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Protecting the Public From AIDS: A New Challenge to Traditional Forms of Epidemic Control

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COMMENTS

PROTECTING THE PUBLIC FROM AIDS: A NEW CHALLENGE TO TRADITIONAL FORMS OF EPIDEMIC CONTROL

I. INTRODUCTION

Infectious diseases are not new to civilization. Plagues are spoken of in the Old Testament[1] and have been recorded as early as 500 B.C.[2] In the fourteenth century, outbreaks of three different plague strains carried by rats destroyed anywhere from twenty-five to fifty percent of Europe's population.[3] A swine flu epidemic in 1918 resulted in the death of 500,000 Americans.[4] As recently as 1976, an anticipated epidemic of swine flu resulted in a federal campaign to vaccinate those thought most likely to contract the potentially fatal disease.[5] More recently, the U.S. Public Health Service has declared the Acquired Immunodeficiency Syndrome (AIDS)[6] to be its number one priority.[7]

A new disease with a high mortality rate, AIDS attacks and breaks down the immune system, leaving the body vulnerable to life threatening illnesses.[8]

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1. *Exodus* 9:14

2. *See, e.g.*, R. GOTTFRIED, THE BLACK DEATH: NATURAL AND HUMAN DISASTER IN MEDIEVAL EUROPE (1983).

3. *Id.* at xiii; *see also infra* notes 17-21 and accompanying text.

4. Morgenstern, *The Role of the Federal Government in Protecting Citizens from Communicable Diseases*, 47 U. CIN. L. REV. 537, 541 (1978).

5. *Id.* at 539. The epidemic failed to occur and the vaccine, which had never been proven effective, created a great deal of panic by reports of its unpleasant and even fatal side effects. *Id.*

6. Sometimes called the Acquired Immune Deficiency Syndrome.

7. PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, FACTS ABOUT *AIDS* July 1984 [hereinafter cited as FACTS ABOUT *AIDS*]. Although this Comment discusses AIDS as an American problem, it does not intend to ignore the fact that AIDS is a global concern. *See, e.g.*, Altman, *Research in Africa Shows AIDS Now Posing a Risk to Newborns*, Int'l Herald Tribune, Dec. 19, 1985, at 5, col. 1; Branigin, *AIDS Scare Sweeping Asia Prompts Preventive, Punitive Moves*, Wash. Post, Oct. 29, 1985, at A12, col. 1; Wolfsky & Mills, *The Acquired Immune Deficiency Syndrome: An International Health Problem of Increasing Importance*, 62 KLINISHCE WOCHEN-SCHRIFT 512 (1984); *AIDS Scare Sparks Action*, Facts On File, World News Digest, Dec. 14, 1984, at 929 G2.

8. PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, WHAT EVERYONE SHOULD KNOW ABOUT AIDS (1984). Until recently, the case definition of AIDS consisted of a "reliably diagnosed disease that is at least moderately indicative of an

Of the 16,458 cases of AIDS reported as of January 13, 1986, fifty-one percent of the adults and fifty-nine percent of the children have died.[9] In the United States, approximately seventy-three percent of persons with AIDS have been homosexual or bisexual men, seventeen percent have been intravenous drug users, and one percent have been hemophiliacs.[10]

Although most scientists and public health officials agree that AIDS is not spread by casual contact,[11] the disease carries with it a stigma comparable to leprosy. Reports of discrimination against persons known to have or suspected of having AIDS are becoming more common.[12] Intensifying the stigma is the fact that the major at-risk group for AIDS is homosexual and bisexual men.[13] The epidemic is continuing to grow, however, and has already begun to spread beyond the risk groups to the general population.[14]

Government, at the federal, state, and local levels, is charged with protecting the public health and must attempt to control AIDS. The federal gov-

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underlying cellular immunodeficiency in a person who has no known underlying cause of cellular immunodeficiency nor any other cause of reduced resistance reported to be associated with that disease." 32 MORBIDITY AND MORTALITY WEEKLY REP. 310 (June 24, 1983). In practice, most cases of AIDS have been diagnosed after the patient developed either *Pneumocystis* pneumonia or Kaposi's sarcoma, two rare diseases that have become synonymous with AIDS. On June 28, 1985, the Centers for Disease Control revised the case definition to include patients with certain other symptoms that have been associated with AIDS. 34 MORBIDITY AND MORTALITY WEEKLY REP. 373-74 (June 28, 1985).

9. Rensberger, *AIDS Cases in 1985 Exceed Total of All Previous Years*, Wash. Post, Jan. 17, 1986, at A1, col. 4. *See also* Boffey, *AIDS in the Future: Experts Say Deaths Will Climb Sharply*, N.Y. Times, Jan. 14, 1986, at C1, col. 1; Lambda Legal Defense and Education Fund, Inc., *AIDS Legal Guide: A Professional Resource on AIDS-Related Legal Issues and Discrimination* 1 (1984) [hereinafter cited as *Guide*].

10. WHAT EVERYONE SHOULD KNOW ABOUT AIDS, *supra* note 8, at 7. *See infra* note 35.

11. Hunt, *Teaming Up Against AIDS*, N.Y. Times, Mar. 2, 1986 (Magazine) at 42. *See also* FACTS ABOUT *AIDS*, *supra* note 7; San Francisco AIDS Foundation, *The Best Defense against AIDS is Information* 34 MORBIDITY AND MORTALITY WEEKLY REP., Jan. 11, 1985, at 2. *But cf.* Redfield, Markham, Salahuddin, Sarngadhanan, Bodner, Folks, Ballou, Wright & Galls, *Frequent Transmission of HTLV-III Among Spouses of Patients with AIDS-Related Complex and AIDS*, 253 J. A.M.A. 1571 (1985) [hereinafter cited as Redfield].

12. For cases of AIDS-related discrimination *see generally* GUIDE, *supra* note 9, at 2-3; *see also infra* note 43.

13. *See supra* note 9.

14. *See, e.g.*, Rensberger, *AIDS Cases in 1985 Exceed Total of All Previous Years*, Wash. Post, Jan. 17, 1986, at A1, col. 4. *See also The New Victims*, LIFE, July 1985 at 12-19 . It is now common knowledge that the AIDS virus is capable of being transmitted through intimate heterosexual as well as homosexual contact. *See also* Russell, *AIDS Exposure Feared Wider*, Wash. Post, Nov. 5, 1984, at A6, col. 1 (As many as 300,000 people may be infected with the AIDS virus). In Washington, D.C., the number of AIDS cases is expected to increase from 238 in April, 1985 to 652 by October, 1986. Wash. Blade, Apr. 5, 1985, at 9. col. 1. *See also* Redfield, *supra* note 11. Estimates have run as high as 1.2 million for the number of people that may be infected with the AIDS virus nationwide. Rensberger & Russell, *AIDS: A Menace Beyond 'Risk Groups'*, Wash. Post Sep. 4, 1985, at A1, col. 4.

ernment, through its ability to collect information and provide funds for research, is in a unique position to take the lead in developing a vaccine and discovering a cure. State and local governments do not have access to information collected from physicians in other jurisdictions, and moreover, are not equipped to undertake the financial responsibilities of a national health problem. Local officials have the resources and the responsibilty to deal with local effects of an epidemic.[15] Thus far, local governments, through public health statutes and regulations, have had virtually unlimited power to impose restrictions on individual liberties in order to control an epidemic.[16]

This Comment will examine government involvement in controlling two major epidemics, the Black Death of the fourteenth century and the ancient disease of leprosy. Traditional powers of public health officials will be reviewed, including the advisability of employing these methods in attempting to control AIDS. The civil liberties issues that are a major symptom of the AIDS epidemic will be analyzed, specifically the right to privacy, the role of the federal government and the danger of discrimination. This Comment will conclude with a discussion of how these conflicting considerations—public health and civil liberties—must be balanced in order to control a major health problem in modern society.

II. ORGANIZED EPIDEMIC CONTROL

A. The Beginnings.

The Black Death, a combination of bubonic, pneumonic and septicaemic plague strains carried by rats[17] devastated much of Europe in the fourteenth century. One of four pandemics that carried bubonic plague, it was said to have caused victims to turn black just before death.[18] It is from this era that modern public health ordinances developed. The earliest extant recorded public health ordinance is from Reggio, Italy. Dated January 17, 1374, a proclamation of Viscount Bernabo ordered "the evacuation of those stricken with plague from the town until they either recovered or died, the ten-day isolation of their nurses, and attendants to be specially chosen for plague cases, with disobedience punishable by burning at the stake and confiscation of property."[19] In March, 1348, the Venetian Great Council appointed a provisional Committee of Three "to consider diligently all possible ways to

15. *See infra* notes 60-69 and accompanying text.

16. *Id.*

17. GOTTFRIED, *supra* note 2, at xiii.

18. *Id. See also* V. Link, A HISTORY OF PLAGUE IN THE UNITED STATES OF AMERICA 1 (1955). The Black Death claimed an estimated twenty-five million lives—one quarter of the population of fourteenth century Europe. *Id.*

19. R. HIRST, THE CONQUEST OF PLAGUE 406-07 (1953).

preserve public health and avoid corruption of the environment."[20] Other health boards emerged in Europe at this time. At first their sole function was to contain the plague, but by the year 1400 their responsibilities included supervision or control over most aspects of health and hygiene.[21]

Not surprisingly, the people of the Middle Ages looked for a reason that would explain the plague. With human efforts useless against it, medieval thought was that the Black Death was an act of God punishing the human race for its sins.[22] Scapegoats were sought and found.[23] The medieval reaction has not been confined to the fourteenth century.[24] The answer to the question, "how to protect the public health," has been repeatedly to isolate the afflicted until they either recover or die.[25] This method has become increasingly difficult as cities have become more populated, society has become more mobile and epidemics have remained elusive.[26]

B. A Biblical Perspective.

No disease in recorded history has carried a greater stigma than leprosy.

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20. GOTTFRIED, *supra* note 2, at 122. The Committee was revived in 1361 during another epidemic.

21. *Id.* at 123. The public health board of Florence, Italy, was created in 1347 because of the Black Death. By the middle of the fifteenth century it was "charged with the responsibilities of making provisions, issuing ordinances, preserving the public health and avoiding an epidemic." *Id.*

22. HIRST, *supra* note 19, at 14.

23. Popular belief was that Jews were bringing on Black Death by poisoning the drinking water. The story apparently began in Neustadt, Germany, in 1348 and spread throughout Europe in a short time. Pogroms against Jews were common. "The general breakdown of law and order made Jews especially vulnerable, particularly if they were wealthy." Gottfried, *supra* note 2, at 52. In Germany, wells and springs were built over; many Jews were burned alive. All Europe's Jews would probably have been murdered had it not been for the intervention of Pope Clement VI (who issued two Papal bills declaring the Jews innocent) and the efforts of Emperor Charles IV, Duke Albert of Austria (and others, who, after payment of large sums of money, exerted their influence to protect the Jews). Hirst, *supra* note 19, at 18-19.

24. *See, e.g.*, Black, *The Plague Years*, Rolling Stone, Apr. 25, 1985, at 58; *Runaway Infection Threatens Millions*, Moral Majority Rep. 4 (June 1985); Shumaker, *Bryan's Right to Life Supercedes Any Gay's Right to Privacy*, Moral Majority Rep. 4 (June 1985). Reverend Jerry Falwell, founder and president of Moral Majority, Inc., has recommended the use of civil and criminal penalties to "control" the AIDS epidemic. He would prefer, rather than the use of legal methods, the return "to traditional and moral values of one man, one woman, one marriage for one lifetime." *Falwell Calls for Legal Penalties to Curb AIDS*, Moral Majority Rep. 3 (June 1985). *See also* Lapham, *AIDS and the Political Right: Smugness, But Little Help*, Wash. Post, May 1, 1985, Health at 6, col. 2.

25. Isolation and quarantine are justifiable and necessary methods for controlling the spread of diseases that are casually transmitted, such as smallpox, measles and tuberculosis. *See infra* notes 28-30 and accompanying text.

26. *See infra* notes 62-72 and accompanying text.

A chronic, degenerative disease, leprosy causes the disintegration of body tissue and bone, leaving its victims disfigured but alive.[27] Medieval doctors believed that the disease was caused by divine judgment and could therefore never be cured.[28] The medical and societal response was isolation,[29] a practice that still continues.[30] A person diagnosed as having leprosy "was counted among the dead, and a leper's mass was sung for his soul. Earth was shovelled on his feet, symbolizing departure from the mainstream of society."[31] Lepers were required to wear distinctive clothing and to touch people and things with a rod.[32] Forbidden to enter public places, lepers could not use any public water source. Their legal identities became "muddled, including their right to hold property."[33] [34] Although AIDS is relatively new, and, like leprosy, is not spread by casual contact, it shares with that ancient disease a stigma that may be as harmful as the syndrome itself.

III. THE AIDS CONTROVERSY

AIDS has been the focus of a considerable amount of public hysteria.

27. Leprosy is still endemic in most of Africa, parts of India and Asia, and some Latin American countries. The exact mode of transmission is not known; the bacteria that causes leprosy, *Mycobacterium Leprae*, has been identified yet scientists are unable to grow it in a laboratory environment. It is likely, although not proven, that a genetic susceptibility factor affects the incidence of the disease. The School of Social Welfare, Louisiana State University, *Final Report: The Identification of Psychosocial Factors Related to the Rehabilitation of Leprosy Patients* 2 (1970) [hereinafter cited as The School of Social Welfare]. An estimated fifteen million people suffer from leprosy worldwide, approximately twenty-five percent of whom are being treated. D. PEARSON & T. WHEATE, ESSENTIALS OF LEPROSY (1977).

28. GOTTFRIED, *supra* note 2, at 13.

29. *Id.*

30. Consider the following entry under "Leprosy" in 8 CYCLOPEDIA OF MEDICINE, *Surgery and Specialties* 869-70 (1939):

> In countries in which it is economically feasible, the *isolation* and *segregation* of lepers is the ideal method with which to attempt eradication . . . . As long as the exact mode of transmission is not known, it is apparent that any effort to control leprosy without controlling the leper as a center of infection is likely to result in failure (Emphasis in original).

31. GOTTFRIED, *supra* note 2, at 13. Society's tolerance of lepers has varied. Ritualistic laws to isolate lepers are described in detail in the Bible. *Leviticus* 13:2 *et seq.* Those afflicted with the disease were completely rejected by society until the time of William the Conquerer. In 1909, some of the returning crusaders brought leprosy back to Europe with them: "This created quite a dilemma, for if leprosy was God's penalty for sin, how could it be visited upon men engaged in God's work?" The School of Social Welfare, *supra* note 27, at 7. The solution was to readmit lepers to society. Yet by the fourteenth century, lepers were again segregated from their fellow human beings. *Id.*

32. *Id.*

33. *Id.*

34. Forstein, *The Psychosocial Impact of the Acquired Immune Deficiency Syndrome*, 11 SEMINARS IN ONCOLOGY 77 (Mar. 1984).

While the disease is new and has a high mortality rate, much of the mystery sparks from the fact that in the United States AIDS has primarily attacked homosexual or bisexual men.[35] An immoral, "fast-lane" lifestyle is perceived by the public and by many persons with AIDS (PWA's) as the cause of the disease.[36] This perception has complicated the epidemic control process by confronting it with its greatest adversary: civil liberties. History has shown that epidemics have been controlled by infringing upon civil liberties.[37] AIDS poses a new challenge to society's traditional methods for protecting the public health. Three concerns—the right of privacy, federal spending, and public health laws at the local government level—have emerged as unique to the AIDS epidemic and explain why AIDS is a national health problem as well as a gay rights issue.

A. The Right to Privacy.

The dilemma over confidentiality in connection with AIDS has two distinct roots: the first began when the Centers for Disease Control (CDC) designated AIDS a reportable illness, and the second developed more recently with the discovery of a blood test that determines if blood is likely to have been infected with the AIDS virus.[38]

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35. Wofsky & Mills, *supra* note 7, at 514. Approximately seventy-one percent of AIDS cases reported in the U.S. as of January 6, 1984 were homosexual or bisexual men, seventeen percent were intravenous drug users, five percent were Haitian immigrants, one percent each were hemophiliacs, blood transfusion recipients, heterosexual contacts of other risk group members, and no apparent risk factors. *Id.* The April 2, 1985 Morbidity and Mortality Weekly Report did not contain a separate entry for Haitians. Being labeled a risk group for AIDS led to complaints of discrimination, and, while political pressure may have played a role in dropping Haitians from the list, the conclusion that Haitians—by merely being Haitian—are not at greater risk for AIDS than the general population appears to have been based on ample evidence. Wash. Post, Apr. 9, 1985, at A3, col. 1. For a contemporary discussion of the political and social questions arising from AIDS, *see* Black, *supra* note 24. As an indication of the overwhelming impact of AIDS on American society, it is the subject of two plays, *see* Brown, *N.Y. Stage: AIDS in the Spotlight*, Wash. Post, June 7, 1985, Weekend, at 9, col. 1 (Review of *As Is* currently playing at the Lyceum Theater in New York and *The Normal Heart* currently at New York's Public Theater), and was the topic of a prime time television movie, *see* Byron, *AIDS Drama Comes to Prime Time NBC*, Wash. Blade, Nov. 8, 1985, at A1, col. 1 (Review of *An Early Frost*).

36. *See generally* Forstein, *supra* note 34; Rubinow, *The Psychosocial Impact of AIDS*, TOPICS IN CLINICAL NURSING, July 1984 at 26; Case Studies, *"If I Have AIDS Then let Me Die Now!"* HASTING CENTER REP. 24, 26 (Feb. 1984). Rock Hudson's announcement that he had been suffering from AIDS for at least a year, followed three months late by his death, may make the disease more of a reality for the American public. *See* Hall, *Rock Hudson Dead at 59 of AIDS Complications*, Wash. Post, Oct. 3, 1985, at A1, col. 1; Johnson, *Facing Reality With Rock Hudson*, Wash. Post, July 28, 1985, at A3, col. 4; Hall & Rovner, *Rock Hudson Being Treated for AIDS*, Wash. Post, July 26, 1985, at A1, col. 1.

37. *See supra* notes 15-33 and accompanying text.

38. Scott, *Should Gay Men Take the HTLV Antibody Test*, Wash. Blade, Apr. 26, 1985, at

By labeling AIDS as a reportable illness, CDC is able to compile statistics which help it monitor the epidemic and any significant trends. CDC publishes these statistics in the Morbidity and Mortality Weekly Report (MMWR). In addition, CDC serves as a center for research and information.

Gay leaders have expressed concern that the government might use the information CDC receives for discriminatory purposes.[39] Gays have ample reason to fear the release of names in connection with an AIDS diagnosis or AIDS research.[40] Even though privacy has come to be recognized as a "right" in certain contexts,[41] the Supreme Court has never extended it to homosexual conduct.[42] Fear of AIDS is responsible for discrimination against gays in general and AIDS patients in particular.[43] In at least three instances, CDC has disclosed names of persons with AIDS to city health

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9, col. 1; *see also* Russell, *New Test for AIDS Virus In Blood Is Expected*, Wash. Post, Jan. 11, 1985, at A3, col. 3.

39. *See, e.g.*, Medical News, *"Confidentiality" Issues May Cloud Epidemiologic Studies of AIDS*, 250 J. A.M.A. 1945 (1983) [hereinafter cited as Medical News]; Budiansky, *Confidential Matters*, 304 NATURE 478 (1983).

40. In addition to the economic, psychological, and medical reasons confidentiality is important to gay men, homosexual activity between consenting adults is a crime in approximately thirty states. *Guide, supra* note 9, at 17. *See also* Comment, *AIDS — A New Reason to Regulate Homosexuality?* 11 J. CONTEMP. L. 315 (1984); Novick, *At Risk for AIDS: Confidentiality in Research and Surveillance*, 6 I.R.B. 10 (1984). *See also infra* note 43.

41. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

42. Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976). Holding that *Doe* was decided on the issue of standing and is therefore not binding, the Eleventh Circuit Court of Appeals held the Georgia sodomy statute unconstitutional for infringing on gays' rights to privacy. Hardwick v. Bowers, 760 F.2d 1202 (11th Cir.), *cert. granted*, 106 S. Ct. 342 (1985).

The Fifth Circuit came to a contrary conclusion in Baker v. Wade, 769 F.2d 289 (5th Cir.), *reh'g denied*, 774 F.2d 1285 (1985), reversing the district court by a 9 to 7 majority. The court, in a one paragraph discussion, denied the equal protection argument because "of the strong objection to homosexual conduct which has prevailed in Western Culture for the past seven centuries." The dissent points out an extraordinary number of procedural irregularities in the majority opinion. *Id.* at 12 (Rubin, J., dissenting).

43. *See* Boodman, *AIDS Patients Fight Pain and Misconceptions*, Wash. Post, Dec. 2, 1984, at A1, col. 6. A gay store manager in New York City was fired after taking a day off to see a doctor; a New York city physician treating AIDS patients was threatened with eviction (the neighbors claimed that patient traffic through the lobby lowered property values and endangered tenants); and the Air Force attempted to discharge a serviceman without medical benefits who contracted AIDS on the grounds that having AIDS amounted to misconduct in and of itself. *Guide, supra* note 9, at 2-3. *See also* Reaves, *AIDS and the Law*, 69 A.B.A. J. 1014 (1983); Blodgett, *Despite the Public's Hands-Off Attitude Toward AIDS, Those Who Discriminate Against the Disease's Victims Are Finding No Immunity from the Law*, 12 STUDENT L. 8 (1984); Nat'l L. J., July 25, 1983, at 3, col. 1; Chase, *Doctor's Efforts to Control AIDS Spark Battles Over Civil Liberties*, Wall Street J., Feb. 11, 1985, at 23, col.3; *AIDS*, NEWSWEEK, Aug. 12, 1985 at 20 (cover story); *AIDS: A Growing Threat*, TIME, Aug. 12, 1985 at 40 (cover story); *The AIDS Conflict*, NEWSWEEK, Sep. 23, 1985 at 19 (cover story); *Fear and*

departments.[44] Although CDC officials claimed that the names were released for medical reasons, not for harassment,[45] this heightened the fears of members of a minority group insecure about their civil liberties. Without adequate assurances of confidentiality, PWA's may lie about their sexual contacts for fear of persecution, sympathetic physicians may fail to report AIDS cases, and vital information needed by CDC and researchers will be inaccurate or incomplete.[46]

The announcement of the development of a blood test that screens blood donors created new fears that the identities of individuals testing positive might be divulged to law enforcement agencies and be used for discriminatory purposes. The blood test is designed to detect the presence of HTLV-III antibodies, which are believed to be present in blood only after exposure to the HTLV-III virus. Research is leading scientists to believe that this virus is the cause of AIDS; the evidence, however, is not conclusive.[47] Use of the blood test to determine whether an individual is likely to contract AIDS, although misleading, is gaining wide acceptance.[48] In fact, this use

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AIDS in Hollywood, PEOPLE, Sep. 23, 1985 at 28 (cover story); Specter, *Discrimination Born of Fear*, Wash. Post, Sep. 4, 1985, at 10, col. 1 (Health Supp.).

In addition, AIDS was at the center of Houston's 1985 mayoral campaign. The so-called "straight slate," led by former Houston mayor Louis Welch, ran on an anti-gay rights platform and played on the public's anxiety about AIDS. Maraniss, *Houston Campaign Has a Theme of Fear*, Wash. Post, Oct. 21, 1985, at A1, col. 1. Incumbent Mayor Kathy Whitmire won the election. *See also* Krauthhammer, *Running Against a Virus*, Wash. Post, Nov. 1, 1985, at A25, col. 1; Taylor, *Houston Divided by Gay Rights Ordinance*, Wash. Post, Jan. 19, 1985, at A3, col. 1.

In August 1985, Los Angeles became the first American city to adopt a comprehensive law aimed at protecting PWA's. Los Angeles, Cal. Ordinance 160289 (Aug. 16, 1985). The ordinance is reprinted in Appendix A hereto.

44. Medical News, *supra* note 39.

45. *Id.*

46. *See* Scott, *Should Gay Men Take the HTLV Antibody Test*, Wash. Blade, Apr. 26, 1985, at 9, col. 1; Budiansky, *Problems of New Blood Test*, 309 NATURE 106 (1984).

47. Wash. Post, Feb. 1, 1985, at A5, col. 1. *See also* Russell, *Scientists Learn AIDS Virus' Makeup*, Wash.Post, Jan. 17, 1985, at A7, col. 1; 309 NATURE 106 (1984); Altman, *U.S. Delays Licensing Blood Test to Detect AIDS*, N.Y. Times, Feb. 15, 1985, at B-16, col. 3. Scientists are hopeful that the use of the blood test will provide new information about AIDS. *Medical News*, 253 J. A.M.A. 16-24 (1985).

48. The Defense Department announced on August 31, 1985 that all recruits for the armed services would henceforth have their blood tested for exposure to the AIDS virus. There are approximately 328,000 recruits per year. Those testing positive will be barred from the military. Engel, *Recruits to Receive AIDS Tests*, Wash. Post, Aug. 31, 1985, at A1, col. 1. On October 19, 1985, the military announced that all 2.5 million men and women in the armed services will be tested. Hilts & Engel, *Armed Forces to be Tested for AIDS*, Wash. Post, Oct. 19, 1985, at A1, col. 1. While the original policy promised that personnel with positive test results would not be discharged, *id.*, in practice this has not been the case. Engel, *Navy Reverses AIDS Virus Policy*, Wash. Post, Jan. 18, 1986, at A10, col. 1. Defense Department officials have denied that the purpose of the massive screening is to detect gay men. The

has overshadowed the original purpose of the HTLV-III test—to screen blood donations to the nation's blood supply.[49]

The ethical questions involved in notifying research volunteers of their test results are reason for concern. A number of projects to study AIDS are being conducted throughout the nation with healthy volunteers.[50] Should any of these volunteers be found to have AIDS or to have HTLV-III antibodies, those conducting the studies will have to decide whether or not to inform the volunteers. There are valid arguments for and against advising volunteers of their blood test results. The argument against disclosure reasons that since AIDS is not curable, the subjects would be caused needless concern and anxiety.[51] The argument for disclosure, however, considers the project a formal research study in which informed consent requirements would apply unless waived by the subjects.[52] While persons testing positive would know to seek a cure if and when one is discovered and to restrict their intimate activities so as not to unnecessarily endanger others, the reliability of the blood test has not been established.[53] The use of the blood test as a diagnostic test for AIDS is misleading at best.

B. The Politics of Federal Grant Money.

The federal government will contribute approximately eighty-five percent

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reason originally given for implementing the test, because "blood in soldier-to-soldier transfusions during battle conditions could not be tested for purity," Engel, *Recruits to Receive AIDS Tests*, Wash. Post. Aug. 31, 1985, at A1, col. 1, does not seem likely when 2.5 million people, many of them office workers, are being screened.

49. The use of the HTLV-III test has made the nation's blood supply safe. Many Americans believe, despite every assurance to the contrary, that they can contract AIDS by *donating* blood; as a result the blood supply is dangerously low. Engel, *Fears of AIDS Limit Blood Donations*, Wash. Post, Jan. 15, 1986, at 15 (Health Supp.); Horwitz, *Back to the Donor*, Wash. Post, May 1, 1985, at 9 (Health Supp.).

50. Curran, *AIDS Research and "The Window of Opportunity"*, 312 NEW ENG. J. M. 903 (1984).

51. *Id.*

52. *Id. See also* Novick, *supra* note 40. Informed consent has been described as the requirement "that before any person be subjected to any medical procedure that person must be informed about the procedure and its alternative, give voluntary consent to undergo that procedure, and be competent to give that consent." Schwartz, *Informed Consent to Participation in Medical Research Employing Elderly Human Subjects*, 1 J. Contemp. Health L. & Pol'y 115, 119 (1985). Another difficult question is whether or not recipients of blood transfusions from donors that are later diagnosed as having AIDS or as HTLV-III positive should be so informed if they are traceable. Curran, *supra* note 50, at 904.

53. In light of the long incubation period for AIDS, it has been widely suggested that all individuals in high risk groups restrict their intimate activities, regardless of HTLV-III test results. *See infra* note 81. The HTLV-III blood test has been made available to community health centers in order to provide individuals in high risk groups with an alternative to donating blood for taking the test. Wash. Blade, Apr. 26, 1985, at 9, col. 1.

of the country's health research funds in fiscal year 1986.[54] The President has requested budget authority of approximately $348.8 billion for the Department of Health and Human Services (H.H.S.) for fiscal year 1986.[55] Of this amount, approximately $126.3 million will go towards AIDS programs.[56] This represents a 31.4 percent increase over the original request for fiscal year 1985 of $96.1 million.[57] The Reagan administration, dedicated to reducing a growing deficit by cutting budget appropriations, has not seen fit to make an exception for AIDS. This lack of financial commitment has given credence to what has been perceived as hostility on the part of the Administration towards gays in general, and indifference towards the AIDS epidemic.[58]

The National Institutes of Health (NIH) receives, by far, the largest amount of federal money designated for AIDS programs. It uses a portion of these funds for its own research, and grants the remainder to independent scientists. The average NIH grant takes approximately eighteen months to be funded.[59] There is a question, however, as to how much money designated for AIDS research is actually being used for that purpose.[60] Thus, the federal government, because of its control over funding, is viewed as the primary source for assistance and at the same time as an antagonist.[61]

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54. U.S. Office of Management and Budget, *Budget of the United States Government, 1986*, at 5-107.

55. *Id.* at 8-105.

56. Wash. Post, Aug. 2, 1985, at A1, col. 1.

57. *Id.*

58. *See* Talbot & Bush, *While the Reagan Administration Dozes & Scientists Vie for Glory, the Deadly AIDS Epidemic Has Put the Entire Nation at Risk*, MOTHER JONES 29 (Apr. 1985); *AIDS: Risks and Responsibilities*, Wash. Post, Aug. 14, 1985, at A22, col. 1 (editorial); A. FETTNER & W. CHECK, THE TRUTH ABOUT AIDS: EVOLUTION OF AN EPIDEMIC 197, 205-06, 209, 210, 242 (1984). *Consider*: " 'Can you imagine anything this straight, white, conservative cold administration would rather see than all gay men being wiped from the face of the earth?' asks a gay New York physician." *Id.* at 237.

The announcement that Rock Hudson was in Paris seeking treatment for AIDS came one day before a statement that the U.S. Department of Health and Human Services intends to increase its AIDS budget by $40.7 million in 1986. Wash. Blade, July 26, 1985, at 1, col. 1. As a spokesman for the National Gay Task Force commented, "Isn't it ironic that a good friend of the president's has to go to a foreign country to seek treatment for a disease?" *Id.*

59. FETTNER & CHECK, *supra* note 58, at 206-07.

60. Charges have been made that the majority of NIH funds designated for AIDS "will be assigned to projects that, while bearing on AIDS, are only tenuously connected to the syndrome." *Id.* at 207.

61. *See, e.g.*, FETTNER & CHECK, *supra* note 58; Specter, *Gay Groups Mobilize Against AIDS*, Wash. Post, Aug. 2, 1985, at A1, col. 1. In view of the length of time it has taken the federal government to respond to the AIDS crisis, the private sector and local governments have provided the vast majority of funds for AIDS services. For example, the District of Columbia government will spend $889,000 on AIDS programs in fiscal year 1986. Wash. Post, Nov. 16, 1985, at B1, col. 5. Much of these funds will go to the Whitman-Walker Clinic,

C. Local Public Health Laws.

1. An Overview.

Traditionally, responsibility for the control of epidemics has rested with state and local governments.[62] Citizens expect their elected officials to protect them from epidemics. Local public health boards have protected the public health by closing schools,[63] movie theatres,[64] and carnivals.[65] Nuisances detrimental to the public health have been suppressed[66] and quarantines have been imposed.[67]

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which has provided social services, including housing, to PWA's and has been funded primarily through donations from the Washington, D.C. gay community. *Id.*

62. The District of Columbia statute is typical:

> The Council of the District of Columbia is hereby authorized and empowered to promulgate, and the Mayor of the District is hereby authorized and empowered to enforce, all such reasonable rules and regulations as the Council may deem necessary to prevent and control the spread of communicable and preventable diseases in the District of Columbia, including the authority and power to provide for the isolation, quarantine, and the restriction of the movements of persons affected by or believed, upon probably cause, to be affected by communicable disease and of persons who are or are believed, upon probable cause, to be carriers of communicable disease.

D.C. CODE ANN § 6-117 (1981). *See also* MD. PUB. HEALTH CODE ANN. § 18-101 *et seq.* (1982); VA. CODE § 32.1-42 *et seq.* (1979).

63. *See, e.g.*, Globe School Dist. No. 1 v. Globe Board of Health, 20 Ariz. 208, 179 P. 55 (1919).

64. *See, e.g.*, Alden v. State, 20 Ariz. 235, 179 P. 646 (1919).

65. *See, e.g.*, Benson v. Walker, 274 F. 622 (4th Cir. 1921).

66. *See, e.g.*, Palfrey v. Carlisle, 29 So. 2d 185 (La. App. 2d. Cir. 1947). *See generally* 39A C.J.S. Health & Env't. § 26 (1976).

67. *See, e.g.*, People *ex rel.* Barmore v. Robertson, 304 Ill. 422, 134 N.E. 815 (1922); Moore v. Armstrong, 149 So. 2d 36 (Fla. 1963); State v. Hutchinson, 246 Ala. 48, 18 So. 2d 723 (1944) (quarantine not imposed but court recognized the state's right to do so).

An apparently established but seldom used action for damages exists for negligently exposing another to an infection or contagious disease. In Kliegel v. Aitkin, 69 N.W. 67 (Wis. 1896), the plaintiff contracted typhoid fever after working as a servant in the defendant's home, where the defendant's daughter was suffering from typhoid fever. The plaintiff did not know that the daughter had a disease, nor that it was contagious. The court allowed damages for loss of time while ill, medical expenses and damages for pain and suffering "endured in the past and which she [the plaintiff] may have to endure in the future." *Id.*

Prosser defines negligence "as conduct which falls below a standard established by law for the protection of others against unreasonable risk of harm." W. PROSSER, LAW OF TORTS § 31 (4th ed. 1971). It is possible that, based on this theory, one could recover damages for being exposed to AIDS, provided assumption of the risk or contributory negligence are not applicable. *But cf.* Hyland Therapeutics v. Superior Court, 175 Cal. App. 3d 509, 220 Cal. Rptr. 590 (1985) (recovery denied for wrongful death of hemophiliac who contracted AIDS from blood products). As AIDS patients generally exhaust their financial resources on medical expenses in a short time, it is unlikely that a successful plaintiff would actually collect any money. *See generally* Comment, *AIDS: A Legal Epidemic*, 17 AKRON L. REV. 717 (1984). *See also* Gorney, *The New Laws of Love*, Wash. Post, Nov. 14, 1985, at C1, col. 2; Johnson, *Carefully Into the Night*, Wash. Post, Jan. 8, 1986, at 10, col. 1 (Health Supp.); MacPherson, *Hudson Estate Sued*, Wash. Post, Nov. 13, 1985, at B1, col. 1.

In the leading case of *Jew Ho v. Williamson*,[68] the Circuit Court for the Northern District of California invalidated an order by the San Francisco Board of Health that imposed a quarantine upon twelve city blocks containing more than 15,000 people, most of whom were Chinese. The quarantine was ordered because the board claimed it had found nine cases of bubonic plague.[69] Questioning the reasonableness of the quarantine, the court found that the "most dangerous thing that could have been done was to quarantine the whole city, as to the Chinese, as was substantially done in the first instance."[70] In addition, the regulation was applied in an arbitrary manner and primarily affected persons of Chinese ancestry. Quoting extensively from the opinion in *Yick Wo v. Hopkins*,[71] the court found the quarantine established by the board to be unreasonable, unnecessary, and applied in a discriminatory manner.[72]

Jew Ho firmly established that a public health ordinance cannot be a disguise for discrimination. Beyond that, however, public health boards have been given broad powers to prevent the spread of an infectious disease.[73] The Supreme Court has applied two levels of scrutiny in assessing challenges to state legislation. If the ordinance or statute intrudes upon a "fundamental right" or on the rights of a "suspect class," it is subject to a strict scrutiny test. The government must prove that the legislation used the least intrusive means to further a compelling state interest.[74]

If the legislation interferes with any other interest, the government must show only that the ordinance or statute bears a "rational relation" to the interest being served.[75] Public health ordinances aimed at controlling AIDS which infringe on the individual liberties of gays would not be subject to a strict scrutiny analysis.

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68. 103 F. 10 (1900).

69. *Id.* at 11-13.

70. *Id.* at 22.

71. "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." 103 F. at 24, (quoting Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

72. *Id.* at 23.

73. *See supra* notes 62-67 and accompanying text.

74. Zablocki v. Redhail, 434 U.S. 374 (1978). Although fundamental right status has been accorded to privacy, it has not yet been extended to homosexuality. *See supra* notes 39-40 and acompanying text. Nor has sexual preference joined race, religion, and national origin as a suspect class. *But see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 943 (1978); Note, *The Constitutional Status of Sexual Orientation: Homosexuality As a Suspect Classification*, 98 HARV. L. REV. 1285 (1985).

75. *See* Comment, *supra* note 40, at 323-24.

2. Protection or Persecution?

Local jurisdictions with high incidences of AIDS have designated the disease a reportable illness,[76] and, in some cases, contributed money for research and education.[77] San Francisco, which along with New York has the highest incidences of AIDS in the country, has taken additional steps to curtail the spread of the disease. After the Director of Public Health unsuccessfully attempted to close San Francisco's commercial sex establishments catering to gay men, the City Attorney and Director of Public Health brought the case to court.[78] The City's complaint alleged that these "bathhouses, theatres, bookstores, sex clubs and other establishments . . . operate for the specific purpose of fostering, promoting, harboring and encouraging multiple sexual contacts between gay males . . . ."[79] The lawsuit was brought on the theory that the risk of contracting AIDS is substantially increased by anonymous, multiple sexual contacts among gay men. As commercial sex establishments cater to patrons seeking this type of activity, the contact will cease or at least decrease, and the spread of AIDS will be curtailed if the establishments are closed. In response to the city's law suit, on December 24, 1984, Judge Roy L. Wonder issued a modified preliminary injunction.[80] The order created considerable controversy, as it required the owners of commercial sex establishments to employ monitors to survey the premises every ten minutes in order to ascertain if patrons are engaging in high-risk sexual activity.[81] A proprietor was required to report incidences of

76. *See, e.g.*, D.C. MUN. REGS. tit. 22, § 206 (1984).

77. *See* FETTNER & CHECK, *supra* note 58, at 212.

78. California *ex rel.* Agnost v. Owen, No. 830321 (Cal. Supre. Ct., San Francisco). *See generally* Comment, *Preventing the Spread of AIDS by Restricting Sexual Conduct in Gay Bathhouses: A Constitutional Analysis*, 15 GOLDEN GATE U.L. REV. 301 (1985). In Washington, D.C. former Air Force Sergeant Leonard Matlovich, who ten years ago challenged the military's ban on gay servicemen, proposed two election initiatives aimed at preventing the spread of AIDS. Greene, *Initiatives Aim at AIDS Virus*, Wash. Post, Mar. 8, 1985, at B4, col. 1. One would have required gay-oriented businesses to post health warning signs. The other would have resulted in the closing of the city's two gay bathhouses. *Id.* The initiatives were received with anger and criticism by Washington's gay leaders, who claimed they would have "fail[ed] to curtail the AIDS problem and will open the way for gay rights opponents to use the AIDS epidemic as an excuse to attack gay rights." Wash Post, Mar. 29, 1985, at 13, col. 1. Although Matlovich defended the proposals as putting health needs before political considerations, *id.*, he "temporarily" withdrew them for reasons that were not made public. Wash. Blade, Apr. 5, 1985, at 14, col. 3.

79. Complaint at 18, California *ex rel.* Agnost v. Owen, *supra* note 78.

80. Modified Preliminary Injunction, California *ex rel.* Agnost v. Owen, *supra* note 78.

81. *Id.* at 4. The high-risk activities were identified by the San Francisco AIDS Foundation and adopted by the Director of Public Health. *Id.* The high-risk sexual activities are contrasted with what has become known as "safe sex," part of an education campaign directed at gay men. Safe sex, generally, involves sex without the passing of body fluids. Organizations such as the San Francisco AIDS Foundation, New York's Gay Men's Health Crisis, and the

patrons engaging in the high-risk activities, and was to expel the participants from the establishment. Moreover, the court ordered owners to remove the lower portions of doors from private rooms in order to facilitate the monitoring.[82] While criticized by many as infringing on civil liberties, and by others as not doing enough, the court attempted to protect citizens from AIDS without being overly repressive.[83]

The case has created fear in the San Francisco gay community as an at-

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Whitman-Walker Clinic in Washington, D.C. have assembled various pamphlets explaining the risks involved in certain sexual practices and recommending those that reduce the threat of AIDS transmission. *See, e.g.*, THE SAN FRANCISCO AIDS FOUNDATION, GUIDELINES FOR AIDS RISK REDUCTION (1984); AIDS EDUCATION FUND, WHITEMAN-WALKER CLINIC, *AIDS Information* (B. Strickler & H. Taylor ed. undated). These pamphlets, and the safe sex education campaign, are based on the assumption that AIDS is not transmitted by casual contact. Should this assumption turn out to be false, the epidemic would take on new proportions. *See, e.g.*, Wash. Post, Nov. 5, 1984, at A6, col. 1.

82. *Id.* at 5. *See also* City of New York v. The New Saint Mark's Baths, No. 43640-85 (Sup. Ct. Jan. 6, 1986) (preliminary injunction to close gay bath house granted under nuisance theory).

83. *See* Will, *Bathhouse Roulette*, Wash. Post, Feb. 7, 1985, at A23, col. 4. Syndicated columnist George Will argues that the position taken by former San Francisco Public Health Director Mervyn Silverman is the correct one. Against the charge that closing commercial sex establishments "will merely change the venue, not the quantity or nature, of homosexual activity," Will agrees with Silverman that "if couples meet in separate locations, the quantity of especially dangerous contacts will decline." *Id.* Silverman believes that any sexually transmitted disease is an "optional disease" in that incidence of it can be substantially reduced "by the dissemination of information that modifies freely chosen behavior." *Id.* The most interesting part of Silverman's argument is that although sexual activity between consenting adults, heterosexual or homosexual, is essentially a private matter and an individual decision, the costs of health care are a societal responsibility. And even though Will states that the "soul of Silverman's argument is that the city is not interfering with anyone's right to commit any sexual act, but only with the bathhouse owner's right to facilitate dangerous sexual activity," the gist of Silverman's argument is that AIDS is a *public* concern. Whether the premise be to preserve life or to avoid the high costs of caring for AIDS patients, the argument is not easily refuted.

Silverman's position becomes more compelling when one realizes that many AIDS patients are relatively young, and, until the onset of the disease, employed. With hospital costs averaging fifty to one hundred fifty thousand dollars per patient, the effect on the economy may become significant. FETTNER & CHECK, *supra* note 58, at 203. Add the health care costs of public assistance, food stamps and social security benefits that most PWA's require, and the impact is more apparent. *See* Hardy, Rauch, Echenberg, Morgan & Curran, *The Economic Impact of the First 10,000 Cases of Acquired Immunodeficiency Syndrome*, 255 J. A.M.A. 209 (1986) (Losses are in the billions of dollars). *See also* Wash. Blade, Mar. 29, 1985, at 5, col. 1 (interview with a Washington, D.C. attorney who has AIDS). In fact, the cost of caring for a PWA is so great that insurance companies are doing everything possible to minimize their liability from AIDS. *See* Kristof, *U.S. Insurers Start AIDS Screening*, Int'l Herald Tribune, Dec. 31, 1985-Jan. 1, 1986, at 9, col. 3. This includes screening blood for exposure to HTLV-III/LAV; denying coverage to men between the ages of 20 and 50, with beneficiaries that are not spouses or where large amounts of life insurance are applied for. *Id.* If the insurance industry is successful in avoiding liability, the burden will fall on the public, since it is unreasonable to believe that most PWA's will be able to afford the high medical costs without health

tempt to regulate sexual conduct, and as an infringement on reluctantly recognized civil liberties. Even though commercial sex establishments are often frequented by bisexual or married men, they remain a symbol of political struggle and long-denied gay rights;[84] closing them to "protect" the public health seems a thin veil for blatant discrimination. Is the next step to enforce sodomy laws against adults who engage in private, consensual homosexual relations?[85] Fears of the army rounding up known or suspected homosexuals for relocation seem incredible but are not beyond the realm of possibility.[86] Thus far, one result of the case has been to further characterize AIDS as the "gay plague" in the eyes of the public.[87] Another is that the portrayal of the bathhouse as a "public nuisance"[88] has put gays on the defensive.

But the fear of AIDS has moved beyond big city gay subculture and has steadily invaded American society leaving few areas of life untouched. Typifying the hysteria of the summer of 1985, the cover of a national newsmagazine depicted two children holding posters outside a school in Queens, N.Y. The signs read "Parents and Children Against AIDS" and "No AIDS

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insurance. *See, e.g.*, Byron, *Insurers Plan to Flex Muscle*, Wash. Blade, Sep. 27, 1985, at 1, col. 1.

84. Prior to 1969, few gay men chose to openly reveal their sexual orientation. In 1969, the Stonewall, a gay discotheque in New York City, was raided by police. The riots that ensued marked the beginning of the gay rights movement and resulted in gays "coming out of the closet." FETTNER & CHECK, *supra* note 57, at 255-56. "Repressed socially, sexually, and psychologically, the gays . . . set about creating their own sexual revolution . . . . Overt sexuality is the statement of many gay men." *Id.* at 226.

85. *See, e.g.*, Comment, *supra* note 40. *But cf.* Chase, *supra* note 43 (Dr. Silverman, who wore a bullet-proof vest following death threats, says he would have been more inclined to close the bathhouses if they had been heterosexual businesses. But homosexual bathhouses are 'symbolic' of an oppressed group, he says").

86. *But cf.* Russell, *Texas Health Chief Seeks Quarantine in AIDS Cases*, Wash. Post, Oct. 23, 1985, at A2, col. 5; *see also* Restak, *Worry About Survival of Society First; Then AIDS Victims' Rights*, Wash. Post, Sep. 8, 1985, at C1, col. 3; *It All Depends on Your Definition of Panic-Mongering*, 12 STUDENT L. 6 (1984). During World War II, second generation American citizens of Japanese ancestry (Nisei) were moved to relocation camps in the Western United States for national security reasons. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944). The Supreme Court upheld the government's decision even though citizens of German and Italian descent, who were clearly as much a threat to the nation's security as the Nisei—if not as easily identifiable—were left at liberty.

87. *See* Specter, *Gay Groups Mobilize Against AIDS*, Wash. Post, Aug. 2, 1985, at A1, col. 1.

88. Prosser defines public nuisance as "a catch-all criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the destruction of a highway to a public gaming-house or indecent exposure. As in the case of other crimes the normal remedy is in the hands of the state." W. PROSSER, LAW OF TORTS § 86 (4th ed. 1971). *See also id.* §§ 87-88.

Children in District 27."[89] Guidelines have been issued not only for hospitals but for general occupational situations.[90] Doctors, legislators, lawyers, gays and parents have all debated the laws that are or may be needed to protect the public from AIDS.[91]

Are laws needed at all to deter people from engaging in high-risk sexual activity? While the threat of a fine or a jail sentence is arguably a deterrent, the fear of contracting a disease known to be deadly and incurable is ostensibly greater.[92] AIDS has received wide media attention, with articles appearing in national and local newspapers almost everyday. Clearly people in high risk groups are aware of the danger.[93] People who increase their risk for AIDS by engaging in unsafe sexual activities do so for the same reason that people smoke cigarettes or ride motorcycles without helmets; they are the ones who are sure "it won't happen to them." Statistics have shown that high-risk sexual activitiy between gay men is decreasing,[94] yet the AIDS mortality rate is staggering. Government, charged with protecting the public from AIDS, must do so without using the epidemic as an excuse to disregard individual liberties.[95]

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89. *The AIDS Conflict*, NEWSWEEK, Sep. 23, 1985 at 16. A photograph on page 19 shows a child in a makeshift coffin with a poster reading: "Is this the city's next idea for our kids?" Most school boards by now have issued a formal policy on school children with AIDS. Many of these follow the CDC guidelines, which, with some exceptions, allow students with AIDS to attend school. Wash. Post, Sep. 19, 1985, at D7, col. 5. *But cf.* Sargent, *Separate D.C. Classes Set for Child Exposed to AIDS*, Wash. Post, Sep. 6, 1985, at C1, col. 2.

90. Wash. Post, Nov. 15, 1985, at A18, col. 2. *See also Dallas Firm Requiring AIDS Testing for Food Handlers*, Wash. Post, Oct. 3, 1985, at A15, col. 1.

91. *See* Restak, *Worry About Survival of Society First; Then AIDS Victim's Rights*, Wash. Post, Sep. 8, 1985, at C1, col. 3. Dr. Restak, a neurologist, referring to quarantines, stated that "what some are describing as 'discrimination' and 'segregation' has a long and not inglorious history in medicine." He chooses to ignore the fact that there is a difference between diseases such as smallpox and typhoid, which were easily transmitted, and AIDS, which, by the overwhelming weight of evidence, is not. *See* Rovner, *How the Virus Spreads*, Wash. Post, Sep. 4, 1985, at 15, col. 1 (Health Supp.).

92. *See, e.g., Changes in Sexual Behavior and Fear of AIDS*, 1984 THE LANCET 1293 ("[T]he evidence points to a decline in overall sexual activity and also in certain specific activities, a selectivity that might stem from differences in risk of AIDS as perceived by homosexuals").

93. *See* Rubinow, *supra* note 36, at 27; Forstein, *supra* note 34, at 80.

94. *See* Specter, *Fear of AIDS cited as Syphilis Rate Declines*, Wash. Post, Aug. 10, 1985, at A1, col. 2.

95. *See* Coller, *AIDS and Civil Liberties*, N.Y. Times, June 26, 1983, 2, (Long Island) at 20, col. 1 (Late City Final Ed.). Coller suggests that the sophistication of society is measured by how much (little) it interferes with individual liberties when it attempts to control an epidemic. *See also* Kirby, *AIDS Legislation—Turning Up the Heat?*, National Conference on AIDS, Melbourne, Australia, Nov. 16, 1985. Justice Kirby, after reviewing Australia's experiences with epidemics, discusses the pro's and con's of various legislative responses to the problem of AIDS in Australia, and supports a reasoned, rational and non-discriminatory approach.

IV. CONCLUSION

Despite rapid advances in modern medicine, little has changed since biblical times in the way society confronts an epidemic. The response has been to isolate infectious persons from society until they either recover or die.[96] History has shown, however, that segregation has not always been effective nor necessary. Leprosy, the classic example, is now known to be less contagious than many other diseases, making the leper camp seem a drastic measure.[97] There is no reliable evidence to suggest that AIDS is transmitted other than by exchange of body fluids, such as through sexual contact or by blood transfusion. There is, therefore, no need for isolation. Until more is known about AIDS, educating high-risk groups will help prevent the disease from spreading, and educating the general public will alleviate fears and reduce the AIDS stigma.[98]

Despite the oft-repeated statement from the Department of Health and Human Services that AIDS is the number one health priority in the United States, the perception by those afflicted with the disease and those in high-risk groups, is that the federal government is not doing enough.[99] While the responsibility to protect the public health is in the hands of state and local governments, the amount of time it takes to develop a vaccine and a cure for the disease largely depends on the federal government. It alone has the financial resources and the best equipped research facilities.

While research is essential to the eventual cure of a disease, history has shown that the control of an epidemic is usually accomplished by an intrusion on civil liberties.[100] Restrictions should only be imposed, however, to the extent that they are clearly necessary to save lives.[101] At the same time, persons at risk for AIDS have a responsibility to minimize their risk. To

96. *See* Morgenstern, *supra* note 4, at 543.

97. Leper camps still exist in the United States, although lepers are being rehabilitated to function in society. *See* The School of Social Welfare, *supra* note 27.

98. Safe-sex guidelines, such as those suggested by AIDS social service organizations such as the San Francisco AIDS Foundation, New York's Gay Men's Health Crisis, and the Whitman-Walker Clinic of Washington, D.C., suggest sexual practices for persons in high-risk groups that pose little or no threat of transmitting or contracting the AIDS virus. *See supra* note 81.

99. "The Secretary of Health and Human Services who declared AIDS health crisis number one was seeking publicity herself and ignoring the crisis," remarked Congressman Henry Waxman (D-CA) at a Gay Rights National Lobby — Human Rights Campaign Fund Congressional reception. Wash. Blade, Mar. 29, 1985, at 1 col. 1. *See also supra* notes 54-61 and accompanying text.

100. *E.g.*, reporting requirements in connection with research are essential if the medical community is to effectively treat a disease and develop a cure. *See supra* notes 38-56 and accompanying text.

101. *See supra* notes 68-72 and accompanying text.

engage in or condone unsafe sexual activity in the midst of an epidemic, under the guise of personal liberties, is to ignore the severity of AIDS. Those in high-risk groups have a responsibility, not only to themselves, but to society.

At present, AIDS is perceived by the public as (and to a lesser extent is in fact) generally confined to certain identifiable population groups.[102] Public antipathy towards these groups notwithstanding, a humane society should recognize that AIDS is a disease and not a form of divine judgment.[103] Government has an obligation to protect the health of all citizens.[104]

Steven J. Stone

102. *See supra* note 35.

103. *But cf.* Wash. Post, Jan. 18, 1986, at All, col. 2 ("Rev. Charles Stanley, president of the nation's largest Protestant denomination (the Southern Baptist Convention), says God created AIDS to show displeasure with America's acceptance of the homosexual lifestyle").

104. Consider the following excerpt from an editorial in The Washington Post:

> Very few of us will lose our eyesight or need a kidney transplant, yet we do not hesitate to mobilize public sympathy and national resources in aid of those who do; just as we mobilize them to assault diseases associated with social and sexual conduct the majority disapproves. It is good that these things are understood. AIDS is being fought and its victims cared for not because we all have an equal risk of contracting it or because a movie star we admire is a victim or for any reason other than that thousands of our fellow citizens, most of them young, are dying slowly, painfully and in profound despair—and we can do something to help.

Aug. 14, 1985, at A22, col. 1.

APPENDIX A

An ordinance amending Chapter III of the Los Angeles Municipal Code by adding Article 5.8 thereto prohibiting discrimination in employment, housing, medical and dental services, business establishments, city facilities, city services and other public accommodations on the basis of the fact that the person discriminated against has the medical condition Acquired Immune Deficiency Syndrome (AIDS) or any condition related thereto.

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS

Section 1. Chapter III of the Los Angeles Municipal Code is hereby amended by adding Article 5.8 thereto to read as follows:

ARTICLE 5.8

PROHIBITION AGAINST DISCRIMINATION BASED ON A PERSON SUFFERING FROM THE MEDICAL CONDITION AIDS, OR ANY MEDICAL SIGNS OR SYMPTOMS RELATED THERETO, OR ANY PERCEPTION THAT A PERSON IS SUFFERING FROM THE MEDICAL CONDITION AIDS WHETHER REAL OR IMAGINARY

SEC. 45.80. STATEMENT OF POLICY:

After public hearings and receipt of testimony, the City Council finds and declares:

That the medical condition described as Acquired Immune Deficiency Syndrome and commonly known as AIDS is a deadly disease which has the potential to affect every segment of our City's population.

That AIDS was first recognized in 1981 by the Federal Center for Disease Control based on the study of a pattern of unusual illnesses among young, single men reported by the medical center associated with UCLA within our City.

That AIDS in the opinion of the scientific and medical community is caused by a virus, known as HTLV-III or LAV, which attacks and cripples the body's immune system, thereby leaving the body vulnerable to opportunistic infections.

That a person afflicted with AIDS suffers a variety of virus and/or fungus-caused illnesses which debilitate the body resulting in a high mortality rate within three years after diagnosis.

That the spread of the virus has occurred through the exchange of bodily fluids, i.e. blood, blood by-products, or semen, between individuals.

That no evidence exists to indicate the spread of the virus by casual contact.

That medical studies of family groups in which one or more persons have [sic] been diagnosed with AIDS show no spread of the virus other than through sexual intimacy or through the exchange of blood (mother to fetus).

That the virus can thrive only in favorable conditions, and cannot exist for a significant period of time outside the body, and can be protected against by the application of regular practices of hygiene, such as the use of chlorine in swimming pools or spas and the use of household bleach when washing garments or cleaning contaminated surfaces.

That the public health danger represented by the virus and its subsequent manifestation as AIDS is caused by the lengthy incubation period during which period an apparently healthy individual may spread the disease to other persons through the exchange of blood, blood by-products, or semen.

That AIDS while recognized as a national public health emergency has been concentrated in urban aras with our city representing the third highest number of cases reported within a local public health jurisdiction.

That AIDS in the opinion of the scientific and medical community will continue to increase at a high rate within our city for the foreseeable future.

That AIDS by its nature has created a discrete and insular minority of our citizens who are afflicted with a seriously disabling condition whose ultimate outcome is fatal.

That the persons afflicted with AIDS represent a segment of our population particularly victimized due to the nature of the disease and to the present climate of misinformation, ignorance and fear in the general population.

That discrimination against victims of AIDS and AIDS related conditions exists in the City of Los Angeles;

That persons with AIDS or AIDS related conditions are faced with discrimination in employment, housing, medical and dental services, business establishments, city facilities, city services and other public accommodations; That such discrimination cuts across all racial, ethnic and economic lines;

That such discrimination poses a substantial threat to the health, safety and welfare of the community

That existing state and federal restraints on such arbitrary discrimination are inadequate to meet the particular problems of this City.

SEC. 45.81. DEFINITIONS:

The following words and phrases, whenever used in this Article, shall be construed as defined in this section

A. AIDS: shall mean the disease complex which occurs when an important part of the human immune system is destroyed by the action of a virus known as HTLV-III or LAV. Signs and symptoms of this disease complex are manifested in the afflicted person by a series of virus or fungus-caused illnesses of a chronic nature.

B. Condition related thereto: Shall mean any perception that a person is suffering from the medical condition AIDS whether real or imaginary.

C. Business Establishment: shall mean any entity, however organized, which furnishes goods or services to the general public. An otherwise qualifying establishment which has membership requirements is considered to furnish services to the general public if its membership requirements: (a) consist only of payment of fees; (b) consist of requirements under which a substantial portion of the residents of this City could qualify.

D. Employer: Shall mean every person, including any public service corporation and the legal representative of any deceased employer which has any natural person in service.

E. Housing Services: Shall mean services connected with the use or occupancy of a rental unit including but not limited to, utilities (including light, heat, water and telephone), ordinary repairs or replacement, and maintenance, including painting. This term shall also include the provision or elevator service, laundry facilities and privileges, common recreational facilities, janitor service, resident manager, refuse removal, furnishings, food service, parking and any other benefits, privileges or facilities.

f. Rent: Shall mean the consideration, including any bonus, benefits or gratuity, demanded or received by a landlord for or in connection with the use or occupancy of a rental unit, including but not limited to monies demanded or paid for the following: meals where required by the landlord as a condition of the tenancy; parking; furnishings; other housing services of any kind; subletting; or security deposits.

G. Rental Units: Shall mean all dwelling units, efficiency dwelling units, guest rooms, and suites in the City of Los Angeles, as defined in Section 12.03 of this Code, rented or offered for rent for living or dwelling purposes, the land and buildings appurtenant thereto, and all housing services, privileges, furnishings and facilities supplied in connection with the use or occupancy thereof, including garage and parking facilities.

This term shall not include:

1. Housing accommodation which a government unit, agency or authority owns, operates, or manages, and which are specifically exempted from municipal regulation by state or federal law or administrative regulation.

H. Person: Shall mean any natural person, firm, corporation, partnership or other organization, association or group of persons however organized.

SEC. 45.82. EMPLOYMENT:

A. Unlawful Employment Practices.

It shall be an unlawful employment practice for any employer, employment agency or labor organization or any agent or employee thereof to do or attempt to do any of the following:

1. Fail or refuse to hire, or to discharge any person, or otherwise to discriminate against any person with respect to compensation, terms, conditions or privileges of employment on the basis (in whole or inpart) of the fact that such person has the medical condition AIDS or any condition related thereto.

2. Limit, segregate or classify employees or applicants for employment in any manner which would deprive or tend to deprive any person of employment opportunities, or adversely affect his or her employment status on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.

3. Fail or refuse to refer for employment any person, or otherwise to discriminate against any person on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.

4. Fail or refuse to include in its membership or to otherwise discriminate against any person; or to limit, segregate or classify its membership; or to classify or fail or refuse to refer for employment any person in any way which would deprive or tend to deprive such person of employment opportunities, or otherwise adversely affect her or his status as an employee or as an applicant for employment on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.

5. Discriminate against any person in admission to, or employment in, any program established to provide apprenticeship or other training or retraining, including any on-the-job training program on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.

B. Bonafide Occupational Qualification not Prohibited; Burden of Proof.

1. Bona Fide Occupational Qualification. Nothing contained in this Section shall be deemed to prohibit selection, rejection or dismissal based upon a bona fide occupational qualification.

2. Burden of Proof. In any action brought under this article, if a party asserts that an otherwise unlawful discriminatory practice is justified as a bona fide occupational qualification, that party shall have the burden of proving: (1) that the discrimination is in fact a necessary result of a bona fide occupational qualification; and (2) that there exists no less discriminatory means of satisfying the occupational qualification.

C. Exceptions.

1. It shall not be an unlawful discriminatory practice for an employer to observe the conditions of a bona fide employee benefit system, provided such systems or plans are not a subterfuge to evade the purposes of this Article; provided further that no such system shall provide an excuse for failure to hire any person.

SEC. 45.83. RENTAL HOUSING

A. Unlawful Rental Housing Practices.

It shall be unlawful for any person having a housing accommodation for rent or

lease, or any authorized agent or employee of such person to or attempt to do any of the following:

1. Refuse to rent or lease a rental unit, refuse to negotiate for the rental or lease of a rental unit, evict from a rental unit, or otherwise deny to or withhold a rental unit from any person on the basis (in whole or inpart) of the fact that such person has the medical condition AIDS or any condition related thereto.

2. Rent or lease a rental unit on less favorable terms, conditions or privileges, or discriminate in the provision of housing services to any person on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any medical condition related thereto.

3. Represent to any person that a rental unit is not available for inspection, rental or lease when such rental unit is, in fact, available on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.

4. Make, print, publish, or cause to be made, printed, or published any notice, statement, sign, advertisement, application, or contract with regard to a rental unit that indicates any preference, limitation, or discrimination with respect to the fact that a person has the medical condition AIDS or any condition related thereto.

B. Exceptions.

1. Owner-occupied. Nothing in this Article shall be construed to apply to the rental or leasing of any housing unit in which the owner or lessor or any member of his or her family occupies the same living unit in common with the prospective tenant.

2. Effect on Other Laws. Nothing in this Article shall be deemed to permit any rental or occupancy of any dwelling unit or commercial space otherwise prohibited by law.

3. Nothing in this Article shall override any just cause for eviction set forth in the Rent Stabilization Ordinance. AIDS shall not constitute an unreasonable health hazard under § 151.09 of the Rent Stabilization Ordinance.

SEC. 45.84. BUSINESS ESTABLISHMENTS:

A. Unlawful Business Practice.

1. Business Practices Generally. It shall be an unlawful business practice for any person to deny any individual the full and equal enjoyment of the goods, services, facilities, privileges, advantage and accommodation of any business establishment including, but not limited to, medical, dental, health care and convalescent services of any kind whatsoever, on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.

B. Exceptions. Nothing in this Article shall apply to any blood bank, blood donation facility, sperm bank, sperm donation facility, organ donation facility, surrogate mother or surrogate mother facility, or to any like service facility or establishment engaged in the exchange of products containing elements of blood or sperm.

SEC. 45.85. CITY FACILITIES AND SERVICES:

A. Unlawful Service and Facility Practices.

It shall be an unlawful practice for any person to deny any person the full and equal enjoyment of, or to impose different terms and conditions on the availability of any of the following:

1. Use of any City facility or City service on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.

2. Any service, program or facility wholly or partially funded or otherwise supported by the City of Los Angeles, on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto. This subsection shall not apply to any facility, service or program which does not receive any assistance from the City of Los Angeles which is not provided to the public generally.

SEC. 45.86. EDUCATIONAL INSTITUTIONS:

A. Unlawful Educational Practices.

It shall be an unlawful educational practice for any person to do any of the following:

1. To deny admission, or to impose different terms or conditions on admission, on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.

2. To deny any individual the full and equal enjoyment of,or to impose different terms or conditions upon the availability of, any facility owned or operated by or any service or program offered by an educational institution on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.

B. Exceptions.

It shall not be an unlawful discriminatory practice for a religious or denominational institution to limit admission, or give other preference to applicants of the same religion.

SEC. 45.87. ADVERTISING:

It shall be unlawful for any person to make, print, publish, advertise or disseminate in any way any notice, statement or advertisement with respect to any of the acts mentioned in this Article, which indicates an intent to engage in any unlawful practice as set forth in this Article.

SEC. 45.88. SUBTERFUGE:

It shall be an unlawful discriminatory practice to do any of the acts mentioned in this Article for any reason which would not have been asserted, wholly or partially, but for the fact that the person against whom such assertions are made has the medical condition AIDS or any condition related thereto.

SEC. 45.89. LIABILITY:

Any person who violates any of the provisions of this Article or who aids in the violation of any provisions of this Article shall be liable for, and the court shall award to the individual whose rights are violated, actual damages, costs, and attorney's fees. In addition, the court may award punitive damages in a proper case.

SEC. 45.90. ENFORCEMENT:

A. Civil Action

Any aggrieved person may enforce the provisions of this Article by means of a civil action.

B. Injunction.

1. Any person who commits,or proposes to commit, an act in violation of this Article may be enjoined therefrom by an court of competent jurisdiction.

2. Action for injunction under this subsection may be brought by any aggrieved

person, by the City Attorney, or by any person or entity which will fairly and adequately represent the interests of the protected class.

C. Non-Exclusive

Nothing in this Article shall preclude any aggrieved person from seeking any other remedy provided by law.

D. Exception

Notwithstanding any provision of this code to the contrary, no criminal penaltites shall attach for any violation of the provision of this Article.

SEC. 45.91. LIMITATION ON ACTION:

Actions under this Article must be filed within one year of the alleged discriminatory acts.

SEC. 45.92. SEVERABILITY

If any part or provision of this Article or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be effected thereby and shall continue in full force and effect. To this end, provisions of this Article are severable.

SEC. 45.93. EXCEPTIONS:

A. No part of this Article shall apply to any bona fide religious organization.

B. No part of this Article shall apply where a course of conduct is pursued which is necessary to protect the health or safety of the general public.

1. Burden of Proof. In any action brought under this Article, if a party asserts that an otherwise unlawful discriminatory practice is justified as necessary to protect the health or safety of the general public, that party shall have the burden of proving; (1) that the discrimination is in fact a necessary result of a necessary course of conduct pursued to protect the health or safety of the general public; and (2) that there exists no less discriminatory means of satisfying the necessary protection of the health or safety of the general public.

SEC. 2. URGENCY CLAUSE

The City Council finds and declares that this ordinance is required for the immediate protection of the public peace, health and safety for the following reasons: This ordinance will prevent unlawful discrimination against persons with AIDS or AIDS related conditions in employment, housing, business establishments and other public accommodations. Such discrimination has denied these persons the right to maintain lawful employment, enjoy sanitary housing conditions, seek medical, dental, convalescent and other business services, and have equal access to public accommodations, thereby creating conditions inimical to the public health and safety. Therefore, this ordinance shall become effective upon publication pursuant to Section 281 of the Los Angeles City Charter.