian."<sup>1</sup>

The historical legacy of the oppression of gay men has been grounded and based in law.<sup>2</sup> Unlike other minorities, gays do not possess any instantly recognizable characteristics that would betray their homosexual identities to a hostile society. The safety of a hidden identity—"the closet," in homosexual lexicon—precludes any urgent need to assert their rights as gay individuals.

The Acquired Immune Deficiency Syndrome (AIDS) epidemic has stripped away the protections of "the closet." Those individuals diagnosed with the disease must confront the additional trauma of having their sexual identities exposed to the heterosexual world. Gays who do not have the disease avoid the test for the causative virus, fearing that a positive test result will serve as a "surrogate marker"<sup>3</sup> for their homosexuality. Furthermore, AIDS victims who are not homosexual are stigmatized by suspicions about their sexuality. As the metaphors surrounding AIDS become more entrenched, it becomes increasingly difficult to prevent society's attitude towards homosexuality from permeating its response to AIDS.

This Note discusses the manner in which society may shape its characterization of a threatening disease, and then traces the development of the identification of AIDS with homosexuality. In that context, the Note then addresses the effect that the recent United States Supreme Court decision on sodomy laws may have on the legal responses to the epidemic and argues that the disease may be utilized as a justification for the enactment of oppressive restrictions under the guise of public health measures. Finally, the Note concludes that although legislative and judicial responses to AIDS are in the seminal period, they foreshadow a counterrevolution against tolerance for minority rights.

### I. SOCIETY AND THE CHARACTERIZATION OF DISEASE

In her study of the social conceptions of disease, Susan Sontag argued that each individual is born holding a dual citizenship in both the world of wellness and the world of illness.<sup>4</sup> Although these two worlds are mutually exclusive, an individual inhabiting one sphere is always aware of the other's existence. The sick want to return to the sphere of wellness, and those who enjoy a state of good

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1. D. ALTMAN, *AIDS IN THE MIND OF AMERICA* 58 (1986).

2. Orland & Wise, *The AIDS Epidemic: A Constitutional Conundrum*, 14 *HOFSTRA L. REV.* 137, 151 (1985) (AIDS Symposium Issue).

3. D. ALTMAN, *supra* note 1, at 79 (attributing appellation of "surrogate marker" to Rodger McFarlane of the Gay Men's Health Crisis, New York City, who stated that a list of HIV antibody positives would in essence be a list of sexually active gay men).

4. S. SONTAG, *ILLNESS AS METAPHOR* 3 (1978).

health guard against its loss.<sup>5</sup> These desires are rooted in the instinct for self-preservation.

When a society is threatened by an outbreak of contagious disease, a conflict arises between the interests of the sick and the well. The ill seek care and a cure; the healthy want protection from exposure to the disease. Each side looks to the society's legal structures to preserve its interests. The AIDS epidemic is a manifestation of this conflict. The AIDS sufferer may expect the legal system to protect his individual civil rights until the medical community can discover a cure. The healthy, on the other hand, may insist that there is an obligation to eliminate the risk of infection even if it requires an impairment of the rights of AIDS carriers. The balance that the legal structure strikes between the conflicting interests is often determined by society's characterization of the disease.

The exclusivity of the states of sickness and health is illustrated by the frequent futility of efforts of the sick to articulate the nature of physical discomfort and pain which are the symptoms of their illness. The experience of pain is a phenomenon that cannot be adequately described to the world outside of the afflicted body. Pain has the effect of "shattering" language.<sup>6</sup> The sufferer can only rely on inaccurate metaphors drawn from tangible reality to articulate his experience: pain is described as "dull," "throbbing," "piercing."<sup>7</sup> Even at the basic level of physical experience, illness begins to carry metaphorical and symbolic associations. Metaphor is the only means through which the ill person can communicate the reality of his physical condition. Yet the separation between the spheres of the sick and the well is so complete that these efforts largely fail: "To have pain is to have *certainty*; to hear about pain is to have *doubt*."<sup>8</sup> The sick individual becomes isolated from an external world that is unable to verify his physical experience.

When the external world does respond to an individual's sickness, it may be that society is reacting to its own associations with the disease, not that the sufferer has been able to communicate the reality of his condition. Certain illnesses can achieve a status wherein the healthy believe that they comprehend the experience of the disease. These diseases share common traits that arouse a sense of dread in the healthy: an unknown mode of transmission, the lack of a cure, and the perception that the disease is contagious.<sup>9</sup> Sontag noted that the reference to death elevates these diseases to the level of "master illnesses." The descriptive metaphors used to communicate the nature of these particular illnesses are far more profound than the ones used to describe the symptoms. The disease becomes a metaphor for death itself.<sup>10</sup>

Sontag's study, first published in 1978 prior to the identification of AIDS,

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5. S. SONTAG, *supra* note 4, at 3.

6. E. SCARRY, *THE BODY IN PAIN* 5 (1985).

7. *See generally id.* at 3-11 (discussing the inability to articulate accurately the physical sensations experienced by one's own body; Scarry's argument emphasizes the political and social exploitation of pain).

8. *Id.* at 13.

9. S. SONTAG, *supra* note 4, at 5-7.

10. S. SONTAG, *supra* note 4, at 18.

compared historical reactions to tuberculosis with contemporary responses to cancer. Both diseases, with no known mode of transmission, were thought to be incurable. With both diseases, acute fear led to the belief the illness was, in some sense, morally if not literally "contagious."<sup>11</sup> The metaphor shrouding each illness was that of death caused by passion. In the case of tuberculosis, the cause was thought to be an excess of passion;<sup>12</sup> with cancer, the genesis of the disease was linked to the repression of passion.<sup>13</sup> These diseases were seen as an expression of the character of their victims.<sup>14</sup> Furthermore, infection with these diseases was characterized as punitive. The illness was nature's retribution on the individual for possessing the very characteristics that "caused" the disease.<sup>15</sup>

AIDS, a " 'master illness' " like cancer and tuberculosis,<sup>16</sup> has been " 'used to propose new, critical standards of individual health, and to express a sense of dissatisfaction with society as such.' "<sup>17</sup> AIDS has been linked to sexuality and blood and is, therefore, particularly susceptible to metaphorical use.<sup>18</sup> Popular conceptions view AIDS as caused by individual characteristics of excess, imbalance, and defiance of socially approved forms of sexuality.<sup>19</sup> Some view AIDS, like cancer and tuberculosis, as a disease caused by passion. The AIDS sufferer can trace the cause of the disease to the expression of those very passions that society has long sought to repress.

In his comprehensive study of the history of Western sexuality, the French philosopher Michel Foucault traced the development of three explicit legal codes—the canon, the Christian pastoral, and the civil laws—to govern all sexual practices.<sup>20</sup> These codes defined licit and illicit behavior using the matrimonial relationship as the central reference point. The early codes regulated practices within marriages; but in the nineteenth century lawmakers began to abandon these inquiries and scrutinized only practices outside the marital relationship.<sup>21</sup> These practices, such as sodomy, sadism, and necrophilia, were set apart and viewed as "unnatural," and of these "sodomy was held to be the greatest sin against nature."<sup>22</sup>

Historically, society has reacted with unusual vehemence when the diseased are infected through the very practices that have set them apart from the community before the onset of the illness. The separateness of the sphere of the ill

11. S. SONTAG, *supra* note 4, at 6.

12. S. SONTAG, *supra* note 4, at 20-21. Sontag argues that tuberculosis became so romanticized that popular beliefs attributed creativity and a heightened awareness and sensitivity to its victims. *Id.* at 26-33.

13. S. SONTAG, *supra* note 4, at 20-21. Sontag then compares popular beliefs about cancer victims, whose illness is believed to stem from repression of their "true" feelings. *Id.* at 20-26.

14. S. SONTAG, *supra* note 4, at 46-48.

15. S. SONTAG, *supra* note 4, at 46-48.

16. Dolgin, *AIDS: Social Meanings and Legal Ramifications*, 14 HOFSTRA L. REV. 193, 197 (1985) (quoting S. SONTAG, *supra* note 4, at 72-73).

17. *Id.* (quoting S. SONTAG, *supra* note 4, at 72-73).

18. D. ALTMAN, *supra* note 1, at 194.

19. Dolgin, *supra* note 16, at 72.

20. M. FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION* 37 (1978).

21. *Id.* at 37-40.

22. *Id.* at 39.

thereby has become more complete. This has been particularly true during epidemics of venereal diseases, wherein the death metaphor is enhanced with symbols of pollution, contamination, and dirt.<sup>23</sup> The disease becomes politicized.<sup>24</sup> The community transfers the metaphors associated with the disfavored group to the disease. Furthermore, the illness is thought to be caused not only by individual transgressions, but also by an attitude of permissiveness in society at large.<sup>25</sup> For example, in the early years of this century, popular opinion held venereal disease to be rooted in the tolerance of the immigrant element in the new industrial society.<sup>26</sup>

This attitude surfaced in the conflict over the cause of AIDS, which peaked before the identification of the human immunovirus (HIV). One research theory was that AIDS was caused by a single, mutant virus; a second theory espoused multifactorial causation.<sup>27</sup> The latter, called the immune-overload theory, viewed AIDS as a response to frequent infection by already known organisms. A victim's constant exposure to these organisms through "promiscuous" sexual activity caused a general suppression or "overload" of the immune system.<sup>28</sup> This theory verged on seeing AIDS as self-inflicted<sup>29</sup> and betrayed the researchers' moralistic viewpoint.<sup>30</sup> How the infected person had chosen to live his life allegedly caused the disease. Causation was rooted in going to bathhouses and being sexually promiscuous.<sup>31</sup> At the other extreme, researchers arguing for a single "new" or "mutant" virus theory of causation were supposedly amoral in their approach.<sup>32</sup> AIDS was a mutant virus and the gay community had the misfortune, the "bad luck," to be the first host.<sup>33</sup> These theories—one which blamed the sick for illness and the other of which deemphasized any individual responsibility—are indicative of the sexual characterizations that shaped the early definitions of AIDS.

The increasing identification of AIDS with male homosexuality has led to greater scrutiny of the gay community by medical researchers and the media—indeed, by society as a whole. Heightened fears have surfaced in a community unaccustomed to such attention and already threatened by a mortal illness.

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23. A. BRANDT, *NO MAGIC BULLET: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880* 5 (expanded ed. 1987).

24. D. ALTMAN, *supra* note 1, at 10-12.

25. See A. BRANDT, *supra* note 23, at 131.

26. A. BRANDT, *supra* note 23, at 22-23.

27. See D. BLACK, *THE PLAGUE YEARS 105-32* (1986) (discussing the history of the development of the conflicting theories); see also D. ALTMAN, *supra* note 1, at 47-57 (discussing, in general, the effect of politics on AIDS research, and, specifically, homophobia as a critical influence on the early stages of scientific research); Fain, *Coping with a Crisis: AIDS and the Issues It Raises*, *THE ADVOC.*, Feb. 17, 1983, at 15 (discussing the gay community's perspective on the conflicting theories).

28. D. ALTMAN, *supra* note 1, at 42.

29. D. ALTMAN, *supra* note 1, at 42.

30. D. BLACK, *supra* note 27, at 105.

31. D. BLACK, *supra* note 27, at 105.

32. D. ALTMAN, *supra* note 1, at 42.

33. D. ALTMAN, *supra* note 1, at 42 (arguing that the school of thought espousing "the pure misfortune" that AIDS surfaced in the gay community essentially denied any individual responsibility in contracting the disease).

Such fears were justified by a respected commentator's suggestions that "[w]e need to entertain the mystical and find the link between Haitians and gays with AIDS . . . in their common tendency to conjure up those dark forces science holds at bay by pretending they don't exist."<sup>34</sup> As Sontag has warned, what "we," the society at large, will find in this "mystical" search will bear no relation to science but will be the metaphors of death, illness, and homosexuality that "we" placed there.<sup>35</sup> Sontag's warning, and a general understanding of how society often characterizes disease, may provide a useful background for discussion of the specific medical and legal issues that have arisen with respect to AIDS.

## II. EPIDEMIOLOGY AND THE CHARACTERIZATION OF AIDS AS A HOMOSEXUAL DISEASE

A leading epidemiologist has suggested that the collection of medical data is an attempt to understand the mysteries of life and death by systematically organizing the ravages of disease into comprehensible structures: "One epidemic resembles the next. The cases are always counted, the dead still listed: humans have an extraordinary sense of macabre administration."<sup>36</sup>

The identification of AIDS<sup>37</sup> began at New York University Hospital in 1979 when a physician treated two young men in succession for Kaposi's sarcoma, a rare skin cancer. The treating physician was puzzled because neither patient belonged to the risk group commonly identified with the cancer—elderly men of Mediterranean origin. He noted, however, that both men were homosexual although he drew no conclusion from the fact.<sup>38</sup>

In 1981, a Center for Disease Control (CDC) examination of a ledger recording the distribution to hospitals of an antibiotic used exclusively for *Pneumocystis carinii*, a common organism causing serious pneumonia only in patients whose immune functions are deficient, revealed an abnormal incidence of five patients in the Los Angeles area.<sup>39</sup> The five were young homosexual men with no known reason for experiencing immune deficiency. The CDC began official documentation of this immune deficiency syndrome in its report on the Los Angeles statistics.<sup>40</sup> Four weeks later, in July 1981, the CDC began tracking the incidence of Kaposi's sarcoma and tracing its relationship to *Pneumocystis pneumonia* (PCP).<sup>41</sup> In the early months of 1982, researchers firmly established the link between the incidence of the disease and homosexual activ-

34. D. BLACK, *supra* note 27, at 66.

35. S. SONTAG, *supra* note 4, at 53-55.

36. J. LEIBOWITZ, A STRANGE VIRUS OF UNKNOWN ORIGIN 92 (1985).

37. See generally Choi, *Assembling the AIDS Puzzle: Epidemiology*, in UNDERSTANDING AIDS 10-19 (V. Gong ed. 1985) (discussing the on-going search for the cause and cure of AIDS).

38. J. LEIBOWITZ, *supra* note 36, at xv.

39. J. LEIBOWITZ, *supra* note 36, at xv-xvi; see D. ALTMAN, *supra* note 1, at 32.

40. *Pneumocystis Pneumonia—Los Angeles*, 30 MORBIDITY & MORTALITY WEEKLY REP. 250, 250-52 (1981).

41. *Kaposi's Sarcoma and Pneumocystis Pneumonia Among Homosexual Men—New York City and California*, 30 MORBIDITY & MORTALITY WEEKLY REP. 305, 305-08 (1981) [hereinafter *Kaposi's Sarcoma*].

ity.<sup>42</sup> Although the CDC initially used the terms Kaposi's sarcoma and PCP, the homosexual stamp was affixed to the disease by popular usage of the acronym GRID—Gay-Related Immune Deficiency.<sup>43</sup> In rapid succession, however, the CDC documented the incidence of the disease among intravenous drug users,<sup>44</sup> Haitians,<sup>45</sup> hemophiliacs,<sup>46</sup> blood transfusion recipients,<sup>47</sup> infants,<sup>48</sup> and the female sexual partners of afflicted males.<sup>49</sup> In a September 1982 report, the CDC adopted the appellation Acquired Immune Deficiency Syndrome (AIDS),<sup>50</sup> a descriptive name less pejorative towards gay victims and less stigmatizing to those AIDS sufferers who are not gay.<sup>51</sup> However, references to the "gay plague" in the popular press increased as hysteria in the general population began to mount in 1983.<sup>52</sup> The fact that the first recorded cases occurred exclusively among gay men affected the entire future conceptualization of AIDS.<sup>53</sup>

Scientific inquiry, however, required the characterization of the victims into groups-at-risk. The study of AIDS was the study of behavior, and only by examining the practices of the affected groups could researchers identify the mode of transmission of the disease. Early recommendations for limiting the transmission of the disease antedated the identification of the HIV virus as the causative agent. Behavioral studies examining health care providers and their exposure to bodily fluids such as saliva and sweat were breakthroughs in determining how

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42. *Update on Acquired Immune Deficiency Syndrome (AIDS)—United States*, 31 MORBIDITY & MORTALITY WEEKLY REP. 507, 507-08, 513-14 (1982); see also *Update on Kaposi's Sarcoma and Opportunistic Infections in Previously Healthy Persons—United States*, 31 MORBIDITY & MORTALITY WEEKLY REP. 294, 300-01 (1982) [hereinafter *Update on Kaposi's Sarcoma*] (documentation of the occurrence of Kaposi's sarcoma and PCP in previously healthy persons); *Diffuse, Undifferentiated Non-Hodgkins Lymphoma Among Homosexual Males—United States*, 31 MORBIDITY & MORTALITY WEEKLY REP. 277, 277-79 (1982) (identification of non-Hodgkins lymphoma in homosexual men); *Persistent, Generalized Lymphadenopathy Among Homosexual Males*, 31 MORBIDITY & MORTALITY WEEKLY REP. 249, 249-52 (1982) (documentation of the occurrence of unexplained, persistent, generalized lymphadenopathy among homosexual men); *Follow-Up on Kaposi's Sarcoma and Pneumocystis Pneumonia*, 30 MORBIDITY & MORTALITY WEEKLY REP. 409, 409-10 (1981) (update on Kaposi's sarcoma and PCP in homosexual men in New York City and California); *Kaposi's Sarcoma*, *supra* note 41, at 305-08 (report on homosexual men with both Kaposi's sarcoma and PCP).

43. D. ALTMAN, *supra* note 1, at 33.

44. *Update on Kaposi's Sarcoma*, *supra* note 42, at 300-01.

45. *Opportunistic Infections and Kaposi's Sarcoma Among Haitians in the United States*, 31 MORBIDITY & MORTALITY WEEKLY REP. 353, 353-4, 360-61 (1982) [hereinafter *Opportunistic Infections*].

46. *Pneumocystis Carinii Among Persons with Hemophilia A*, 31 MORBIDITY & MORTALITY WEEKLY REP. 365, 365-67 (1982).

47. *Possible Transfusion-Associated Acquired Immune Deficiency Syndrome (AIDS)—California*, 31 MORBIDITY & MORTALITY WEEKLY REP. 652, 652-54 (1982).

48. *Unexplained Immunodeficiency and Opportunistic Infections in Infants—New York, New Jersey, California*, 31 MORBIDITY & MORTALITY WEEKLY REP. 665, 665-67 (1982).

49. *Immunodeficiency Among Female Sexual Partners of Males with Acquired Immune Deficiency Syndrome (AIDS)—New York*, 31 MORBIDITY & MORTALITY WEEKLY REP. 697, 697-98 (1983).

50. *Update on Acquired Immune Deficiency Syndrome (AIDS)—United States*, *supra* note 42, at 507.

51. See D. BLACK, *supra* note 27, at 60 (attributing this idea to Dr. James Curran of the CDC).

52. See D. ALTMAN, *supra* note 1, at 58-65 (discussing examples of discrimination against homosexuals because of popular beliefs about AIDS).

53. D. ALTMAN, *supra* note 1, at 33.

the disease was not transmitted.<sup>54</sup> A comparison of the behavioral practices of those diagnosed to the lack of evidence of any transmission to health care workers culminated in the finding that the disease is transmitted primarily through sexual activity and through the exchange of blood or blood-containing secretions. This, in turn, led to the conclusion that the risk of transmission through casual contact was nonexistent.<sup>55</sup>

However, if such classification was successful in defining the means of transmission of AIDS, the stigmatization of the characterized "risk groups" continued after the evidence eliminated the risk of infection through casual contact. The brief history of the documentation of the Haitians as an identified risk group raises questions about the methods and effects of statistical characterization.

In 1982, researchers first identified recent Haitian immigrants to the United States as a high risk group for AIDS.<sup>56</sup> An immediate controversy accusing the CDC of racial and socio-economic bias surrounded the classification of an entire nationality as a risk group.<sup>57</sup> However, the lack of any identifiable behavioral characteristics precluded inclusion of many of the Haitian cases in any of the existing risk categories.<sup>58</sup> Haitian authorities asserted that there was no scientific basis to classify a nationality as being at risk for AIDS. The CDC prevailed by arguing that proper epidemiological evaluation required the creation of the category because the empirical subjects denied participating in any previously classified risk behavior while the incidence of AIDS cases per population unit was much higher in the American Haitian community than in the population of the United States as a whole.<sup>59</sup>

The CDC's argument reflected a lack of insight into Haitian culture. In this devastatingly poor, predominantly Catholic, totalitarian state, there was little tolerance for homosexuality, and a high percentage of Haitian males practicing homosexual prostitution did not consider themselves gay.<sup>60</sup> Later studies revealed that a disproportionate number of Haitian AIDS cases came from Carrefour, a suburb of Port-au-Prince, which was a center of male and female prostitution frequented by many tourists, including American gays.<sup>61</sup> Under

54. *Prospective Evaluation of Health Care Workers Exposed Via Parenteral or Mucous-Membrane Routes to Blood and Body Fluids of Patients with AIDS*, 33 MORBIDITY & MORTALITY WEEKLY REP. 181, 181-82 (1984) [hereinafter *Prospective Evaluation*]; *Prevention of AIDS: Report of Inter-Agency Recommendations*, 32 MORBIDITY & MORTALITY WEEKLY REP. 101, 101-04 (1983); *AIDS: Precautions for Clinical and Laboratory Staffs*, 31 MORBIDITY & MORTALITY WEEKLY REP. 577, 577-80 (1982).

55. See *An Evaluation of AIDS Reported in Health Care Personnel*, 32 MORBIDITY & MORTALITY WEEKLY REP. 358, 358-60 (1983); *Prospective Evaluation*, *supra* note 54, at 181-82.

56. See *Opportunistic Infections*, *supra* note 45 at 360-61.

57. D. ALTMAN, *supra* note 1, at 71-73 (discussing the fact that while the classification of the other groups-at-risk was based on common behavioral practices with diagnosed AIDS cases, Haitians were classified as a group-at-risk for simply sharing the same nationality as diagnosed AIDS patients. Altman notes the Haitians were the only risk group identified by who they were rather than what they did).

58. Vieira, *The Haitian Link*, in UNDERSTANDING AIDS 93 (V. Gong ed. 1985).

59. D. ALTMAN, *supra* note 1, at 72.

60. Vieira, *supra* note 58, at 94.

61. D. BLACK, *supra* note 27, at 67-68.



mounting political pressures,<sup>62</sup> and supported by the recent evidence of sexual transmission and the growing awareness of the reluctance of Haitian men forced into prostitution by economic necessity to identify themselves as homosexuals,<sup>63</sup> the CDC abandoned the classification of Haitians in 1985.<sup>64</sup>

Their identification as an AIDS risk group had a devastating effect on the Haitian population. Haitians in the United States "were literally targeted: poor, black, contagious immigrants."<sup>65</sup> The reaction of the non-Haitian populations living in close proximity to the "contagious" people, who were often unprotected illegal aliens, led to employment discrimination, housing eviction and—in the case of intercepted "boat people"—impoundment.<sup>66</sup> In Haiti, the rapid decline of the tourist industry led to a widely publicized press release from the Duvalier government which stated that Haiti would no longer serve as the brothel of the Caribbean.<sup>67</sup> Haitian officials began arresting and jailing native homosexuals while expelling foreign gays.<sup>68</sup>

The CDC's classification of Haitian nationals as a risk group, vilified by one commentator as an example of "North American semantic carelessness,"<sup>69</sup> also undermined the epidemiological structure of the early AIDS studies. The final CDC update before the declassification of Haitians attributed 3.8 percent of all AIDS cases to unknown or "uncharacteristic" factors.<sup>70</sup> The next update cited an increase to 6.7 percent in the uncharacteristic category,<sup>71</sup> which reflected statistical evidence drawn from the Haitian population that the CDC was either unable, or had simply failed, to evaluate properly.

The positive impact of behavioral study on classified risk groups is evidenced by reported self-behavior modification in homosexual males and attendant lower rates of venereal infection.<sup>72</sup> Furthermore, the possibility of the occurrence of new modes of transmission of the AIDS virus seems to preclude any argument in favor of abandoning the behavioral characterization systems.<sup>73</sup> The CDC's epidemiological structure was undermined only when the behavioral

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62. D. ALTMAN, *supra* note 1, at 72-73.

63. D. BLACK, *supra* note 27, at 67-68.

64. *Update: AIDS—United States*, 34 MORBIDITY & MORTALITY WEEKLY REP. 245, 245-48 (1985). Statistical evidence from the abandoned Haitian risk category eventually became categorized in the revised "Heterosexual Cases" (formerly "Heterosexual Contacts") category formulated in 1986. See Memorandum of July 29, 1986, CDC AIDS WEEKLY SURVEILLANCE REP. ("This category includes all patients without one of the risk exposures higher on the list who have either had heterosexual contact with a person with AIDS or at risk of AIDS or who were born in countries in which heterosexual transmission is considered to play the major role.").

65. J. LEIBOWITZ, *supra* note 36, at 79.

66. J. LEIBOWITZ, *supra* note 36, at 79.

67. D. ALTMAN, *supra* note 1, at 72.

68. J. LEIBOWITZ, *supra* note 36, at 80.

69. Letter from Fritz Cineas, 309 NEW ENG. J. MED. 668, 668 (1983).

70. *Update: AIDS—United States*, 33 MORBIDITY & MORTALITY WEEKLY REP. 661, 661-64 (1984).

71. *Update: AIDS—United States*, *supra* note 64, at 245-48.

72. See, e.g., *Update: AIDS in the San Francisco Cohort Study*, 34 MORBIDITY & MORTALITY WEEKLY REP. 573, 573-78 (1985).

73. See D. ALTMAN, *supra* note 1, at 55-56 (discussing the epidemiological study of "link" theories, including the possible roles of genetic, environmental, and social factors in the transmission of AIDS).

core of the classification was abandoned and a Haitian class created. The responsibility of the scientific community to its research subjects is fulfilled when the categorization of these subjects is legitimate for scientific purposes. Once an afflicted individual has been properly classified for epidemiological studies, it is the function of the legal system to protect that individual. In the context of this epidemiological background, this Note examines the legal protections that are implicated by the recent onset of the public health threat engendered by AIDS.

### III. AIDS, HOMOSEXUALITY, AND LEGAL PROTECTIONS

Throughout an epidemic, the communities of the ill and the well may turn to the legal system to protect their conflicting interests. Each issue raised by AIDS has ramifications beyond the workplace, classroom, or laboratory where the legal drama is unfolding. Every legal question echoes the ultimate issue of the epidemic: what limits on the activities of the diseased will the community be willing to impose?

#### A. *Homosexuals and Constitutional Protection*

Although an individual's sexual conduct may, in some instances, be entitled to substantive due process protection, the United States Supreme Court has not extended general protection to adult consensual homosexual activity. In *Bowers v. Hardwick*,<sup>74</sup> the one major decision on homosexual sodomy, the Court took a highly restrictive view of what substantive due process protection, if any, should be accorded to adult consensual sexual acts. In *Hardwick*, a homosexual male challenged a Georgia statute<sup>75</sup> criminalizing the performance of or submission to an act of sodomy.<sup>76</sup> The Supreme Court, in a five to four decision, upheld the statute. In his concurring opinion Chief Justice Burger stated that there is "nothing in the Constitution depriving a State of the power to enact the statute challenged here."<sup>77</sup>

The Court has used a bifurcated approach in analyzing whether a statute can be upheld as constitutional on a due process challenge. A statute that interferes with a nonfundamental right need bear only a rational relationship to a

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74. 106 S. Ct. 2841 (1986). In August 1982 Michael Hardwick was charged with violating the Georgia statute criminalizing sodomy, see *infra* note 75, by performing an act of oral sex on another adult male in the bedroom of his own home. Although the district attorney dropped the charges against him, Hardwick challenged the constitutionality of the statute in federal district court. "John and Mary Doe," a married heterosexual couple, joined Hardwick in this action, alleging that they wished to engage in sexual activity proscribed by the statute, but the statute and Hardwick's arrest "chilled and deterred" them from participating in those activities. The district court, however, denied standing to the Does, stating that they had not sustained, nor were they in any immediate danger of sustaining, any direct injury from the enforcement of the statute. *Id.* at 2842 & n. 2. For a discussion of the *Bowers* decision, see Note, *Bowers v. Hardwick: An Incomplete Constitutional Analysis*, 65 N.C.L. REV. 1100 (1987).

75. GA. CODE ANN. § 16-6-2(a) (1984). The statute provides that a person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. Such offenses are punishable by imprisonment of not less than one nor more than 20 years. *Id.*

76. *Hardwick*, 106 S. Ct. at 2842.

77. *Id.* at 2847 (Burger, C.J., concurring).

legitimate state interest;<sup>78</sup> however, when a statute infringes on a fundamental right the state's objective must be compelling<sup>79</sup> and the statute a necessary and least restrictive means to the achievement of that end.<sup>80</sup> One commentator has stated that it is the duty of the Court to utilize this analysis to define and defend the rights of individuals against statutes that represent a majority sentiment seeking to limit the legal entitlements of unpopular groups.<sup>81</sup>

The *Hardwick* Court, however, used precisely such a majoritarian sentiment to rationalize its decision to uphold the sodomy statute. Justice White, writing for the majority, refused to acknowledge *Griswold v. Connecticut*<sup>82</sup> and its progeny as precedent.<sup>83</sup> *Griswold* recognized a fundamental right to privacy in the conduct of one's intimate relationships, but the *Hardwick* court reasoned that the established privacy rights did not bear "any resemblance to the claimed constitutional right of homosexuals to engage in sodomy."<sup>84</sup> The Court was unwilling to find any fundamental right to engage in sodomy,<sup>85</sup> because it had previously regarded as fundamental only those rights which are "implicit in the concept of ordered liberty"<sup>86</sup> or "deeply rooted in this Nation's history and tradition."<sup>87</sup> The Court believed that it would be "facetious" to find a fundamental right to engage in sodomy under these tests, because all states outlawed sodomy until 1961 and twenty-four states maintained criminal sodomy statutes as of the date of the decision.<sup>88</sup> Justice White further reasoned that the Court would no longer be inclined to discover new fundamental rights under the due process clause.<sup>89</sup>

The Georgia statute at issue in *Hardwick* did not differentiate between heterosexual and homosexual sodomy.<sup>90</sup> Justice Stevens, writing in dissent, argued that the statute would be unconstitutional as applied to married or unmarried heterosexual adults.<sup>91</sup> Thus, the State should have the burden of showing why

78. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Loving v. Virginia*, 388 U.S. 1 (1967).

79. *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969).

80. *NAACP v. Alabama*, 377 U.S. 288, 307 (1964). Fundamental rights—in particular, those aspects of "liberty" not enumerated in the Bill of Rights—have been held to include the right to teach one's child a foreign language, *Meyer v. Nebraska*, 262 U.S. 390, 400-01 (1923); the right to send one's child to private school, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); and the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-2 (1978) (discussing the difficulty in applying this analysis to fundamental rights under substantive due process).

81. L. TRIBE, *supra* note 80, § 15-2, at 892.

82. 381 U.S. 479 (1965) (recognizing the right to privacy in the use of contraceptives in marital sexual intercourse).

83. *Roe v. Wade*, 410 U.S. 113, 164 (1973) (the right of privacy protects the decision of a woman and her doctor to abort in the first trimester of pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (recognizing the right of privacy in the use of contraceptives in nonmarital sexual intercourse).

84. *Hardwick*, 106 S. Ct. at 2843-44.

85. *Id.*

86. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

87. *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

88. *Hardwick*, 106 S. Ct. at 2845-46.

89. *Id.* at 2846.

90. See *id.* at 2856 (Stevens, J., dissenting).

91. *Id.* at 2858 (Stevens, J., dissenting) (citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

selective enforcement against homosexuals did not constitute constitutional discrimination.<sup>92</sup> Although Stevens' dissent did not specifically address the issue, his comments raise the possibility that the Court could find such selective enforcement a violation of the equal protection clause.<sup>93</sup> However, the Court has never recognized homosexuals as a suspect class<sup>94</sup> and the present Court appears as unwilling to find new "suspect classes" or "fundamental rights" under the equal protection clause as it has been under the due process clause.<sup>95</sup> According to Justice White, "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."<sup>96</sup>

Gay rights advocates were outraged by the *Hardwick* decision. Thomas Stoddard, Executive Director of Lambda Legal Defense and Education Fund, has accused the *Hardwick* majority of utilizing an unprincipled distortion of the actual issue presented before the Court in a zealous effort to tailor the disposition of the case to suit its particular prejudices.<sup>97</sup> Stoddard's argument rests upon the limited scope of the United States Court of Appeals for the Eleventh Circuit's decision on appeal to the Supreme Court. The court of appeals in reversing and remanding the district court's dismissal, had merely charged the State of Georgia with proving a compelling interest in the prohibition against sodomy; the court of appeals never ruled on the actual issue of the constitutionality of the statute.<sup>98</sup> Stoddard argued that the Court's decision was beyond the scope of the actual appeal and indicated the majority's eagerness to rush forward to the ultimate question of the statute's constitutionality. The *Hardwick* decision thus may have exceeded the restrictions placed on the Court's appellate jurisdiction when it proceeded to uphold the statute in the absence of any lower ruling on the issue. Furthermore, the Court issued its decision in the absence of any trial record identifying the particular state interest that the statute was intended to protect.<sup>99</sup> Stoddard also attacked the *Hardwick* majority for converting a "sexual privacy case" to a "gay rights" case, arguing that this recharacterization allowed Justice White to avoid a precedential analysis under the *Griswold* progeny<sup>100</sup> and permitted the Court to uphold the sodomy statute with the simple reasoning that proscriptions against such conduct have "an-

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92. *Id.* at 2858-59 (Stevens, J., dissenting).

93. The Court applied a two-tiered approach in equal protection analysis. Only a classification based on a suspect class, such as race or national origin, or which impairs a fundamental right, such as the right to vote, is subject to the strict scrutiny test, in which the classification must be a limited, necessary means to promote a compelling state interest. See L. TRIBE, *supra* note 80, §§ 16-1 to 16-7 (discussing model for judicial review of challenges to statutes under equal protection clause).

94. See Orland & Wise, *supra* note 2, at 151.

95. Orland & Wise, *supra* note 2, at 148-57; see also Stoddard, Bowers v. Hardwick: *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987) (arguing that the *Hardwick* Court characterized its decision as judicial restraint employed to counteract the perceived excesses of the "personal lawmaking" of the Warren Court).

96. *Hardwick*, 106 S. Ct. at 2846.

97. Stoddard, *supra* note 95, at 655.

98. Stoddard, *supra* note 95, at 651.

99. Stoddard, *supra* note 95, at 651.

100. Stoddard, *supra* note 95, at 652-53.

cient roots.' ”<sup>101</sup>

Although the decision is narrowly limited to the holding that states may proscribe homosexual activity without violating substantive due process, *Hardwick* indicates that the Court is unsympathetic to the assertion of gay rights and is unlikely to hold discrimination against homosexuals unconstitutional.<sup>102</sup> Gay men would be at a severe disadvantage in seeking constitutional protections against actions undertaken to combat AIDS, because such restrictions are justified as being aimed at “disease carriers” and not at a particular sexual orientation.<sup>103</sup> These “public health” actions may go directly to the core question of whether the state criminalizes homosexual conduct. For example, in *Baker v. Wade*<sup>104</sup> “Dallas Doctors Against AIDS” sought to set aside a judgment of the United States District Court for the Northern District of Texas, which declared the Texas sodomy statutes unconstitutional.<sup>105</sup> This group of “concerned physicians” urged the court to reopen the evidence to allow the introduction of evidence of AIDS as a public health reason to uphold the sodomy statutes.<sup>106</sup>

Several months before the Supreme Court delivered the *Hardwick* decision, the United States District Court for the Eastern District of Pennsylvania stated in dictum in *Randall v. Alcohol & Mental Health Association*<sup>107</sup> that it was not unconstitutional to be gay. Although the *Hardwick* majority expressed its abhorrence of homosexual practices, the decision did not address the status of homosexuals as individuals under the Constitution.<sup>108</sup> By failing to address this issue, the Court has, in essence, created targets for those who would use the AIDS epidemic to persecute the homosexual community.

Because AIDS is still perceived to be “a gay men’s disease,”<sup>109</sup> the epidemic may be used to justify homophobic attitudes in society. For example, testimony at a House Judiciary Subcommittee Hearing on Criminal Justice demonstrated that “AIDS Backlash” was a factor in the significant increase in

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101. Stoddard, *supra* note 95, at 654. (quoting *Hardwick*, 106 S. Ct. at 2844).

102. Orland & Wise, *supra* note 2, at 151-53.

103. Orland & Wise, *supra* note 2, at 153.

104. 106 F.R.D. 526 (N.D. Tex.), *rev'd on other grounds*, 769 F.2d 289 (5th Cir.), *cert. denied*, 106 S. Ct. 3337 (1986).

105. *Id.* at 527-28.

106. *Id.* at 528-30. The motion of the doctors' group to set aside a final judgment was denied because the AIDS-related “evidence” they sought to introduce did not constitute “newly discovered evidence” that could not have been discovered with due diligence in time to move for a new trial, nor was the “new evidence” sufficient to warrant a new trial or to change the result as required by FED. R. Civ. P. 60(b). *Baker*, 106 F.R.D. at 531.

107. No. 85-4910, slip op. at 2 (E.D. Pa. Jan. 13, 1986) (court dismissed plaintiff's § 1983 action which alleged that defendant nurse was required to be screened for AIDS because he was dispensing medication to plaintiff).

108. *Hardwick*, 106 S. Ct. at 2847-49 (Powell, J., concurring). Although Justice Powell agreed that there is no fundamental right to engage in homosexual sodomy, he believed that the respondent was protected under the eighth amendment and that a prison sentence for engaging in such consensual acts would create a serious eighth amendment issue. The majority, however, did not address the implications of the Georgia statute for an individual who engages in the proscribed acts; rather, the decision only addressed the ability of the State to proscribe such conduct. *Id.*

109. See *AIDS Perceived “Gay Men’s Disease,”* AIDS POL’Y & L., Oct. 22, 1986, at 6, col. 1 (discussing issues raised at a 1986 Women and AIDS conference held in Boston, Mass.).

anti-gay violence in 1985.<sup>110</sup> An eight-city study of homophobic violence showed that twenty percent of gay men had been the victims of physical assaults and, in at least eight percent of the reported incidents, the perpetrators allegedly made verbal reference to AIDS.<sup>111</sup> A representative of the American Psychological Association testified that the increase in violence against homosexuals "is 'apparently fueled by public reaction' to AIDS."<sup>112</sup>

The epidemic has also made homosexuals vulnerable to those who seek to use AIDS to further their political agendas. For example, on May 1, 1987, an aide to Reverend Jerry Falwell disclosed that the Moral Majority was going to purchase broadcasting time to " 'expose the myths and the cover-up of the facts about the AIDS epidemic.' "<sup>113</sup> In a related letter, Reverend Falwell attributed the " 'original spawn' " of the AIDS epidemic to homosexuals and alleged that " 'powerful militant homosexuals' " have extended their " 'wretched [political] influence' " to extract a " 'cover-up' " about the disease and to prohibit public health officials from " 'doing what needs to be done' "—mandatory testing and quarantine—to halt the spread of " 'the gay plague.' "<sup>114</sup>

*Hardwick* raises further questions about the state's ability to perform its public health duty to prevent the further transmission of AIDS. The Surgeon General of the United States has urged comprehensive educational programs as the best defense against proliferation of the disease.<sup>115</sup> These educational programs emphasize that individuals must adapt their sexual practices to reduce the risk of transmission. A state that criminalizes sodomy is faced with a dilemma: how can the state effectuate its public health duties when a pragmatic and effective undertaking of this duty requires the state to address modified adaptations of behavior it criminalizes? The question is raised whether *Hardwick* could be used to justify shifting the burden of public health education from the state to the private sector.

The characterization of AIDS as a gay disease has confused the issue of the legal entitlements of homosexuals with the separate question of the limits and restrictions that may be imposed on the carriers of contagious disease. The ultimate question is whether those courts justifying restrictions to prohibit the further transmission of the disease will be alert to attempts to attack homosexuals through restrictions masquerading as public health measures. In the face of a public backlash created by the AIDS epidemic and the continuing threat of the disease itself, gay men will be forced to trust and rely on the sensitivity of the courts and the legislatures to distinguish the disease from the homosexual. Assuming, *arguendo*, that this distinction is made, courts must distinguish the apparent lack of protections to which the homosexual is relegated under the

110. *AIDS Said Cause of Rise in Violence*, AIDS POL'Y & L., Oct. 22, 1986, at 6, col. 2.

111. *Id.*

112. *Id.* (quoting Gregory Herek of the American Psychological Association).

113. *Falwell Plans TV Program to Expose AIDS "Cover-Up,"* AIDS POL'Y & L., May 6, 1987, at 5, col. 1 (quoting an unnamed aide to Rev. Jerry Falwell).

114. *Id.* (quoting a fund-raising letter from Rev. Falwell).

115. SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME (1986).

Court's decision in *Hardwick* from their duty to scrutinize the legitimacy of all public health measures undertaken to combat AIDS.

### B. AIDS and Quarantine

The most drastic protective measure available to a community is the imposition of a complete restriction on the movement of an infected individual. The term "quarantine" literally means "forty days" and stems from the Renaissance practice of a forty-day detention of ships from plague-ridden ports.<sup>116</sup> The practice, however, dates back to Biblical edicts mandating that the "unclean" shall live alone, dwelling outside of the camp, during the period of infection.<sup>117</sup>

Early American case law established preservation of the public health as a proper concern of state legislatures. Quarantine was held to be a legitimate exercise of the state's police power, even to the extent of depriving individuals of their constitutional guarantees of liberty.<sup>118</sup> In a 1905 decision, *Jacobson v. Massachusetts*,<sup>119</sup> the Supreme Court ratified the police power of the states over issues of public health. The Court, in holding compulsory smallpox vaccination of adults to be constitutional despite infringement on personal liberty, asserted that individual liberty must yield in the face of the state's right "to secure the general comfort, health, and prosperity of the State."<sup>120</sup> The Court further recognized, in dicta, the right of the state to impose even the most stringent requirements, including quarantine, in order to protect public health.<sup>121</sup> According to the Court, the only limitation on the state's power was that the state could not act arbitrarily or oppressively.<sup>122</sup>

The *Jacobson* decision is typical of the minimum review applied by early twentieth century courts in cases involving both economic and civil rights infringements: the legislation was presumed valid unless it bore no reasonable relationship to a proper governmental goal.<sup>123</sup> The State could establish a reasonable relationship, even though the legislature reacted solely on the basis of a common belief about the transmission of the disease. A court required no evidence establishing the validity of the belief.<sup>124</sup>

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116. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 55 (1985).

117. *Leviticus* 13:46.

118. See Parmet, *supra* note 116, at 55-71, for a comprehensive summary of American case law from the colonial era to the early years of the twentieth century.

119. 197 U.S. 11 (1905).

120. *Id.* at 26 (quoting *Railroad Co. v. Husen*, 95 U.S. 465, 471 (1878)).

121. *Id.* at 29 ("An American citizen, arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared.").

122. *Id.* at 28.

123. See *Miller v. Wilson*, 236 U.S. 373, 380 (1915) (citing *Muller v. Oregon*, 208 U.S. 412 (1908) and *Riley v. Massachusetts*, 232 U.S. 671 (1914) for the proposition that the Court may uphold state statutes restricting work hours for women on challenges that such statutes violated liberty of contract).

124. *Jacobson*, 197 U.S. at 35.

In the early twentieth century the United States Court of Appeals for the Ninth Circuit addressed the discriminatory potential of quarantine in *Jew Ho v. Williamson*.<sup>125</sup> The *Jew Ho* court invalidated a San Francisco city ordinance quarantining the Asian residential section of the city in response to nine deaths attributed to an outbreak of bubonic plague.<sup>126</sup> Although contradictory evidence was presented on the existence of bubonic plague in San Francisco,<sup>127</sup> the court ruled that if bubonic plague were shown to exist, a limited quarantine could be upheld.<sup>128</sup> The court, however, noted that the boundaries of the quarantine were carefully drawn to exclude the residences of white citizens, and held that the ordinance was a subterfuge for discrimination.<sup>129</sup> The *Jew Ho* decision held that a public health ordinance could not be an excuse for discrimination. The duty of the court was to invalidate "the administration of a law 'with an evil eye and an unequal hand.'" <sup>130</sup>

Beyond the *Jew Ho* proposition barring overt discrimination, courts have generally granted expansive readings of state powers to prevent the spread of an infectious disease.<sup>131</sup> The quarantine of prostitutes on the presumption that they carried venereal diseases is an example of the exercise of this power.<sup>132</sup> During the First World War, the Commission on Training Activities instituted a campaign in the military forces for "moral cleanliness and health" that culminated in the passage of the Chamberlain-Kahn Act, which established funds for civilian quarantine and isolation camps as part of a venereal disease prevention program.<sup>133</sup> From December 1918 to July 1920, twenty-seven "reformatories" and "dormitories" quarantined 18,000 women convicted of prostitution.<sup>134</sup> "Hold and treat" statutes and ordinances enabled officials to hold a woman suspected of venereal infection until she was examined and, if the examination proved positive, treated.<sup>135</sup> The possibility of infection was sufficient cause for incarceration. The fact that 15,500 of the 18,000 women committed tested positive for venereal diseases reinforced the belief that all prostitutes were infected. Whereas courts may have been sympathetic to less stigmatized complainants, the "hold and treat" statutes were maintained as bearing a reasonable relation to a proper state objective.<sup>136</sup>

125. 103 F. 10 (C.C.N.D. Cal. 1900).

126. *Id.* at 26.

127. *Id.* at 24-26.

128. *Id.* at 26.

129. *Id.* at 23.

130. *Id.* at 23-24 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)).

131. Comment, *Protecting the Public from AIDS: A New Challenge to Traditional Forms of Epidemic Control*, 2 J. CONTEMP. HEALTH L. & POL'Y 191, 202 (1986); see also Parmet, *supra* note 116, at 59-71 (comprehensive survey of cases upholding quarantine laws from early twentieth century).

132. See A. BRANDT, *supra* note 23, at 84-92 for a detailed narrative.

133. Act of July 9, 1918, ch. 143, § 2, 40 Stat. 845, 886.

134. See A. BRANDT, *supra* note 23, at 88-89.

135. A. BRANDT, *supra* note 23, at 85.

136. Cases concerning prostitutes include *Ex parte Clemente*, 61 Cal. App. 666, 215 P. 698 (1923) (fact that woman was conducting house of "ill fame" was reasonable ground to believe she was affected with infectious disease); *Ex parte Dayton*, 52 Cal. App. 635, 199 P. 548 (1921) (woman who was "inmate" of a brothel was reasonably suspected of carrying infectious disease); *Ex parte*



As medical advances developed efficient treatments and preventions for infectious disease, the incidence of quarantine rapidly declined.<sup>137</sup> The current case law is anchored in the holdings of courts sitting in the early decades of this century and, thus, should have little precedential value in the AIDS epidemic. Existing case law has been outdated because courts have adopted more progressive attitudes in evaluating the effects of governmental regulation. Specifically, most public health law in this country predates the current scope of protected individual rights.<sup>138</sup>

The law of quarantine, however "anachronistic,"<sup>139</sup> has been resuscitated as a means of containing the AIDS epidemic.<sup>140</sup> As early as 1983, a proposal to quarantine recalcitrant AIDS patients—diagnosed cases who continued to seek sexual partners—was drafted by the Chief of Infectious Diseases in California.<sup>141</sup> The proposal was dropped after a rash of highly unfavorable press exposure. In Connecticut, publicity about a New Haven prostitute infected with AIDS resulted in that state legislature's clarification of state quarantine law with respect to the spread of infectious disease through irresponsible behavior.<sup>142</sup> In 1985 a public television documentary on AIDS prominently featured the sensational "Fabian Bridges Case."<sup>143</sup> Controversy and renewed calls for quarantine legislation erupted after Bridges, a male homosexual prostitute affected with AIDS, announced that he had continued to have sexual activity.

A widely publicized attempt to enact quarantine proposals occurred in the Proposition 64 campaign preceding the 1986 California general elections. In

Arata, 52 Cal. App. 380, 198 P. 184 (1921) (woman of "ill fame" reasonably presumed to have venereal disease). *But see Ex parte Shephard*, 51 Cal. App. 49, 195 P. 1077 (1921) (more than mere suspicion required to hold an individual in quarantine; therefore, prostitute suspected of infection was unreasonably detained).

137. *See, e.g.*, A. BRANDT, *supra* note 23, at 170-74 (discussing the discovery of antibiotics—"magic bullets"—to treat venereal disease and the attendant decline in reasons for officials to be involved in regulating public morals).

138. Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1276 (1986).

139. Parmet, *supra* note 116, at 89.

140. D. ALTMAN, *supra* note 1, at 63-64.

141. *See* D. ALTMAN, *supra* note 1, at 64.

142. *See* CONN. GEN. STAT. § 19(a)-221 (West 1986). The substantially revised section added provisions for the confinement of a respondent with a "communicable disease" when it is determined that the person poses a substantial threat to the public health. *Id.*

In August 1987, the North Carolina General Assembly responded to the AIDS epidemic by enacting amendments to the existing Communicable Disease Law. Act of Aug. 12, 1987, ch. 782, §§ 1-21, 1987 N.C. Adv. Legis. Serv. 440 (amending portions of N.C. GEN. STAT. ch. 130A). The amendments allow the State to isolate persons with communicable conditions, defined as those individuals "infected with a communicable agent but without symptoms," *id.* § 3 (to be codified at N.C. GEN. STAT. § 130A-133(5)), in addition to those persons with a communicable disease. The amendments further enable the State to limit the actions as well as the movements of any person exposed to a communicable disease or condition. *Id.* § 2 (to be codified at N.C. GEN. STAT. § 130A-133(4)). Additional language in the provision, which enables public health officials to exercise quarantine and isolation authority, states that such action will be undertaken "only when and so long as the public health is endangered, all other reasonable means for correcting the problem have been exhausted, and no less restrictive alternative exists." *Id.* § 15 (to be codified at N.C. GEN. STAT. § 130A-145). The amendment, however, fails to articulate the evidentiary burden of officials seeking isolation authority and does not provide a statutory time limit on individuals subject to quarantine.

143. Matthews & Neslund, *The Initial Impact of AIDS on Public Health Law in the United States—1986*, 257 J. A.M.A. 334, 334 (1987).

June 1986, the "Prevent AIDS Now Initiative Committee" (PANIC), spearheaded by supporters of Lyndon LaRouche, successfully petitioned to place a quarantine proposal on the November ballot.<sup>144</sup> Although public health experts recognized the proposal as a means to permit the confinement and quarantine of individuals who tested positive for the HIV virus, supporters of the initiative attempted to dress up Proposition 64 as a modest measure employing only proven public health practices.<sup>145</sup> However, the LaRouche national headquarters in Virginia printed over one million campaign pamphlets promoting a theory of AIDS transmission by insect carriers, casual contact, and federal economic policies,<sup>146</sup> and the proposal was enthusiastically supported by conservative politicians such as California House Representative William Dannemeyer of the House Health Subcommittee.<sup>147</sup> The campaign tactics of the proponents of Proposition 64 created an immediate controversy. Upon suit by the California Secretary of State, a California Superior Court judge ordered false information about the transmission of AIDS stricken from the official Proposition 64 information pamphlet that was to be mailed to each of the State's twelve million voters.<sup>148</sup> The initiative was attacked by commentators both inside and outside the State. On October 1, the American Public Health Association announced that Proposition 64 would deprive individuals of their basic liberties despite a lack of scientific evidence that the proposed measures would protect public health.<sup>149</sup> In an editorial entitled "No on [Proposition] 64," the *Los Angeles Times* succinctly labeled the initiative as "homophobia disguised as public health."<sup>150</sup> The bill was finally rejected by a two to one margin after a massive and coordinated demonstration of opposition by medical experts.<sup>151</sup> On announcing the defeat of the proposal, the California State Health Director called the vote "a triumph, very simply, for good over evil."<sup>152</sup>

However, in the early months of 1987 a similar bill requiring mandatory disclosure of virus carriers to the Colorado Department of Health was introduced in the Colorado General Assembly.<sup>153</sup> This bill was passed by the legislature and signed by the governor on June 8, 1987.<sup>154</sup> The law enables the State and local health departments to examine and test any individual whom a health

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144. *LaRouche Trounced on All Fronts but Vows to Keep Trying*, AIDS POL'Y & L., July 2, 1986, at 4.

145. *Californians to Vote on Adding AIDS to Disease List*, L.A. Times, Nov. 6, 1986, § 2, at 5, cols. 2, 3.

146. *Measures: AIDS, English-Only and Limits on Pay Put California in Limelight*, L.A. Times, Nov. 2, 1986, § 1, at 3, col. 3.

147. Letter to the Editor from H. Rep. W. Dannemeyer, L.A. Times, Nov. 1, 1986, § 2, at 2, col. 2.

148. *See Statements on Proposition 64 Removed*, AIDS POL'Y & L., Aug. 27, 1986, at 2.

149. *Association Asks Justice to Rescind Opinion on AIDS*, AIDS POL'Y & L., Oct. 8, 1986, at 8.

150. *No on Prop. 64*, L.A. Times, Oct. 19, 1986, § 5, at 4, col. 1.

151. *Toxics: Anti-Pollution Measure Wins Easily; AIDS Initiative Rejected*, L.A. Times, Nov. 5, 1986, § 1, at 29, col. 1.

152. *Id.*

153. *Colorado Measure to Allow AIDS Patient "Restriction,"* AIDS POL'Y & L., Mar. 25, 1987, at 6.

154. *Colorado is Split on New AIDS Law*, N.Y. Times, June 15, 1987, § A, at 13, col. 1.

official "knows or has reason to believe" is infected by the HIV virus.<sup>155</sup> Health officials may seek a State court order "to take such person(s) into custody, for a period not to exceed 72 hours, and place him in a facility designated or approved by the executive director."<sup>156</sup> Furthermore, the statute allows officials to petition the courts for orders enabling the State to "restrict" an HIV carrier for a period of up to three months for failure to comply with a court injunction to "cease and desist" from practicing unsafe sexual behavior.<sup>157</sup> Although the statute states that public health officials must justify all petitions for a court order by "clear and convincing evidence,"<sup>158</sup> it may happen that individuals who are not infected by the HIV virus—in particular, individuals such as gay men whose sexual behavior may raise suspicions in the minds of the public health department—could be confined and tested by the State.

Similarly, in December 1986 the Minnesota Department of Health issued a discussion paper urging the State legislature to modify its statutory disease control program. The proposal suggested a three-tiered program for noncompliant HIV carriers who continued to engage in behavior known to transmit the AIDS virus: the individual would first be monitored and counseled, then assigned to supervised living quarters, and finally "confined" if he or she persisted in "unsafe" activities.<sup>159</sup> The Department of Health said that the category of "non-compliant carriers" could be extended to individuals who refused to be tested for the virus, and to those persons who exhibited "mental illness" or "sociopathic tendencies."<sup>160</sup> Although the Minnesota AIDS Project charged that the proposal was "akin to quarantine" and questioned the necessity of presenting the program to the legislature for statutory enactment,<sup>161</sup> an omnibus health bill with provisions for detaining communicable disease was passed by the Minnesota State legislature in 1987.<sup>162</sup> A spokesperson for the sponsor of the bill addressed the issue of individual liberties by explaining that the State would not order testing of any individual and would rely on the carrier's health care provider to report those patients she suspects to be noncompliant carriers.<sup>163</sup>

The enactment of the Illinois Sexually Transmissible Disease Control Act<sup>164</sup> in September 1987 illustrates a unique strategy to deflect potential questions about the individual protections accorded under statutory quarantine provisions. Under preexisting law, the Illinois Department of Public Health had

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155. COLO. REV. STAT. § 25-4-1407(1) (1987).

156. *Id.* § 25-4-1407(2).

157. *Id.* § 25-4-1406(2)(c), (3).

158. *Id.* §§ 25-4-1406(2)(c), 25-4-1407(4).

159. *Minnesota Views Restrictions on Non-Compliant Carriers*, AIDS POL'Y & L., Dec. 3, 1986, at 4.

160. *Id.*

161. *Id.*

162. 1987 Minn. Sess. Law Serv. ch. 209 (West) (bill allows health commissioner to petition for a six-month confinement for non-compliant carriers and permits 72-hour emergency "holds" on carriers suspected to be imminent health threats).

163. *Perpich Expected to Sign AIDS Detention Material*, AIDS POL'Y & L., May 20, 1987, at 7. The Minnesota AIDS Project protested that the bill encourages a violation of the doctor-patient relationship because the burden is on the physician to refer noncompliant carriers to the State. *Id.*

164. Act of Sept. 21, 1987, Ill. Pub. Act 85-651.

complete power to order isolation of any infected individuals who endangered the public health.<sup>165</sup> The new Illinois act—in addition to providing for reporting requirements, contact investigation between known carriers of infectious diseases and their sexual partners, physical examination, and confidentiality of medical information—allows for quarantine “to prevent the probable spread of a sexually transmissible disease.”<sup>166</sup> In his official signing message, Governor James Thompson stated that the law “affords the AIDS victims *more* protection than current quarantine and isolation laws by requiring the Department of Public Health to secure court approval before taking any intrusive actions such as quarantine.”<sup>167</sup> A more skeptical viewpoint is that the existing law, which affords the Department an almost unreviewable power to effectuate a quarantine, would not withstand scrutiny under modern constitutional protections. Governor Thompson’s view that the new law grants greater protection to HIV carriers must be substantiated by documentation of recent successful quarantine actions in instances of other infectious diseases. The passage of the new law may act as a means to revive a long-dormant public health action.

Quarantine measures raise a range of exasperating questions. Commentators have suggested that because there is no medical cure for AIDS, quarantine measures have the potential for lifetime commitment; individuals quarantined, therefore, will likely be entitled to procedural due process protections requiring that the state prove by more than a preponderance of the evidence that commitment is justified.<sup>168</sup> Furthermore, a total quarantine of gay men would be barred under even a minimum review substantive due process analysis. Such a quarantine would lack a reasonable relation to reducing infection, because not all gay men have AIDS nor are all AIDS carriers gay.<sup>169</sup> The entire doctrine of quarantine may lack the requisite rational relationship: its effectiveness depends on the confinement of asymptomatic carriers of the virus who will never develop the disease. CDC estimates that over 1,500,000 Americans have already been exposed to the virus, and that 270,000 of these will develop the disease by 1991.<sup>170</sup> The practical obstacles to the use of quarantine on this scale make the rational relationship analysis inconsequential.

The first documented cases on AIDS-related quarantine have concerned the isolation of AIDS carriers within prison populations. In *Foy v. Owens*<sup>171</sup> an

165. ILL. ANN. STAT. ch. 111½, para. 22 (Smith-Hurd 1977). See *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 134 N.E. 815 (1922) (Illinois Department of Health is empowered by the state legislature to isolate persons who endanger the public health).

166. Act of Sept. 21, 1987, Ill. Pub. Act 85-651, § 7(a). Such quarantine must be either by consent of the person to be isolated or the place to be quarantined, or by a court order upon clear and convincing proof that the public health and welfare are significantly endangered and that “all other reasonable means of correcting the problem have been exhausted and no less restrictive alternative exists.” *Id.* § 7(b).

167. Letter from Gov. James R. Thompson to the Honorable Members of the Illinois Senate, 85th General Assembly (Sept. 21, 1987) (official signing message on enactment of Senate Bill 651).

168. Parnet, *supra* note 116, at 77-82 (analogizing AIDS quarantine to mental health commitments).

169. Note, *supra* note 138, at 1282-83.

170. *Redefining the Deadly Enemy*, NEWSWEEK, May 11, 1987, at 65, col. 4.

171. No. 85-6909, slip op. (E.D. Pa. Mar. 19, 1986).

inmate of Holmsburg Prison in Pennsylvania sought a quarantine of all possible AIDS carriers in the prison. The United States District Court for the Eastern District of Pennsylvania, in dismissing the complaint, held that the plaintiff had failed to meet the burden of demonstrating a threat of sexual assault with the ensuing danger of contracting AIDS.<sup>172</sup> Although an inmate is constitutionally protected from exposure to communicable diseases,<sup>173</sup> the imposition of a quarantine would have required a greater burden than the showing of the presence of "possible" AIDS carriers.<sup>174</sup>

In *Cordero v. Coughlin*,<sup>175</sup> however, the court upheld a quarantine of diagnosed AIDS victims. The court dismissed the equal protection claims of inmates who had been diagnosed with AIDS, because AIDS sufferers are not a suspect class; the inmates' due process claim was dismissed because prisoners retain only a narrow range of protected liberty interests.<sup>176</sup> Because the inmates were diagnosed, the court found that procedural due process was satisfied, and the quarantine was upheld as bearing a rational relationship to the protection of the prison population.<sup>177</sup> In *Powell v. Department of Correction*<sup>178</sup> a quarantined Oklahoma inmate who alleged the same protections under the equal protection clause did not have AIDS but had tested positive for the HIV virus. The court upheld the quarantine as a reasonable means to achieve a legitimate state purpose in light of the lesser protections accorded an inmate.<sup>179</sup>

The prison cases may be seen as a particularized response to a specific situation. The imminent threat is a similar selective quarantine of "recalcitrant" gay men. Notions about the profligate promiscuity of gay men influence many in society to think of homosexual urges as uncontrollable,<sup>180</sup> despite evidence of self-behavior modification within the gay community.<sup>181</sup> The first widely publicized successful quarantine order involved a fourteen-year-old gay juvenile who was confined to a Florida mental health ward to prevent him from spreading AIDS.<sup>182</sup> The juvenile, who did not have AIDS but had tested positive for the HIV virus, was released by a court order after eleven days of confinement and placed in the youth section of a community health center to await a hearing on a state custody petition. Although the State Health Department conceded that the State had made a mistake in seeking the quarantine order, it predicted that

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172. *Id.* at 2.

173. *Id.* (citing *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981); *Smith v. Sullivan*, 553 F.2d 373, 380 (5th Cir. 1977)).

174. *Id.*

175. 607 F. Supp. 9 (S.D.N.Y. 1984).

176. *Id.* at 10.

177. *Id.*

178. 647 F. Supp. 968 (N.D. Okla. 1986).

179. *Id.* at 970-71. The court noted, however, that if the inmate were treated differently than any other prisoner who was a known carrier of HIV virus—to which the court referred by its earlier acronym HTLV III—he would have suffered an equal protection violation. *Id.* at 971.

180. See, e.g., *Duncan, Commentary: Public Policy and the AIDS Epidemic*, 2 J. CONTEMP. HEALTH L. & POL'Y 169, 171 (1986) (balancing justification for quarantine against human costs).

181. *Update: AIDS in the San Francisco Cohort Study*, *supra* note 72, at 573-78.

182. N.Y. Times, June 17, 1987, § B, at 9, col. 5.

attempts to confine HIV carriers under state laws would continue.<sup>183</sup> In future cases, the modern emphasis on health as a matter of individual concern and responsibility should prevail.<sup>184</sup> The responsibility of prevention lies with each individual's choice to engage in sexual activity and not with the conduct of his partner. The individual must choose to control his own sexual behavior rather than relying on the state to control the behavior of others.

### C. AIDS and the Regulation of Sexual Activity

A state may choose to avoid the legal problems raised by quarantine measures by enacting measures restricting opportunities for sexual activity. A state or municipality has the power to enact health, safety, and public nuisance statutes to force the closing of establishments that threaten the general welfare of the community.<sup>185</sup> Under such statutes, the state does not have to establish that the entire community will be affected by the nuisance so long as the nuisance is a threat to the health and safety of those who come into contact with it in the exercise of a public right.<sup>186</sup> Health and safety legislation is generally given broad construction by courts, and such regulations will be limited only by provisions of the federal and state constitutions.<sup>187</sup>

State and municipal attempts to restrict the spread of AIDS by regulating "unsafe" sexual conduct in public buildings illustrate the range of the state's power to regulate activity under health and safety ordinances. Complete closing of an establishment as a public nuisance is only the broadest example of the use of a state's power to regulate conduct on public premises. A bill introduced in the 1984-85 session of the New Jersey Legislature<sup>188</sup> proposed licensing of adult bookstores by the State Department of Health. The bill, which died in committee hearings, would have required each entering patron to provide identification which would be logged in a daily record to be made available to the Department of Health on request; the owner of the adult bookstore would then be civilly liable to any patron contracting AIDS or any other sexually transmitted disease on the premises.

The city of Chattanooga, Tennessee, enacted an ordinance specifying that the incidence of AIDS in the community required all viewing booths in "adult-entertainment" theaters to be physically unobstructed and visible from the common area of the theater.<sup>189</sup> Upon challenge by bookstore proprietors in *Broadway Books, Inc. v. Roberts*,<sup>190</sup> the United States District Court for the Eastern District of Tennessee stated that the city's objective promoted a proper govern-

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183. *Id.*

184. Parmet, *supra* note 116, at 75.

185. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 90 (5th ed. 1984).

186. *Id.*

187. Note, *Preventing the Spread of AIDS by Restricting Sexual Conduct in Gay Bathhouses: A Constitutional Analysis*, 15 GOLDEN GATE U.L. REV. 301, 309 (1985).

188. H.R. 4217, 1984-85 N.J. Legislature.

189. CHATTANOOGA, TENN., ORDINANCE 8601(14)(g) (1986).

190. 642 F. Supp. 486 (E.D. Tenn. 1986).

mental interest and upheld the statute as a regulation sufficiently narrow to withstand a first amendment challenge.<sup>191</sup> When San Francisco public health officials attempted to close fourteen gay bathhouses under the theory that they facilitated the spread of AIDS, the California Superior Court interpreted the ordinance as a prohibition of unsafe sexual activity on the premises.<sup>192</sup> Although the businesses were permitted to remain open, proprietors were required to distribute AIDS prevention pamphlets and to hire employees who would monitor the establishment to assure compliance.<sup>193</sup>

In *City of New York v. New St. Mark's Baths*,<sup>194</sup> the New York Superior Court validated a New York City ordinance<sup>195</sup> which had been specifically amended to allow *selective* closing, as public nuisances, of bathhouses and clubs where allegedly unsafe sexual activity was practiced. When the bathhouse proprietors argued for narrowing the interpretation of the statute, the court rejected their arguments for the adoption of less restrictive alternatives as futile and claimed that the legislative intent behind the public nuisance regulation required expansive interpretation.<sup>196</sup>

Despite the *St. Mark's* judge's emphasis on the "futility" of less restrictive measures, four New York bathhouses remained in operation as of the summer of 1987.<sup>197</sup> The four facilities promote safe-sex practices and employ "life guards" to enforce the prohibition of unsafe activities.<sup>198</sup> City officials concede that they do not know whether unsafe activity is, in fact, being practiced in "private" areas of the clubs.<sup>199</sup> The State Health Commissioner justified the closing of the New St. Mark's bathhouse as a public demonstration of public health officials' concern because the closing raised the issue of transmission of the disease. Stated the Commissioner, "[w]e feel that we have demonstrated the extent to which public health should go."<sup>200</sup> Attendance at the remaining New York City bathhouses has increased nearly twenty-five percent from 1986 to 1987;<sup>201</sup> but the New St. Mark's bathhouse has not reopened.

Despite the fact the New York City ordinance succeeded only as a public relations tool of the Department of Health, the Georgia General Assembly enacted a statute<sup>202</sup> in 1986 declaring the operation of bathhouses to be harmful to

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191. *Id.* at 490-92.

192. *San Francisco ex rel. Agnost v. Owen*, No. 830-321 (Cal. App. Dep't Super. Ct. Nov. 28, 1984) (unpublished opinion); see D. ALTMAN, *supra* note 1, at 151.

193. See D. ALTMAN, *supra* note 1, at 147-51, for a discussion of the controversy and political infighting preceding this decision.

194. 130 Misc. 2d 911, 497 N.Y.S.2d 979, *aff'd*, 122 App. Div. 2d 747, 505 N.Y.S.2d 1015 (1986); see also *Georgia ex rel. Slaton v. Fleck & Assocs.*, 622 F. Supp. 256 (N.D. Ga. 1985) (suit to close Atlanta bathhouse remanded for failure to meet federal removal statute).

195. N.Y. COMP. CODES R. & REGS. tit. 10, § 24.2 (1985).

196. *St. Mark's*, 130 Misc. 2d at 917-18, 497 N.Y.S.2d at 984 (arguing that the broad legislative intent to prohibit the further transmission of AIDS required a rejection of strained or narrow interpretation of the statute).

197. N.Y. Times, May 3, 1987, § 1, at 58, col. 1.

198. *Id.*

199. A "private area" in the clubs is any area enclosed by a door. *Id.*

200. *Id.*

201. *Id.*

202. GA. CODE ANN. § 31-12-11 (1986).

the public health, safety, and welfare of the citizens. The statute enabled the state and local departments of health "to abate the operation of any bathhouses as a public nuisance."<sup>203</sup> Furthermore, under the act, any owner or employee of a bathhouse will be declared guilty of a misdemeanor.<sup>204</sup>

The legal arguments against these ordinances were based on the right to privacy under substantive due process and the first amendment right to free association.<sup>205</sup> In *Broadway Books, San Francisco ex rel. Agnost v. Owen*,<sup>206</sup> and *St. Mark's* it was conceded that the public health goals of the AIDS ordinances at issue demonstrated a compelling government interest; the question raised by the plaintiffs' complaints was directed to whether the level of protection of their asserted rights mandated a requirement of least restrictive means. This issue was most crucial in *St. Mark's*, in which the court did not attempt to narrow the statute. Although it was suggested that strict scrutiny is required because bathhouses themselves are not per se nuisances,<sup>207</sup> the New York court rejected medical evidence that bathhouse closure would not affect the spiraling rate of AIDS infection. According to the court, "[i]t is not for the courts to determine which scientific view is correct in ruling upon whether the police power has been properly exercised."<sup>208</sup> This indicates that the courts need not even inquire whether the nuisance closure is an effective, let alone necessary, means to achieve a legitimate state purpose when impaired individual rights are not protected.

Had *Hardwick* upheld the right to engage in consensual sodomy, the fundamental right of privacy would have extended to intimate conduct in one's home.<sup>209</sup> The privacy protection does not extend to commercial establishments simply because they provide an opportunity for intimate sexual behavior.<sup>210</sup> One court, in a blunt but colorful statement, observed that "[w]e decline to hold that the right to unobserved masturbation in a public theatre is 'fundamental' or 'implicit in the concept of ordered liberty.'"<sup>211</sup>

Additionally, state police powers have been held to eclipse first amendment rights of association when the nature of the assemblage is not for the advancement of beliefs and ideas but for entertainment and gratification.<sup>212</sup> Social associations do not come under the core protection of the first amendment.<sup>213</sup> Although some members of the gay community believe that the history of sexual

203. *Id.*

204. *Id.*

205. The first amendment to the United States Constitution states in part: "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . ." U.S. CONST. amend. I.

206. No. 830-321 (Cal. Super. Ct. Nov. 28, 1984) (unpublished opinion).

207. Note, *supra* note 187, at 314.

208. *St. Mark's*, 130 Misc. 2d at 917, 497 N.Y.S.2d at 983 (quoting Chiropractic Ass'n. of New York, Inc. v. Hilleboe, 12 N.Y.2d 109, 114, 187 N.E.2d 756, 757, 237 N.Y.S. 2d 289, 291 (1962)).

209. For a discussion of *Hardwick*, see *supra* notes 74-101 and accompanying text.

210. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1974).

211. *Ellwest Stereo Theatres v. Wenner*, 681 F.2d 1243, 1248 (9th Cir. 1982) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

212. *People v. Morone*, 150 Cal. App. 3d Supp. 18, 22, 198 Cal. Rptr. 316, 318 (1983) (upholding closure of a heterosexual "swing club").

213. *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1195 (D.C. Conn.



repression elevates the practice of homosexual sexual activity to the status of a political act,<sup>214</sup> it is unlikely that any court will accept this argument. A similar argument by gay health officials that closure of gay bathhouses would sever their ability to reach individuals most in need of AIDS education, however, reaches the protected core of association for belief and ideas, and may have influenced the California court's decision to allow the San Francisco bathhouse to remain open.<sup>215</sup>

Opponents of bathhouse and bookstore closings are not necessarily striving to legitimize sexual establishments. Their arguments are based on the fear that AIDS will be utilized to restrict all gay organizations with political or social functions. Such fears may be well-grounded in an era when gay rights are threatened by the public fear of AIDS.<sup>216</sup> To dismiss the argument that such closings are a prelude to more ominous restrictions is to ignore the earlier lesson learned from the quarantine of prostitutes. That quarantine followed the failure of the closure of red light districts, such as Storyville and the Barbary Coast, to restrict the spread of venereal disease.<sup>217</sup>

#### IV. CONCLUSION

Ironically, AIDS has appeared at the very time when society was making tentative steps towards recognition of the rights of sexual minorities. If there were no AIDS crisis, the gay community would be concentrating on the achievement of greater recognition of its rights instead of struggling to preserve the few conceded protections.

The epidemic is still at the stage in which it is largely defined by the possibilities that loom ahead. Although AIDS has been in the forefront of national issues for the better part of the decade, the Reagan Administration only began to make tentative steps in confronting the epidemic on the eve of the Third International Conference on AIDS, which convened in Washington, D.C. in June 1987. Addressing the American Foundation for AIDS Research, President Reagan, in his first statement on AIDS, called for "urgency, not panic" in combatting the epidemic and "compassion, not blame" for the victims.<sup>218</sup> Yet, his proposal for effective restriction of the transmission of the disease consisted solely of the implementation of a wide range of testing for the HIV virus at the state and federal levels.<sup>219</sup>

As noted above, the legislative and judicial responses to the AIDS epidemic

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1974) (private club held exempt from Civil Rights Act barring racial discrimination in public accommodations).

214. See, e.g., D. BLACK, *supra* note 27, at 135 (discussing belief that the exercise of the freedom to perform homosexual acts was motivation for some gay men to patronize bathhouses); see also Fitzgerald, *The Castro-II*, THE NEW YORKER, July 28, 1986, at 44-63 (discussing the belief of gay leaders that the bathhouses symbolized gay freedom).

215. D. ALTMAN, *supra* note 1, at 151.

216. Note, *supra* note 138, at 1286.

217. A. BRANDT, *supra* note 23, at 73-75.

218. N.Y. Times, June 1, 1987, § A, at 1, col 2.

219. President Reagan's testing proposal is seen as an indication of his partiality to the views of William Bennett, his Secretary of Education, who favors mandatory testing for the HIV virus, over

are still in the seminal stage. No one is willing to predict the ultimate outcome of society's attempts to restrict the advance of the epidemic. Yet, there are significant omens that warrant the growing concern in the gay community. Despite publicity about the increasing threat to the heterosexual community, the majority of AIDS victims are still homosexual men. As discussed above, there is much evidence that the public still perceives AIDS as a gay disease; therefore, many people perceive the threat of AIDS as a threat from the gay community. Efforts that demonstrate compassion for the victims of contagious diseases<sup>220</sup> are frequently offset by a rash of irresponsible and ineffective proposals that further victimize the diseased.<sup>221</sup> The current calls for mandatory AIDS testing have increased anxiety among gays who perceive such measures to be a surrogate marker for their homosexuality.<sup>222</sup> This identification is frightening when the possibilities of quarantine and regulation of sexual behavior loom ahead.<sup>223</sup> After the Supreme Court's decision in *Hardwick*, homosexuals question whether the legal system will afford them any protections should the threat of such restrictions become imminent. Furthermore, the issue of the individual liberties of homosexuals is critical to all AIDS victims, who are likely to be subject to the same treatment as gays in a society that identifies the disease with a particular sexual practice. In the future, gays will not be able to rely on the safety of "the closet" to ensure the preservation of their rights. Self-preservation in the gay community depends not only on protections from the fatal virus but on the ability to persuade courts and legislatures to distinguish the reality of the disease from the metaphors that surround it.

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the views of Dr. C. Everett Koop, his Surgeon General, who believes that only a voluntary testing program can be effective. See N.Y. Times, May 22, 1987, § A, at 20, col. 1.

Representative Henry Waxman, responding to the imminent implementation of widespread testing, introduced a bill mandating confidentiality of HIV-antibody test results. H.R. 3071, 100th Cong., 1st Sess. (1987); see also H.R. 2773, 100th Cong., 1st Sess. (1987) (requiring confidentiality of medical records of AIDS patients). The bill would also make it illegal to discriminate "against an otherwise qualified individual in employment, housing, public accommodations, or governmental services, solely by reason of the fact that such individual is, or is regarded as being, infected" with the HIV virus. H.R. 3071, *supra*. However, the Reagan Administration's Secretary of Health and Human Services, Otis Bowen, announced that the Administration would oppose the bill, stating that individual states should be free to adopt or reject civil rights laws without federal intervention. N.Y. Times, Sept. 21, 1987, § 1, at 1, col. 3.

220. See, e.g., *School Board of Nassau County v. Arline*, 107 S. Ct. 1123 (1987) (Federal Rehabilitation Act of 1973 forbids discrimination against persons with contagious diseases; although plaintiff in the case suffered from tuberculosis, the opinion set forth a protective analysis that will have implications for the employment status of persons with AIDS).

221. See *supra* notes 144-67 and accompanying text.

222. See A. BRANDT, *supra* note 23, at 197 (discussing further implications of HIV testing in which individuals fear not only isolation and quarantine, but the use of test results as a license to discriminate in employment, housing, and the availability of health and life insurance).

223. See Buckley, *Identify all the Carriers*, N.Y. Times, Mar. 18, 1986, § A, at 27, col. 4 (arguing for universal mandatory screening in which individuals testing positive would be tattooed on their forearms and buttocks).