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# DISCRIMINATION: THE DIFFERENCE WITH AIDS

*Rev. Raymond C. O'Brien\**

## INTRODUCTION

What makes AIDS<sup>1</sup> different from other fatal diseases? The response to this question often differs according to the attitude of the person answering the question. On the one hand are those who state that AIDS is the just result of a person's life of sodomy, illicit drug use, prostitution or even carelessness.<sup>2</sup> Such a conclusion could justify extensive testing of potentially HIV-infected persons, public notification, criminal penalties, and in general, a loss of privacy. Based in part on an attitude that condemns the activity or status that brought about the medical condition, any rational basis for imposing legal public safeguards is disregarded. Instead, containment of the disease takes on the aura of a crusade against an activity or a status which someone regards as repugnant.<sup>3</sup> This attitude is one of several regarding

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1. It is acknowledged that AIDS as a term is obsolete, replaced by HIV infection. See REPORT OF THE PRESIDENT'S COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC IN THE UNITED STATES XVII (1988) [hereinafter PRESIDENTIAL COMMISSION REPORT]. "The medical, public health, political, and community leadership must focus on the full course of HIV infection rather than concentrating on later stages of the disease (ARC and AIDS). Continual focus on AIDS rather than the entire spectrum of HIV disease has left our nation unable to deal adequately with the epidemic." *Id.* Nonetheless, because of the public familiarity with the term "AIDS" it shall be used in a popular context within this Article.

2. Such an attitude was addressed by the November 1987 American Medical Association's (AMA) Council on Ethical and Judicial Affairs' (CEJA) Report entitled *Ethical Issues Involved in the Growing AIDS Crisis*. See Fowler, *Acquired Immunodeficiency Syndrome and the Refusal to Provide Care*, 17 HEART & LUNG 213 (1988). Seeking to address prejudice based on life-style, medical professional associations collectively assert that, "prejudice is not a legitimate ground for the denial of care [and that] it is not morally permissible to display prejudice toward the individual to whom care is given." *Id.* at 214.

3. Senator Jesse Helms, in his introduction of S. 70, the AIDS Control Act of 1989, states:

Members of this militant movement [the homosexual lobby] have masterfully manipulated the American public into believing that they, the homosexuals, are innocent victims of the AIDS epidemic rather than its perpetrators. By feeding on America's compassion, they have turned the AIDS epidemic to their political advan-

AIDS, making it somewhat different from other epidemics.<sup>4</sup>

An opposite attitude is one which regards AIDS as a distinctive calamity because it afflicts those already burdened by past histories of discrimination: homosexual men, drug users, and as the epidemic spreads rapidly into urban ghettos, blacks and Hispanics. "This disease emerged initially in homosexual men and intravenous drug users — two groups that evoke strong negative or hostile feelings in many members of the larger society. AIDS has led not only to loss of life, but often to loss of job, family, housing, insurance, and any acceptable human support system along the way."<sup>5</sup> Thus, the distinctiveness of the HIV epidemic results from the fact that this fatal disease invites the deepest ethical, moral, and legal questions. It has the potential of imposing genocide on racial and sexual minorities living beyond the mainstream of society; it calls our attention to the fact that the American health care system mistreats — woefully mistreats — the poor, many of whom are black and Hispanic.<sup>6</sup> It is an added burden imposed on homosexual, black, and Hispanic persons already burdened with lack of respect and poor self-image;<sup>7</sup> and finally, it literally "drags from the closet" persons who arguably

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tage by using it to promote something they have never achieved before - homosexual rights. . . . While some are using the AIDS issue to promote political and societal acceptance of an Anti-Christian lifestyle, thousands of innocent Americans are dying.

135 CONG. REC. S396 (daily ed. Jan. 25, 1989).

4. "The popular biases hang tough, like, well, persistent viruses. Forty-three percent [of persons in a 1987 Gallup poll] still hold that AIDS is a 'divine punishment for moral decline.'" McCormick, *AIDS: The Shape of the Ethical Challenge*, AMERICA 147, 149 (Feb. 13, 1988). For a history of the United States Response to epidemics, see PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 161-70.

5. Rogers, *Federal Spending on AIDS—How Much is Enough*, 320 NEW ENG. J. MED. 1623, 1624 (1989). See also AIDS: THE LEGAL ISSUES 5 (1988); AMERICAN BAR ASSOCIATION, AIDS COORDINATING COMMITTEE, DRAFT REPORT (1989); USCC, *The Many Faces of AIDS: A Gospel Response*, 17 ORIGINS 482, 483 (1987) ("Discrimination or violence directed against persons with AIDS is unjust and immoral . . . [and] [a]s with all other diseases, AIDS is a human illness to which we must respond in a manner consistent with the best medical and scientific information available.")

6. See, e.g., Specter, *Emergency Rooms in Crisis*, Wash. Post, Sept. 14, 1989, at A1, col. 1. The American College of Emergency Physicians (ACEP) reported that hospital emergency departments in 41 states and the District of Columbia suffer from such serious overcrowding that the health of patients is threatened. This problem is most serious for the poor because, "[f]or millions of inner-city residents, particularly those without health insurance or regular medical care, emergency rooms have replaced the family doctor in the past few decades." *Id.* The overcrowding results in part from the "massive increases in the number of drug-related emergency room admissions, the surge in AIDS cases, the growing number of poor and uninsured patients." *Id.* at A27, col. 3. In the District of Columbia, the director of the Department of Human Services admits that, "Government has exhausted its resources at the present time." Abramowitz, *Health Care in Critical Condition*, Wash. Post, July 3, 1989, at B5, col. 5.

7. *Daniels v. Cristofelelli*, Civ. Ct., Queens City, reported in N.Y.L.J., June 7, 1989, at 26, col. 6. A blind resident of the Queens Lighthouse Home for Adults was evicted because he

have few choices about sexual identity and even fewer options because of judicial and legislative containment.<sup>8</sup> These examples illustrate why AIDS is different.

Once a person makes a rational determination as to which side of the argument he or she wishes to belong — AIDS associated with status or AIDS associated with existent discrimination — money is a means by which that person's determination may be effectuated. That is, money can be spent to contain the lifestyle and suppress the HIV epidemic, or money can be spent to eliminate the disease without regard to the lifestyle. Both sides of the issue would probably advocate care for those afflicted first; then at the same time maintain a separate agenda to address either lifestyle *or* the disease, depending on which side is selected.

Money is being spent on AIDS. Examining the estimates of federal spending and number of deaths in 1989 with respect to selected diseases, the following statistics appear:<sup>9</sup>

DISEASE	SPENDING	DEATHS
	[in billions of dollars]	
CANCER	1.45	494,422
HEART DISEASE	1.01	777,626
AIDS & HIV	1.31	34,388

“The current and future costs occasioned by HIV-related illness are the subject of much debate, but most would agree that billions of dollars will be

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had AIDS and required continuous medical care. It was also alleged that he posed a risk of infection to others. The court ordered that the resident be restored to his room in the Home, since his eviction was a denial of due process of law. *Id.*

The Texas Human Rights Foundation filed a formal complaint against Midland National Life Insurance Company. The complaint alleged that the company violated anti-discrimination practices by using zip codes to determine which applicants for insurance would be required to undergo HIV tests. LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., 3 AIDS UPDATE, No. 10, at 4 (1989).

A defendant was convicted of several counts of sexual battery and given a very harsh sentence, significantly departing from Florida guidelines. The court deviated from the usual sentencing guideline based on the fact that the defendant was homosexual and knew or should have known that he was HIV-positive. The sentence was upheld on appeal. *Cooper v. State of Florida*, 539 So. 2d 508 (Fla. Dist. Ct. App. 1989), *rev. denied*, 548 So. 2d 662 (Fla. 1989).

8. See, e.g., Americans With Disabilities Act, specifically exempting defined sexual lifestyles covered under the Act. Courts have continued to refuse to protect homosexual activity and orientation. S. 933, 101st Cong., 1st Sess. (1989). See also Note, *The Legality of Homosexual Marriage*, 82 YALE L. J. 573 (1973); Annotation, *Visitation Rights of Homosexual or Lesbian Parent*, 36 A.L.R. 4TH 997 (1985); Annotation, *Initial Award or Denial of Child Custody to Homosexual or Lesbian Parent*, 6 A.L.R. 4TH 1297 (1981).

9. Winkenwerder, Kessler & Stolec, *Federal Spending for Illness Caused by the Human Immunodeficiency Virus*, 320 NEW ENG. J. MED. 1598, 1602 (1989) (tables 4 & 5).

needed by the early 1990s.”<sup>10</sup> No one can estimate the actual cost because the HIV epidemic has forced America to admit that the health care system is in critical condition.<sup>11</sup> Furthermore, it is impossible to predict the cost of providing drugs such as AZT,<sup>12</sup> since larger numbers of persons have been recommended to receive the treatment so as to postpone symptoms.<sup>13</sup> Also, cost will be affected by factors surrounding Medicaid, private incentives, and alternative treatment modes.

Whatever the cost becomes — not even considering the cost in human lives — a factor which is almost always forgotten in the equation is the cost of discrimination. If, as this Article shall seek to demonstrate, HIV or AIDS is unique in that the persons most afflicted in the past and those most afflicted in the future are also persons whom society has shown the greatest amount of discrimination, then does the fact of this discrimination affect the cost of the disease? Does discrimination affect the manner of medical treatment? Does past discrimination affect accessibility to health insurance, decent housing, jobs, education, and an overall sense of well-being? Does discrimination make such a difference in regards to HIV that herculean efforts are needed to address the epidemic? This Article advocates that the answer to all of these questions is yes.

If HIV is different because of the discrimination that has consistently sur-

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10. *Id.* at 1598.

11. See Rich, *Restructuring Nation's Health System*, Wash. Post, Aug. 10, 1989, at A23, col. 1; PRESIDENTIAL COMMISSION REPORT *supra* note 1, at 1-6; INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, *CONFRONTING AIDS* 93-117 (Update 1988) [hereinafter *CONFRONTING AIDS*]. The *Washington Post* wrote that “Medicaid, at \$37 billion a year in federal funds and nearly as much again from the states,” is a program that allows the nation to believe the government has a health care program for the poor. But in fact, Medicaid covers fewer than half of the poor. *Expanding Medicaid*, Wash. Post, Sept. 18, 1989, at A18, col. 1 (editorial).

12. As testimony to this and the accusations made by many that Burrows Wellcome was charging too much for AZT, the company agreed to reduce the price of the drug by 20 percent. The cost is still nearly \$6,000 a year. Specter, *Price of AZT to be Cut 20 Percent*, Wash. Post, Sept. 19, 1989, at A1, col. 6.

13. The results of two studies recently released by the National Institute of Allergy and Infectious Diseases (NIAID) indicate that AZT delays progression of disease in certain HIV-infected individuals who are either asymptomatic or who have low level symptoms. It is estimated that 650,000 Americans could take advantage of this option. LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., 3 AIDS UPDATE No. 10, at 8 (1989). New drugs may increase competition and reduce costs, and this may in fact have led to the cost reduction in AZT announced by Burrows Wellcome in September 1989. See *FDA to Permit Distribution of Experimental AIDS Drug*, Wash. Post, Sept. 14, 1989, at A19, col. 3 (DDI has been proven to block the progress of AIDS with fewer of AZT's harsh effects). Unless alternatives are found, the cost will be high. Specter, *Early HIV Care May Cost Over \$5 Billion a Year*, Wash. Post, Sept. 15, 1989, at A4, col. 1.

rounded the persons with it — and the statistics testify to discrimination<sup>14</sup> — the next question must be whether or not this difference is being taken into account. To a small degree it is; we are doing something. Once the gay and lesbian community drew upon past experiences of discrimination and mobilized to address the epidemic within, a network of assistance developed. Discrimination was a cohesive force. The remainder of society has yet to confront the question of whether or not AIDS has to date been associated in the United States with victims of discrimination: homosexuals, drug-users, and minority populations. This difference may well be the deciding point in extending legislation protecting handicapped individuals,<sup>15</sup> expanding the scope of Medicaid coverage, or mitigating the complexities of insurance, privacy, or access to the legal system.<sup>16</sup> Every person afflicted with any disease is entitled to care and more. But again, as long as AIDS is predominantly associated with groups already burdened with discrimination, it is reasonable to advocate that society uniquely respond to all those afflicted, homosexuals included, not only those traditionally associated with strict scrutiny status under the law, racial minorities.

In addition to advocating unique and special consideration of HIV-infected persons because they have experienced intensive discrimination in the past, this Article advocates that each group mobilize its own resources to respond to the epidemic. Once the gay and lesbian community began to consider HIV as infecting and killing “us” rather than “them”, neighborhood clinics, advocacy groups, health networks, and common sense became part of what it meant to be homosexual. This transformation came about even though not every gay and lesbian person engaged in activities that were and are thought to be considered high-risk; this change came about even

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14. The question of society's inactivity in the face of clear statistics was raised in 1962 by Michael Harrington, recently deceased author and social thinker, when he wrote *THE OTHER AMERICA: POVERTY IN THE UNITED STATES*. The book was read by Presidents John Kennedy and Lyndon Johnson and prompted each to act upon the statistics. The statistics were equally clear in 1980, when Michael Harrington wrote *DECADE OF DECISION*: “The figures are clear enough — but they do not interpret themselves.” M. HARRINGTON, *DECADE OF DECISION* 229 (1980).

15. See Americans With Disabilities Act (ADA), which, if passed, will expand the scope of the existing Sec. 504 of the Rehabilitation Act, to now protect against disability-based discrimination in virtually all private sector and public sector employees, and prohibit discrimination in public accommodations. S. 933, 101st Cong., 1st Sess. § 3(2) (1989).

16. The United States Conference of Mayors has adopted four AIDS/HIV-related policy resolutions supporting: (1) early intervention for treatment and funding by Medicaid, Medicare, and private insurance payment for drugs being tested; (2) housing for PWAs (persons with AIDS) under a changed definition in HUD guidelines; (3) increased federal funding for AIDS prevention, treatment, and services; and (4) television broadcasters' acceptance of condom advertisements. LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., 3 AIDS UPDATE No. 10, at 9 (1989).

though a significant majority of the gay and lesbian community did not have and will not become infected with HIV. Once the discrimination experienced by all of the gay and lesbian community was experienced as a bond, upon which the certainty of HIV infection promised even more suffering and death, the community mobilized to provide the local apparatus that has made a significant difference. The black and Hispanic communities must do the same. For these latter two groups, the sensitivity of the judicial structure and existing legislative entitlement provide sustenance that the gay and lesbian communities did not have. Nonetheless, the poverty of the ghettos, the unique medical histories of many black and Hispanic persons, and the efficiency of shared needles in transmitting HIV, remove any advantage. Homosexuals, blacks and Hispanics share a particular plight in reference to HIV.

The task at this point in the history of the epidemic must be to state publicly what has been implied since the statistics were first recorded at the Centers for Disease Control in Atlanta, Georgia. That is, that AIDS is different from polio, cancer, and heart disease. It is different because AIDS has a predilection for minorities, men, and women who have consistently experienced discrimination in the most basic areas of human life. The fact that the HIV epidemic has descended upon these particular communities is the crucial difference between this disease and others. It is the conclusion of this Article that this difference demands special consideration by the medical and legal communities.

### I. DISCRIMINATION INVOLVING HOMOSEXUALS

Expanding upon a theme fashioned by W. Somerset Maugham's *Of Human Bondage* written in 1915, Anthony Burgess published *Earthly Powers* in 1980. While the older book explores the vagaries of the physical handicap of Philip Carey, Burgess uses the modern novel to explore the responsibility of homosexuality through a dialogue between two men who would be in fact Somerset Maugham and Pope John XXIII.<sup>17</sup> At one point in the novel, the homosexual Maugham asks the saintly Pope: "To which God do I listen — the God who made me what I am or the God whose voice is filtered through the edicts of the Church?"<sup>18</sup> And then, as if to further dramatize the tension between the two, Burgess re-writes a portion of the book of Genesis, fantasizing that God first created two persons of the same sex, and only created the opposite sex because Adam ate of the forbidden

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17. The characters in Burgess' novel are Kenneth Marchal Toomey, eminent novelist, and Don Carlo Campanati, Pope and candidate for sainthood.

18. A. BURGESS, *EARTHLY POWERS* 49 (1980).

fruit.<sup>19</sup> Such a fantasy scene is created in the play, *Torch Song Trilogy*, when Arnold, the drag-queen entertainer is confronting his mother with the possibility of a homosexual dominated world with cries of: "What if?!" "What if?!" "What if?!"

Popular literature such as that mentioned, captures the essence of the debate over the nature of homosexuality, whether it is innate, acquired, biological or behavioral. If there is no choice in sexual preference, is it possible to justify different treatment? Such issues have surfaced during the past three decades in the United States and have allowed a more open debate over the distinction between homosexual orientation and activity.<sup>20</sup> The fact that some persons in society may be willing to countenance orientation but not activity has a significant bearing on how persons perceive gay and lesbian persons. This debate was a part of the court's decision in *Watkins v. United States Army*:

Although the causes of homosexuality are not fully understood, scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change. Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation. Would heterosexuals living in a city that passed an ordinance banning those who engaged in or desired to engage in sex with persons of the *opposite* sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex?<sup>21</sup>

The tension within society over the issue of homosexuality is very real and AIDS has heightened the anxiety.<sup>22</sup> For instance, a gay man diagnosed with

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19. *Id.* at 167-70.

20. See *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir.), *reh'g granted en banc*, 847 F.2d 1362 (9th Cir. 1988), *vacated*, 875 F.2d 699 (9th Cir. 1989). In the 1988 opinion, the court relied on the equal protection component of the fifth amendment's due process clause to forbid the U. S. Army from discriminating on the basis of sexual orientation. Indeed, it can be argued that the important feature of this decision was the willingness of the court to consider the distinction between homosexual status and homosexual acts. See *id.* at 1338, 1343. Nonetheless, the majority of the court in the 1989 decision ordered the U.S. Army to retain Sgt. Watkins on the ground of equitable estoppel alone, without consideration of the due process claim. Concurring opinions by Judge Norris and Judge Canby would retain the original condemnation of the Army's discrimination against homosexual orientation. *Watkins*, 875 F.2d at 731.

21. *Watkins*, 847 F.2d at 1347-48 (citations omitted).

22. For a discussion of this tension in society, see Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1176 n.79 (1988), where the author discusses the fact that gay men and lesbian women are subject to widespread social hostility. "As a result, disclosure of homosexuality creates a series of risks of social sanctions, ranging from various forms of social ostracism to dismissal from employment to private violence. It is for this reason, among others, that the



AIDS writes:

It's always been so hard, and now this doesn't make it easier. It's the final blow, really. Nobody will let you be yourself, and now that I'm sick, it's a double whammy. You know how they treat me when I go into the office? I've had to come ALL the way out because of this, and the admission that goes along with it—that I have gay sex, that it's made me sick somehow . . . it's like they always said. And they treat me like a leper, like I'm leaving germs all over the place.<sup>23</sup>

Larry Kramer, a gay author, compiled a list of reasons why he thinks the tension exists. He posits four: (1) People hate differences, anything that veers from the norm; (2) the majority of gay and lesbian people is not visible, and this fact is threatening; (3) everyone has homosexual tendencies, and hating gay and lesbian people is a way to reject those feelings; and, (4) everyone needs a scapegoat.<sup>24</sup> Whatever the reason, there is tension and even hatred in the country, augmented by AIDS. The tension has sometimes precipitated violence.<sup>25</sup>

Actual violence against gay and lesbian persons has resulted in the introduction of legislation to collect data about "criminal acts that manifest prejudice based on race, religion, homosexuality or heterosexuality, or ethnicity."<sup>26</sup> Also, bills were introduced to amend the Civil Rights Act of 1964 to include language that would prohibit discrimination on the basis of affectional or sexual orientation.<sup>27</sup> Many bills have been introduced affect-

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exercise of political power by gays and lesbians is unusually difficult." *Id.* See also Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 728-31 (1985); J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 162-64 (1980). Incidents of "gay bashing" and other hate crimes are on the rise nationwide. See Swisher & Masters, *Gay Activists Say Assaults on Homosexuals Are Rising*, Wash. Post, Sept. 17, 1989, at A1, col. 1.

23. P. REED, *FACING IT* 126 (1984).

24. L. KRAMER, *REPORT FROM THE HOLOCAUST* 238 (1989).

25. Gay and lesbian newspapers often insert announcements requesting information concerning specific acts of violence against gay and lesbian persons. See, e.g., *Inadequate Police Response: Report Anti-Gay Assault: 202-667-5139*, Wash. Blade, Sept. 8, 1989, at 9 [sponsored by Anti-Violence Task Force (GLAA)].

26. H.R. 1048, 101st Cong. 1st Sess., 135 CONG. REC. E464 (daily ed. Feb. 22, 1989). This bill was introduced by Rep. John Conyers, Jr. as the Hate Crime Statistics Act. But note that the Act "shall be used only for research or statistical purposes" and nothing in the Act "creates a right for an individual to bring an action complaining of discrimination based on homosexuality." *Id.* at E465. Similar was the bill to establish a Commission on Racially Motivated Violence, to "collect and analyze information and statistics concerning acts of racially motivated violence and consult with representatives of groups involved or interested in the protection of the rights of racial minorities." H.R. 28, 101st Cong., 1st Sess., 135 CONG. REC. H37 (daily ed. Jan. 3, 1989).

27. See H.R. 655, 101st Cong., 1st Sess. (1989); S. 47 101st Cong., 1st Sess. (1989). The

ing some aspect of AIDS,<sup>28</sup> with over 170 statutes passed in state legislatures,<sup>29</sup> and the comprehensive Health Omnibus Programs Extension Act of 1988,<sup>30</sup> enacted by the 100th Congress. These statutes have been America's first efforts at providing any protection for homosexual orientation or activity.

On the contrary, legislation to date still does not address all of the various aspects of American society which treat gay and lesbian persons differently; for instance, sexuality, and the manner in which this particular aspect of life includes activity. In the 1986 case of *Bowers v. Hardwick*,<sup>31</sup> the Supreme Court was asked, in the language of the majority, to decide, "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."<sup>32</sup> The issue encompassed the privacy doctrine that had granted expanded sexual rights to American society since 1965, with the seminal case of *Griswold v. Connecticut*.<sup>33</sup> Even though the majority opin-

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term affectional or sexual orientation means male or female homosexuality, heterosexuality, and bisexuality by orientation or practice, by and between consenting adults.

28. In 1984 there were six bills introduced in state legislatures concerning AIDS, but by 1987 there were over 550. *AIDS and State Policy*, AIDS LAW REP. 3 (Apr. 1988). The Report of the Presidential Commission recommended many legislative initiatives, but they have not come about. See *White House Earns Black Marks for AIDS Policy*, 118 NEW SCIENTIST 34 (June 1988) (new laws should be enacted to protect against AIDS discrimination and to protect confidentiality); Thompson, *Frank Talk About the AIDS Crisis*, TIME, June 13, 1988, at 53 (report is critical of the Reagan Administration); Rovner, *AIDS Experts Urge Anti-Discrimination Law*, 46 CONG. REP. 1496 (1988).

29. Gostin, *Public Health Strategies for Confronting AIDS*, 261 J. A.M.A. 1621 (1989). For a summary of state legislative proposals, see INTERGOVERNMENTAL HEALTH POLICY PROJECT, A SYNOPSIS OF STATE AIDS RELATED LEGISLATION (1987) (available at George Washington University, Washington, D.C.).

30. Pub. L. No. 100-607. Among other things, the Act provides for treatment, research, counseling and testing, home health care, education, and creates a National Commission on AIDS to succeed the Presidential Commission.

31. 478 U.S. 186 (1986).

32. *Id.* at 190. See also *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989). In *Ben-Shalom*, the Seventh Circuit held that a recently promulgated Army regulation denying admitted homosexuals the right to re-enlist does not violate a soldier's First Amendment right to freedom of speech or their fifth amendment right to equal protection. A compelling state interest is not necessary because homosexuals do not constitute a suspect class: "If homosexual conduct may be constitutionally criminalized [*Bowers v. Hardwick*, 478 U.S. 186 (1986)] then homosexuals do not constitute a suspect class entitled to greater than rational basis scrutiny for equal protection purposes." *Id.* at 464 (footnote omitted).

33. 381 U.S. 479 (1965). In *Griswold*, the Court invalidated state statutes prohibiting the use and distribution of contraceptive devices. *Id.* at 485-86. Such use and distribution was found in the right to privacy discerned in the "penumbras" of the first, third, fourth, fifth, and ninth amendments of the United States Constitution. *Id.* at 484. Seven years later, the Court extended its holding to protect the use and distribution of contraceptives to unmarried persons. "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a per-

ion in *Griswold* concerned the rights of married couples and the concurring opinion specifically accepted state restrictions on “[a]dultery, homosexuality and the like,”<sup>34</sup> privacy opened new possibilities of sexual freedom, even including abortion,<sup>35</sup> an activity historically denied in the same manner as sodomy.<sup>36</sup>

The privacy cases up to *Hardwick* seemed intent upon establishing the right to personhood<sup>37</sup> through acknowledging the role of a person’s sex in the development of his or her identity. “There has been a peculiar willingness simply to state or to assume — as if it required no explanation — that matters of sexuality go straight to the heart of personal identity.”<sup>38</sup> Furthermore, the sexual activities of:

childbearing, marriage, and the assumption of a specific sexual identity are undertakings that go on for years, define roles, direct activities, operate on or even create intense emotional relations, enlist the body, inform values, and in sum substantially shape the totality of a person’s daily life and consciousness. Laws that force such undertakings on individuals may properly be called ‘totalitarian,’ and the right of privacy exists to protect against them.<sup>39</sup>

But *Hardwick* directly entered upon the privacy right of a homosexual to

son as the decision whether to bear or beget a child.” *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

34. *Griswold*, 381 U.S. at 499.

35. See *Roe v. Wade*, 410 U.S. 113 (1973) (woman’s right to privacy in her body’s reproductive organs took precedence over the state’s interest in restricting abortions). See, e.g., Frey, *The Guilty But Mentally Ill Verdict and Due Process*, 92 YALE L.J. 475 (1983); Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women’s Movement*, 61 N.Y.U. L. REV. 589, 638 (1986); Note, *Special Project: Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597, 821 (1986).

36. Minorities such as blacks and homosexuals have previously shared discriminatory sexual treatment. Dissenting in *Hardwick*, Justice Blackmun joined by Justices Brennan, Marshall and Stevens, noted the similarity between prosecution for sodomy and prosecution for miscegenation. *Bowers v. Hardwick*, 478 U.S. 186, 210 n.5 (1986). Justice Stevens, in a separate dissent joined by Justices Brennan and Marshall, noted the same similarity. *Id.* at 216 n.9.

37. See *id.* at 205. (Blackmun, J., dissenting) (“We protect the decision whether to have a child because parenthood alters so dramatically an individual’s self-definition . . .”). Self-definition and its relationship to “personhood” form the basis of a suggested basis for privacy in the future. See P. Freund, Address to the American Law Institute (May 23, 1975), quoted in AMERICAN LAW INSTITUTE, 52ND ANNUAL MEETING 42-43 (1975); L. Tribe, AMERICAN CONSTITUTIONAL LAW, § 15-13 at 943 (1st ed. 1978); Craven, *Personhood: The Right to Be Let Alone*, 1976 DUKE L.J. 699, 702-03; Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977); Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 752 (1989) [hereinafter *Right of Privacy*]; Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26 (1976); Wasserstrom, *Privacy: Some Arguments and Assumptions*, in PHILIOSOPHICAL DIMENSIONS OF PRIVACY 317 (Schoeman ed. 1984); Note, *Personhood and the Contraceptive Right*, 57 IND. L.J. 579 (1982).

38. *Right of Privacy*, *supra* note 37, at 755.

39. *Id.* at 801-02.

assume a sexual identity; a privacy right still retained by a majority of persons who are heterosexual. *Hardwick* separated homosexuals from the expanded concept of privacy generally, and allowed states to prosecute homosexuals for sodomy specifically. It has yet to be decided if sodomy statutes could be used to prosecute heterosexuals, or if privacy could be a defense in that situation.<sup>40</sup>

Justice White, writing for the 5-4 majority in *Hardwick*, decided that the federal Constitution does not confer on homosexuals a fundamental right to engage in sodomy. To do so, he writes, would be to force the "imposition of the Justices' own choice of values on the States."<sup>41</sup> There is a limit to privacy and that limit has been reached with homosexuality: "[N]one of the rights announced in [*Griswold to Roe*] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy. . . . No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . ."<sup>42</sup> This conclusion is based on the Court's interpretation of the Due Process Clause and its inherent reference to history, tradition, and whether or not homosexual sodomy is "deeply rooted in this Nation's history and tradition."<sup>43</sup>

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40. The Georgia Code provision at issue in *Hardwick* did not specifically mention homosexual sodomy: "(a) 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." GA. CODE ANN. § 16-6-2 (1984). *But see* TEX. PENAL CODE ANN § 21.06 (Vernon 1987) which specifically mentions homosexual sodomy. The majority in *Hardwick* found that most sodomy statutes do not differentiate between homosexual and heterosexual sodomy, but then restricted itself to homosexual sodomy: "The only claim properly before the Court, therefore, is *Hardwick's* challenge to the Georgia statute as applied to homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy." *Bowers v. Hardwick*, 478 U.S. 186, 186 n.2 (1986). Nonetheless, the dissenting opinion notes that, "the Georgia Attorney General concedes that Georgia's statute would be unconstitutional if applied to a married couple. *See* Tr. of Oral Arg. 8 (stating that application of the statute to a married couple 'would be unconstitutional' because of the 'right of marital privacy as identified by the Court in *Griswold*')." *Id.* at 218 n.10.

41. *Hardwick*, 478 U.S. at 191. The Court's reluctance to adopt a posture of judicial activism can be seen in the majority's opinion. "The 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." *Id.* at 194. Postures of judicial restraint are more prevalent within the Court today. *See Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3041 (1989) ("The goal of constitutional adjudication is surely not to remove inexorably 'politically divisive' issues from the ambit of the legislative process, whereby the people through their elected representatives deal with matters of concern to them.").

42. *Hardwick*, 478 U.S. at 190-91. The Court's reference to the value attributed to family emphasizes the crucial role this institution has on the changing sexual rights of gay and lesbian persons. It is possible to conclude that there will be no change in sexual rights of privacy until the legislative definition of family has been expanded to include homosexual partners. *See infra* text accompanying notes 69-76.

43. *Hardwick*, 478 U.S. at 191-92. Authors would argue that nothing in the text of the

The point is not so bold as to suggest that homosexual conduct should be protected under the same constitutional framework as is used for heterosexual conduct. Rather, the point is that in a era that has seen privacy protection broaden to safeguard the bedrooms of heterosexual married persons, heterosexual single persons, interracial couples, and women seeking abortions, significant numbers of persons are still criminalized<sup>44</sup> in the same manner as persons who commit child abuse, incest, or public indecency. This double standard occurs even though: homosexuality is no longer viewed as a disease;<sup>45</sup> there is evidence in fact and judicial decisions that homosexuality is not a matter of choice;<sup>46</sup> arguments are made that sexuality provides self-definition to homosexuals in the same manner as heterosexuals;<sup>47</sup> and there is no proof that homosexuality per se is any more dangerous to health and safety than heterosexuality.<sup>48</sup>

Efforts to explain why the sexual privacy of gay and lesbian persons has not been protected — even though the majority of the population has had the opportunity of expanded protection — fail because of a lack of consistency, selective interpretation, or simple discrimination. For instance, while the Court in *Hardwick* is correct in stating that there is no “tradition” of homosexual sodomy, “[t]here is [likewise] no established tradition of protection of abortion, marital privacy, or use of contraception.”<sup>49</sup> In drawing the line at homosexuality, the Court has been accused of “evolving standards of

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Due Process Clause compels the connection between tradition and due process. See Sunstein, *supra* note 22, at 1170-71. But the courts have interpreted it as such from the beginning: “For purposes of due process, the baseline for inquiry has tended to be the common law, Anglo-American practice, or the status quo.” *Id.* at 1171. “The clause has . . . been associated with a particular conception of judicial review, one that sees the courts as safeguards against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history.” *Id.* at 1163.

44. Presently, the Michigan Organization for Human Rights, the Lambda Legal Defense and Education Fund, and the ACLU of Michigan are challenging a Michigan statute prohibiting “crimes against nature” and “gross indecency” as infringing rights to privacy and equal protection under the Michigan Constitution. See LAMBDA LEGAL DEFENSE AND EDUCATION FUND, 6 LAMBDA UPDATE 12 (Spring/Summer 1989).

45. See *Bowers v. Hardwick*, 478 U.S. 186, 202-03 n.2 (1986) (citing Brief for American Psychological Association and American Public Health Association at 8-11).

46. *Watkins*, 847 F.2d. at 1347-48. Note that *Watkins* is still serving within the United States Army, although the decision is based on equitable estoppel. But see *Padula v. Webster*, 822 F.2d 97, 99 (D.C. Cir. 1987) (Basing its decision on *Hardwick*, the United States Court of Appeals for the District of Columbia Circuit upheld the FBI’s policy of considering homosexual conduct a “significant” and often dispositive factor in employment decisions.)

47. See *Right of Privacy*, *supra* note 37, at 752-82.

48. Prohibited conduct under sodomy statutes would be equally dangerous for heterosexual persons as for homosexual persons. See *CONFRONTING AIDS*, *supra* note 11, at 33-56.

49. Sunstein, *supra* note 22, at 1173.

decency,"<sup>50</sup> and even "lawmaking by personal predilection."<sup>51</sup> This conclusion is directed at the proposition of judicial restraint and the absence of any neutrality or principled decision making in the area of sexual privacy. Furthermore, the fact that the matter can be resolved by the state legislatures does not address the fact that homosexuals, like racial minorities, already suffer from existing social stigmas, impeding legislative freedoms.<sup>52</sup>

It is true that *Hardwick* may well have been decided differently if the Court had been offered an equal protection argument to consider rather than due process.<sup>53</sup> "The function of the Equal Protection Clause is to protect disadvantaged groups, of which blacks are the most obvious case, against the effects of past and present discrimination by political majorities."<sup>54</sup> And further, equal protection may be a better basis for overturning state laws on reproduction and other privacy issues. But the difficulty is that when equal protection is used to offer protection to gay and lesbian persons, there is a history of distrust and even contempt, so that the result is far from certain.<sup>55</sup> Tradition works in favor of protecting the privacy rights of heterosexuals because, like marriage, it "is a coming together for better or for worse, hope-

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50. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). See also DWORKIN, *LAW'S EMPIRE*, ch. 2 (1986). The Court's willingness to provide access to legal abortion was not seen as "deeply rooted in this Nation's history and tradition." *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

51. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 656 (1987).

52. There is no effort to raise homosexual rights to the level of strict scrutiny. See *Bowers v. Hardwick*, 478 U.S. 186, 197 (Burger, C.J., concurring) ("To hold that the act of sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."). See also *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33-34 (1973) (limiting the fundamental rights branch of equal protection to matters explicitly or implicitly guaranteed by the Constitution); *Ben-Shalom v. Marsh*, 881 F.2d 454, 465-66 (7th Cir. 1989) ("We do not see that the new regulation [denying a homosexual the right to re-enlist] embodies a gross unfairness in the military context so inconsistent with equal protection as to be termed 'invidious.'").

53. There was no equal protection argument before the Court in *Hardwick*. The Court noted that, "[r]espondent does not defend the judgement below based on the ninth amendment, the equal protection clause or the eighth amendment." *Hardwick*, 478 U.S. at 196 n.8. But see *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) (Army regulation prohibiting declared lesbian from re-enlisting does not deny fifth amendment right to equal protection). See also *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (refusing to expand the reach of equal protection to find a fundamental right of homosexual conduct under the equal protection component of the due process clause of the fifth amendment).

54. Sunstein, *supra* note 22, at 1174.

55. See J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 162-63 (1980); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) (denying suspect class status for equal protection to Army lesbian).

fully enduring, and intimate to the degree of being sacred."<sup>56</sup>

There are many similarities between the discrimination used against blacks<sup>57</sup> and that used against gay and lesbian persons. Both groups are minorities, and both groups were or are barred from marriage or the military for similar reasons — but at least at present, there is very little history of tolerance offering clear direction in the use of equal protection to protect the sexual privacy of homosexuals.<sup>58</sup> Indeed, it is likely that in an age of judicial restraint the courts will offer no solace.

Examined within a secular context, sexuality is the first instance of discrimination against gay and lesbian persons because it seems so irrational when viewed within the context of expanded sexual opportunity in America throughout the last three decades. For example, the United States Census Bureau statistics continue to show an increase in couples of the opposite sex cohabiting without marriage: 439,000 in 1960; 523,000 in 1970; 1.5 million in 1980; 2.2 million in 1986.<sup>59</sup> When law and custom combine to say that it is permissible for a majority of the population to express a substantial part of a person's identity, but that the minority must continue to repress that part for no rational reason, discrimination results.<sup>60</sup> And anger results. For in-

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56. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). *But see Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974) (denying the right to homosexuals to enter into marriage because the tradition did not include persons of the same sex within the definition of marriage).

57. *See Loving v. Virginia*, 388 U.S. 1 (1967) (Court held that a black woman and a white man were deprived of equality of rights on account of race by Virginia's statute prohibiting interracial marriage). *See also Note, supra* note 8.

58. *See, e.g., Sunstein, supra* note 22, at 1179. The author writes: "The *Watkins* decision provides reason to believe that constitutional protection against discrimination on the basis of sexual orientation will ultimately take place under the Equal Protection Clause." The *Watkins* decision to which he refers was not the most recent one. In the latter 1989 decision, the court of appeals decision deleted the language of the earlier case which made bold assertions concerning the rights of homosexuals. The most recent decision retained the homosexual's rights, but on equity grounds. All indications are that this development shall continue. *See Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (court relies upon *Bowers v. Hardwick* and its protection of state criminalization of homosexual conduct).

59. U. S. BUREAU OF CENSUS, U.S. DEP'T OF COMM., CURRENT POPULATION REPORTS, HOUSEHOLDS, FAMILIES, MARITAL STATUS AND LIVING ARRANGEMENTS 2 (1986).

60. It is beyond the scope of this Article to analyze the sexuality of any representative sampling of gay men or women. But any analysis must include an examination of how laws and customs specifically prohibiting homosexual conduct *and* orientation affect the development of persons unable to conceive of a heterosexual orientation. It is true that it is, "this aspect of the ban on homosexuality — its central role in the maintenance of institutionalized sexual identities and normalized reproductive relations — that have made its *affirmative* or *formative* consequences, as well as the reaction against these consequences, so powerful a force in modern society." Rubinfeld, *supra* note 37, at 800. What then are the results when, "the real force of anti-homosexual laws, if obeyed, is that they enlist and redirect physical and emotional desires that we do not expect people to suppress?" *Id.* The onus of this discrimination is present today because on radio, television and press, a majority of the population —

stance, Larry Kramer writes:

I am going to tell you something you've never heard before. I am going to tell you that the AIDS pandemic is the fault of the white, middle-class, male majority. AIDS is here because the straight world would not grant equal rights to gay people. If we had been allowed to get married, to have legal rights, there would be no AIDS cannonballing through America.<sup>61</sup>

There are many retorts to such a statement. Indeed, even within his own writings, Kramer vilifies gay and lesbian people for doing nothing, for doing too little, for doing the wrong thing.<sup>62</sup> But the point is that the anger and accusations of persons like Larry Kramer are about to be repeated by thousands of other minorities, with smaller stakes in the American enterprise than many of the homosexual men who were the first people with AIDS. What will be the cost of the anger felt by the thousands of blacks and Hispanics who are and will be suffering to the degree that the gay and lesbian community is suffering now? Black and Hispanic communities have their own appraisal of discrimination and their anger is likely to be catastrophic.

But sexuality is not the only issue of discrimination concerning homosexuals. It is just that this issue seems so particular to this minority. Because of the closeted lives of many gay and lesbian persons, the issue of discrimination and homosexuality never seems associated with housing, insurance, employment, immigration, or marriage and family. But the association is there. If the issue is considered seriously, it is quite clear that unless a municipality, state, or federal statute provides express protection for a person who is homosexual,<sup>63</sup> a gay or lesbian person may be denied employment or discharged at the will of the employer,<sup>64</sup> denied the benefits of health or life insurance,<sup>65</sup> denied housing,<sup>66</sup> denied immigration into the United States,<sup>67</sup>

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heterosexuals — are told to express themselves freely and be protected because of privacy. This instruction is not being given to a minority — homosexuals — and the burden is felt because of the change in attitude towards sexuality itself. This is discrimination.

61. L. KRAMER, *supra* note 24, at 178.

62. *Id.* at 100-26. (*An Open Letter to Richard Dunne and Gay Men's Health Crisis*).

63. Among the cities and states which forbid discrimination based on sexual orientation or preference are Los Angeles, San Francisco, Boston, Philadelphia, Austin, the District of Columbia, and Wisconsin. See A. LARSON & L. LARSON, 3 EMPLOYMENT DISCRIMINATION 110.30 (1984).

64. See R. O'BRIEN, AIDS AND THE LAW 92-95 (1987); O'Brien, *AIDS: Perspective on the American Family*, 34 VILL. L. REV. 209, 225-37 (1989) [hereinafter *Perspective*]; Note, *Government Employment and the Homosexual*, 45 ST. JOHN'S L. REV. 303 (1970). For a list of recent cases involving discrimination based on sexual orientation, see LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., 6 LAMBDA UPDATE 8-14 (Spring/Summer 1989).

65. Obviously the issue of testing is important within the context of health, disability or life insurance because the presence of HIV is a significant cost factor and at present, the test is



or suffer the loss of family integrity or stability.<sup>68</sup> AIDS has focused attention on types of discrimination against gay and lesbian persons because it has forced many homosexuals to admit their sexual orientation. Nonetheless, AIDS can cloud the issue of discrimination already existent and unaddressed to a large degree, directed against persons who are *not* HIV-positive but who are homosexual. For example, in a vast majority of jurisdictions today, you cannot fire a person because he or she has AIDS, but you can fire him or her because he or she is homosexual.<sup>69</sup> Addressing discrimination concerning persons with AIDS is not necessarily addressing discrimination concerning gay and lesbian persons.

In regard to family issues, there are some indications that treatment of persons identifying themselves as homosexuals may be coming under closer scrutiny by legislative authorities.<sup>70</sup> For instance, same-sex marriages have traditionally been held void because they were not permitted by marriage

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seen as a sexual preference indicator. See Schatz, *The AIDS Insurance Crisis: Underwriting or Overreaching?*, 100 HARV. L. REV. 1782, 1788 (1987).

66. See LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., AIDS LEGAL GUIDE 8.1-8.2 (2d ed. 1987) (protection against discrimination is present at the city, state or federal levels for persons who are HIV-positive, but unless protection exists for sexual orientation, property-owners can discriminate against gay and lesbian persons).

67. Section 212(a)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(4) (1989) excludes entry into the United States by foreigners with a "sexual deviation." The Lambda Legal Defense and Education Fund is working for the legalization of five Cuban refugees from the Mariel boatlift who were denied resident alien status because their entry papers indicated they are homosexual. See LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., 6 LAMBDA UPDATE 11 (Spring/Summer 1989).

68. For a complete discussion of family issues as they relate to homosexuals, see *Perspective*, *supra* note 64, at 209-79.

69. See *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (upholding Department of Defense policy and practice of refusing to grant security clearances to known or suspected gay applicants).

70. If change is to come, it is likely to come from a legislative initiative, not a judicial one. For instance, judicial efforts to declare state prohibitions of same-sex marriages are not likely. "In view of the continuing hostility toward homosexuality still evident in the United States, it seems likely that society's interest will be considered paramount to those of the homosexual and that therefore the ban on same-sex marriage will be held constitutional." H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 208, at 147 (2d ed. 1987). Unlike the 1960's, courts are not likely to use the Constitution to condemn state statutes. See *e.g.* *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989). It is very likely that the courts will more frequently refer to the ability of minorities to seek redress through the legislative process.

Today, homosexuals are proving that they are not without growing political power.

It cannot be said they have no ability to attract the attention of the lawmakers. A political approach is open to them to seek a congressional determination about the rejection of homosexuals by the Army. We are, however, unwilling to substitute a mere judgement rule for the Army's regulation . . . .

*Ben-Shalom v. Marsh*, 881 F.2d 454, 466 (7th Cir. 1989) (footnote omitted) (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 445 (1985)).

statutes or not countenanced within the common law definition of marriage.<sup>71</sup> While this practice is not likely to change until there is a new consensus regarding the definition of family within the United States,<sup>72</sup> cities on either side of the country are seeking to bring non-marital partners into the benefits traditionally enjoyed by persons related through marriage or consanguinity.

The New York Court of Appeals, with regard to New York City, narrowly reinstated a trial court's ruling that the "life partner" of a deceased tenant of a rent-controlled apartment is entitled to claim the benefit of rent control laws.<sup>73</sup> In a case that had more to do with property rights than sexual relations, the court defined family to include "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence."<sup>74</sup> A concurring judge in the case eschewed this broad definition of family, but took into account the relationship of ten years and said "it would be irrational" not to include this particular petitioner "within the regulation's class of family."<sup>75</sup> One month later, the Mayor of New York City issued an order "recognizing the domes-

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71. See *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) (refusing to allow marriage of a female couple, not on the basis of any Kentucky statute, but because of "their own incapability of entering into a marriage as that term is defined"); *Singer v. Hara*, 11 Wash. App. 247, 253-54, 522 P.2d 1187, 1191-92 (1974) (male couple argued that the Washington state Equal Rights Amendment prevented the state from denying persons of the same-sex the ability to marry, but court responded that same-sex marriage was not within the definition of marriage and upheld the state prohibition against same-sex marriages); Annotation, *Marriage Between Persons of the Same Sex*, 63 A.L.R. 3d 1199 (1975); Note, *supra* note 8. Some states specifically specify that marriage is reserved to a man and woman. See TEX. FAM. CODE ANN. 1.01 (Vernon 1989) ("A man and a woman desiring to enter into a ceremonial marriage shall obtain a marriage license from the county clerk of any county of this state. A license may not be issued for the marriage of persons of the same sex.").

72. A new definition of family is the linchpin that would place non-marital partners, same-sex and opposite-sex, within the aura of family rights. The courts continue to debate the definition of family, but it will be the legislatures that finally decide upon a common consensus. See generally *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Town of Durham v. White Enterprises, Inc.*, 115 N.H. 645, 348 A.2d 706 (1975).

73. *Braschi v. Stahl Assoc., Co.*, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989). Similar New York cases are pending. See *Lewpa Equities, Ltd. v. Collins and Collins v. Next West Management, Inc.* both announced in LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., 6 LAMBDA UPDATE 11 (Spring/Summer 1989).

74. *Braschi*, at 74 N.Y.2d at 211. See also Yen, *Court Adds Gay Couples to Definition of Family*, Wash. Post, July 7, 1989, at A3, col. 3. In reality, the decision will have greater impact upon heterosexual non-marital couples living together.

75. *Braschi*, at 74 N.Y.2d at 215 (Bellacosa, J., concurring). Note that this equitable estoppel type of argument resembles that of the United States Court of Appeals for the Ninth Circuit and its decision to reinstate a black homosexual sergeant after his dismissal from the United States Army because he revealed that he was in fact homosexual. *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988). Neither case included sexual activity and both cases involved long periods of time. In *Watkins*, the court stated: "This is a case where equity

tic partnerships of gays, unmarried heterosexuals, senior citizens and handicapped persons,"<sup>76</sup> as long as couples register with the city that they have been living together for more than a year. They can terminate the relationship at any time if they complete another form at City Hall.

In San Francisco, the city's Board of Supervisors approved a domestic partners law that would allow homosexual and heterosexual partners to register "domestic partnerships" with the city for a fee of \$35.00. The ordinance itself provides no express benefits. Nonetheless, the ordinance was rejected by the voters when made the subject of a special referendum.<sup>77</sup> As this issue goes before the voters, the ensuing debate will have the effect of crystallizing issues surrounding the definition of family.

Homosexuals are treated differently. The pattern of this differentiation varies throughout the geographical areas of the country. Some persons would justify the different treatment upon religious grounds,<sup>78</sup> while others would say that the discrimination is rational because homosexual activity violates the secular fabric of society. The common arena for both groups will be the changing American definition of family.<sup>79</sup> This definition is crucial; it provides legislative and judicial perspective in its appeal to the tradition of due process, status for equal protection, and a discussion point for what has become a changing institution in America. The conclusion is inescapable that the difference in treatment afforded to gay and lesbian people has directly contributed to the misery and deprivation associated with HIV-positivity. This difference in treatment makes AIDS different from other

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cries out and demands that the Army be estopped from refusing to reenlist Watkins on the basis of his homosexuality." *Id.* at 1333.

76. *Koch Grants Benefits for 'Domestic Partners,'* Wash. Post, Aug. 8, 1989, at A6, col. 1. The order covers benefits traditionally associated with married couples: health benefits, bereavement leave policy, and death benefits.

77. Zonana, *Gay Agenda Takes Beating—Even in San Francisco*, L.A. Times, Nov. 9, 1989, at 1, col. 1 (the ordinance was defeated by a "margin of fewer than 2,000 votes 50.5% to 49.5%.").

78. It is beyond the scope of this article to explore the revelation pertinent to each religious creed within the context of homosexuality or sexuality in general. Nonetheless, within any analysis some elements should be present. Among them is the fact that pluralism has a rich history in America, both in terms of conflict and opportunity for discovery. *See generally* M. MARTY, *PILGRIMS IN THEIR OWN LAND* (1984). Also, there is a dynamism in the charge of Jesuit theologian Karl Rahner to have the "courage to let the world be the world," but at the same time having the courage to allow oneself to be "asked too much of." K. RAHNER, *THE PRACTICE OF FAITH* 217-25, 224 (1983). Finally, as is always the case with religion, the question arises of how to "base the new realism . . . on a firm foundation of reassurance, the rediscovery of ancient truth, the reassertion of fundamental values, the redefinition of what is good and what is evil, not relatively but absolutely, always and everywhere." NEUHAUS, *THE CATHOLIC MOMENT* 97-98 (1987) (quoting P. JOHNSON, *POPE JOHN PAUL II AND CATHOLIC RESTORATION*).

79. *See generally* *Perspective*, *supra* note 64, at 209-12, 248-52, 273-77.

terminal illnesses. It is this difference in treatment without a rational basis that imports discrimination and this is the distinction between AIDS and other diseases.

## II. DISCRIMINATION INVOLVING BLACKS AND HISPANICS

Statistics detailing discrimination against blacks and Hispanics are far easier to obtain than those for homosexuals.<sup>80</sup> Indeed, "[g]reat inequalities in the treatment of blacks and whites in the legal system have been present throughout most of the nation's history."<sup>81</sup> As with homosexuals, remember that the discrimination in question relates to the fact that discrimination has been consistently associated with this group of persons, a pattern of "separateness" that antedates AIDS. "Segregation was the rule in public accommodations, health care, housing, schooling, work, the legal system, and interpersonal relations."<sup>82</sup> It is easier to document this past pattern of discrimination against blacks and Hispanics. Discrimination results from the fact that certain clearly defined persons have received different treatment in housing, education, voting, insurance, employment, family models, health care, and immigration. There is no rational basis for this difference. Nonetheless, efforts to eliminate this difference in treatment at the legislative and

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80. In regards to discrimination, note that blacks "appear to differ from whites in what they mean by discrimination." NATIONAL RESEARCH COUNCIL, *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 151 (G. Jaynes & R. Williams, Jr. eds. 1989) [hereinafter *COMMON DESTINY*]. Whites see it as a problem created and maintained by prejudiced individuals, but blacks "view discrimination as a result of both prejudiced individuals and broader social processes." *Id.* See also L. Bobo, *Racial Attitudes and the Status of Black Americans: A Social Psychological View of Change Since the 1940's* (1987) (paper prepared for the Committee on the Status of Black Americans, National Research Council, Washington D.C.); J. KLUEGEL & E. SMITH, *BELIEFS ABOUT INEQUALITY: AMERICANS' VIEWS OF WHAT IS AND WHAT OUGHT TO BE* (1986).

81. *COMMON DESTINY*, *supra* note 80, at 453-54. See generally D. BELL, *RACE, RACISM AND AMERICAN LAW* (1980); A. HIGGINBOTHAM, *IN THE MATTER OF COLOR* (1978); C. MAGNUM, *THE LEGAL STATUS OF THE NEGRO* (1940).

82. *COMMON DESTINY*, *supra* note 80, at 58. The Council continues by noting: this segregation was not 'separate but equal'; virtually all facilities and services for blacks were fewer in number, much lower in quality, or more inaccessible than those for whites. For example, in public education, states operating under legislated segregated school systems spent far more on the education of white pupils than on that for black pupils. In the southern states for which data are available, per-pupil expenditures for whites averaged more than 3 times those for blacks. In Mississippi, the rate of expenditure for whites was 7 times greater than for blacks. Another example was health care, which was negligible for most rural black people, and in urban areas all-white hospitals and hospitals with less-than-equal, segregated black wings were common. Differential access to health care for blacks was reflected in great disparities in black and white mortality and morbidity rates.

*Id.* (citations omitted).

the judicial<sup>83</sup> levels have been far more extensive for blacks and Hispanics than for homosexuals.<sup>84</sup>

There is a long history of constitutional and legislative enactments concerning the rights of racial minorities.<sup>85</sup> There have been a host of Executive Orders.<sup>86</sup> For instance, President Kennedy banned racial discrimination by

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83. Racial minorities have benefited from the Court's understanding that the equal protection clause of the fourteenth amendment demands that racial classifications be subject to the "most rigid scrutiny." *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Loving v. Virginia*, 388 U.S. 1, 11 (1976). This expectation has resulted in change. "The post-1965 'due process and equal rights revolution' within the criminal justice system and related civil rights reforms have led to substantial scrutiny of alleged racial inequalities in the administration of justice." *COMMON DESTINY*, *supra* note 80, at 454.

84. A most recent development is the shift in the judicial posture concerning civil rights efforts. See *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989) (a plaintiff must prove discriminatory intent for disparate impact in violation of Title VII when disparate impact resulted from subjective employment practices); *Martin v. Wilks*, 109 S. Ct. 2180 (1989) (plaintiffs, white firefighters, because they were not a party to the original Title VII suit, were permitted to challenge consent decrees which provided employment promotions for black firefighters); *Patterson v. McLean Credit Union*, 109 S. Ct. 2636 (1989) (42 U.S.C. § 1981 prohibits racial discrimination in the making and enforcement of private contracts, but does not extend to an employer's conduct after the contract relation has been established); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989) (city plan that required prime contractors who were awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" was struck down because the city failed to demonstrate compelling governmental interest that justified the plan; and the plan was not narrowly tailored to remedy the effects of prior discrimination).

85. (1) That period between President Lincoln and President Franklin Roosevelt is especially bleak in terms of minority legislation; (2) By the time of President Roosevelt, the economic status of the vast majority of black Americans was well below middle class; (3) More than 1 of every 2 black adults had no more than 8 years of education, and 62 percent of working black men and women were employed either in agriculture or in menial personal service jobs; (4) Other minority groups, such as Hispanics, did not face the same disparities as Blacks mainly because, during that period, that group consisted of a small percentage of the U.S. population. *COMMON DESTINY*, *supra* note 80, at 164. More examples of federal legislation for minorities include the Thirteenth Amendment to the United States Constitution, the 1961 Federal Airport Act, the 1957, 1960, and the 1964 Civil Rights Acts, the 1964 Economic Opportunity Act, the 1965 Voting Rights Act, the Fair Housing Act of 1968, the 1977 Local Public Works Act, the 1978 Equal Pay Act, and the Age Discrimination Employment Act.

86. President Roosevelt issued Executive Order 8802 in 1941, forbidding discrimination in defense industries and establishing the President's Committee on Fair Employment Practices to monitor the private sector. 3 C.F.R. 957 (1941). President Truman signed Executive Order 9981 on July 16, 1948, calling for equality of treatment within the Armed Forces. 3 C.F.R. 1943-1948 Comp., at 722. This Order resulted in the establishment of the President's Committee on Equality of Treatment and Opportunity in the Armed Services and the eventual desegregation of training and assignment of some blacks to formerly all-white units. See *COMMON DESTINY*, *supra* note 80, at 67. The arguments in favor of segregation of the races are similar to the arguments offered today in favor of separating homosexuals from heterosexuals in the Armed Forces. See *Watkins v. United States Army*, 847 F.2d 1329, 1350 (9th Cir. 1988). "These concerns strike a familiar chord. For much of our history, the military's fear of racial tension kept black soldiers separated from whites." *Id.*

government contractors and established guidelines for hiring blacks,<sup>87</sup> and President Johnson ordered all contractors with 50 or more employees and contracts of \$50,000 or more to develop and submit affirmative action compliance programs with goals and timetables for the hiring and promotion of minorities.<sup>88</sup> And of course it was President Johnson who sought to "eliminate the paradox of poverty in the midst of plenty"<sup>89</sup> by declaring an "unconditional" war on poverty, a project that many complained was doomed before it began.<sup>90</sup> Though not designed specifically for racial minorities, the expectations were the greatest for them.

Richard Nixon contributed the Family Assistance Plan in 1969, a plan that had been designed to provide a guaranteed annual income for all citizens, and that did guarantee income for the poor, elderly, blind, and the permanently and totally disabled.<sup>91</sup> There were also subsidy and assistance programs, including the Office of Minority Business Enterprise, the Manpower Development and Training Program, and the Minority Enterprise Small Business Investment Company. By the time of President Carter, housing discrimination was being taken seriously and there were some efforts to eliminate it through a combination of sanctions and incentives, together with a substantial subsidized-housing construction program.<sup>92</sup> But the programs ended during the Reagan Administration and the country finished the 1980's in a quagmire of scandal at the Department of Housing and Urban Development (HUD).<sup>93</sup>

This brief review of legislation concerning discrimination is meant to illustrate the frequency and types of efforts introduced into American culture to combat discrimination. The list is not exhaustive and it does not identify more subtle forms of discrimination. For example:

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87. Exec. Order No. 10925, 3 C.F.R. 448 (1961).

88. Exec. Order No. 11246, 3 C.F.R. 339 (1965). The Order is administered by the Office of Contract Compliance Programs (OFCCP) within the U.S. Department of Labor. See *COMMON DESTINY*, *supra* note 80, at 316.

89. The Economic Opportunity Act of 1964, 42 U.S.C. § 2701 (1964).

90. See M. HARRINGTON, *THE NEW AMERICAN POVERTY* 16-31 (1984). "When President Johnson made that declaration of social war, the United States was the most limited welfare state in the Western world." *Id.* at 16. "The basic reason why Lyndon Johnson's commitment 'to eliminate the paradox of poverty in the midst of plenty' failed was the war in Vietnam." *Id.* at 21. And even today, it is rational to think that, as poverty has not been eliminated: "If only we had not been so foolishly generous to the poor, this would not have happened." *Id.* at 20.

91. D. MOYNIHAN, *FAMILY AND NATION* 68 (1986).

92. *QUIET RIOTS: RACE AND POVERTY IN THE UNITED STATES* 110 (F. Harris & R. Wilkins eds. 1988).

93. See Marino, *HUD Officials Ignored Warnings About D.C. Lender*, Wash. Post, Aug. 19, 1989, at A1, col. 1; Hilzenrath, *A Breakdown of Accountability*, Wash. Post, Aug. 17, 1989, at A1, col. 1.

By 1940 cities in all regions had unwritten, but clearly understood, rules designating which neighborhoods were open or closed to blacks. . . . The rules were enforced through both legal and extralegal practices, which included violence, real estate marketing that explicitly prohibited the sale of homes in white areas to blacks, federal housing policies that mandated segregation, municipal zoning ordinances, school board policies that designated separate attendance zones for white and black children, and the activities of thousands of neighborhood organizations that sought to keep certain minorities out of their areas.<sup>94</sup>

Today this fact is still true: "The clearest evidence of discrimination comes from audits of practices in the rental and sale of residential properties. . . . Blacks are more likely to be excluded from renting or buying in certain residential areas, to be given quotations of higher prices and rents, and to be 'steered' to areas already primarily populated by blacks."<sup>95</sup> Subtle discrimination has resulted in lieu of former express forms now forbidden by statute.

A review of the most recent appraisal of blacks in American society, *A Common Destiny*, reaffirms the impression that there have been some successes against discrimination,<sup>96</sup> but the continuing reports in American society are abundant. Today, discrimination takes a subtle form, almost always in defiance of existing anti-discrimination statutes. Because of this nuanced discrimination, "direct evidence of systematic discriminatory behavior by whites is difficult to obtain."<sup>97</sup> But it is possible to say that, "the overall

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94. COMMON DESTINY, *supra* note 80, at 88.

95. *Id.* at 49-50. See also U.S. DEP'T. OF HOUSING AND URBAN DEV., MEASURING RACIAL DISCRIMINATION (1979) (offers an extensive investigation of 40 major urban areas documenting racial discrimination in housing patterns).

96. Both the 1979-80 National Survey of Black Americans and the 1982 General Social Survey indicated that nationwide, blacks were most optimistic about the trend in patterns of discrimination, with 65 percent believing there was less discrimination than 20 years earlier. COMMON DESTINY, *supra* note 80, at 1332. Nonetheless, an important change in the political context may have affected black attitudes by the time of the 1982 General Social Survey. The Reagan administration was then perceived by many black leaders as the most aggressively anti-civil rights administration since before the civil rights movement. *Id.* at 136.

97. *Id.* at 155. The housing industry offers the best examples of discrimination. "Discrimination against blacks seeking housing has been conclusively demonstrated. How much the important example of the housing market indicates discrimination in other areas, such as the labor market, is tempered by the fact that residential segregation is very high on whites' 'rank order of discrimination.'" *Id.* at 155-56. Regarding labor:

Improvements in blacks' relative economic status have been primarily due to sustained economic growth and black's migration to higher wage sectors of the economy (1940-1973), rising levels of black education, vigorous enforcement of equal opportunity laws and employment programs that benefited blacks, and overall improvements in attitudes toward race relations in the economy. When these important factors have not been present, blacks have not generally made progress in their relative economic status.

preponderance of evidence indicates that the existence of significant discrimination against blacks is still a feature of American society."<sup>98</sup>

The perception of discrimination among students is one example. During a 1982 study, "65 percent of the black undergraduates and 73 percent of the black graduate students reported having encountered discrimination."<sup>99</sup> "Separation and differential treatment of blacks continue to be widespread in the elementary and secondary schools,"<sup>100</sup> even though it has been shown that if black students attend school with white children in the first or second grade then, "as adults, [the black students] were less likely to be involved in police incidents, less likely to perceive discrimination, more likely to live in nonsegregated residential areas, and more likely to have frequent social contacts with whites."<sup>101</sup> Surveys detailed in *A Common Destiny* led researchers to conclude that any "relatively positive assessments of trends in discrimination should not overshadow the fact of widespread belief by blacks that discrimination continues to be an important problem."<sup>102</sup>

Discrimination in health care is especially onerous. The Civil Rights Act of 1964 and Medicare and Medicaid legislation in 1965 barred discrimination in health care and provided greater access for blacks; organizations such as the Medical Committee on Human Rights, the National Medical Association, and the Student National Medical Association advocated an end to discrimination in health care facilities; and the health care industry has made an affirmative effort to increase the number of blacks and other minorities in the profession. These changes prompted the statement: "Over the past 50 years, blacks' health status and life expectancies have improved a great deal."<sup>103</sup> But, in spite of the efforts, "blacks are found to be more

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*Id.* at 324.

98. *Id.* at 156.

99. W. ALLEN, L. BOBO, & P. FLEURANGES, PRELIMINARY REPORT: 1982 UNDERGRADUATE SURVEY OF BLACK UNDERGRADUATE STUDENTS ATTENDING PREDOMINANTLY WHITE, STATE SUPPORTED UNIVERSITIES (1984) (sponsored by Center for Afro-American and African Studies, Ann Arbor, Mich.), *quoted in* NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 364 (G. Jaynes & R. Williams, Jr. eds. 1989).

100. COMMON DESTINY, *supra* note 80, at 378.

101. R. CRAIN, J. HAWES, R. MILLER, & J. PEICHERT, FINDING NICHES: THE LONG-TERM EFFECTS OF A VOLUNTARY INTERDISTRICT SCHOOL DESEGREGATION PLAN (1986) (Department of Phil. and Social Sci., New York Teachers Coll.), *quoted in* NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 80 (G. Jaynes & R. Williams, Jr. eds. 1989).

102. COMMON DESTINY, *supra* note 80, at 132.

103. *Id.* at 395. Blacks have a substantially higher rate of mortality than whites for cancer and homicide. "[T]here is now a substantial excess in cancer mortality among blacks." *Id.* at 396.



highly concentrated than whites in high-risk socioeconomic groups,"<sup>104</sup> and nationwide, "black children are overrepresented among the poor, and the youngest black children are the most likely to live below the poverty level."<sup>105</sup> These children "have not shared *equally* in the overall health gains, and their death rates are much higher than those for white children."<sup>106</sup>

If poverty results from discriminatory treatment, discrimination is having its harshest effects upon black children.<sup>107</sup> Deaths due to accidents in the home, automobile injuries that occur on ghetto streets, missing smoke detectors, defective heaters, the presence of toxic chemicals for pest control or peeling lead paint abound. There is malnutrition, neglect and abuse, anemia, lack of immunization, lack of dental care, and lack of proper prenatal care, often resulting from poverty. By adolescence, several conditions are of major concern: teenage pregnancy and reproductive health, substance abuse, injuries, and glaucoma. And these adolescents "are the most medically underserved sector of the population"<sup>108</sup> with any program of preventive health care being the least likely to be covered by insurance of any kind.

The lack of insurance reaches each level of the black population. Black Americans are much less likely to have health coverage than whites. "In 1984, an estimated 22 percent of blacks and 14 percent of whites under age 65 were not covered by either public or private health insurance . . . and these figures have been rising since then."<sup>109</sup> Children are more likely to be uninsured; 25 percent of all black children and 17 percent of white children were not covered by insurance in 1984. And 61 percent of all uninsured

104. *Id.* at 401.

105. *Id.* at 404. In 1987, there were 5.3 million black children aged 5-14; they represented 16 percent of the nation's children in this age group. Black children are much more likely to live in a single-parent household, often with an adolescent mother, and they are somewhat more likely to have parents who have not completed high school. *Id.* See generally J. KOZOL, *RACHEL AND HER CHILDREN* (1988); D. MOYNIHAN, *supra* note 91; L. SCHORR, *WITHIN OUR REACH* (1988).

106. *COMMON DESTINY*, *supra* note 80, at 405. Note the mortality rates for children aged 1-14, by race, 1985:

CHILDREN	1-4	5-14
MALE		
WHITE	52.4	29.9
BLACK	89.0	41.3
FEMALE		
WHITE	39.7	19.4
BLACK	70.3	28.1

*Id.*

107. For an analysis of the plight of minority children and the effect upon the American family, see *Perspective*, *supra* note 64, at 222-25.

108. *COMMON DESTINY*, *supra* note 80, at 411.

109. *Id.* at 430.

children came from poor or near-poor families. The HIV epidemic shall continue to produce a dramatic rise in the numbers of poor minority children — often called boarder babies — who are infected and sick. “As elsewhere in the cause of the poor, children, who are the poorest age group in society, point the way.”<sup>110</sup>

Of course, all persons without insurance face serious problems in obtaining ambulatory care comparable to that obtained by those with health coverage. “Data from metropolitan areas [average for 1978-1980] show that about one-third of uninsured blacks and whites under the age of 65 had not seen a physician in the past year, compared with about one-fourth of blacks and whites with private coverage and one-sixth of blacks and whites covered by Medicaid.”<sup>111</sup> Estimates state that, “at least one in four black Americans faces a potential barrier in access to ambulatory and hospital care.”<sup>112</sup> As black and Hispanic minorities become the most affected HIV populations, there are definite parameters that surround the issue of health care. Some health care issues are certainly the result of ongoing discriminatory patterns, but some are simply the result of decreasing governmental spending, a condition that affects minorities first and hardest.<sup>113</sup> These parameters include:

- (1) CHILDREN: “Between 1978 and 1986 federal appropriations for maternal and child health services declined [in 1978 dollars] by 43 percent, for Community Health Centers by 11 percent, and for migrant health centers by 33 percent.”<sup>114</sup>
- (2) MEDICAID: Medicaid eligibility has been restricted and payments to physicians have been reduced along with other reforms of Medicaid designed to reduce expenditures. As a result of these changes, more than one-third of physicians in obstetrics, pe-

110. *Expanding Medicaid*, *supra* note 11.

111. Trevino & Moss, *Health Insurance Coverage And Physician Visits Among Hispanic and non-Hispanic People*, in HEALTH UNITED STATES & PREVENTION PROFILE, U.S. Dep't of Health at 89 (1983).

112. Davis & Lillie-Blantaon, *Health Care for Black Americans: Trends in Financing and Delivery* (1987). Paper presented for the Committee on the Status of Black Americans, National Research Council, Washington, D.C.; Davis, Lillie-Blantaon & Lyons, *Health Care for Black Americans: The Public Sector Role*, Currents of Health Policy: Impacts on Black Americans, Part 1. 65 MILBANK QUARTERLY (SUPP.) 213-47 (1987); Farley, *Who Are the Underinsured?* 63 MILBANK MEMORIAL FUND QUARTERLY: HEALTH AND SOCIETY 476-503 (Summer 1985).

113. Senator Edward M. Kennedy addresses most of these funding points in a 10-point action plan announced July 25, 1989. See also Low Income Treatment Assistance Program (LITAP), S. 1792, 101st Cong., 1st Sess. (1989). LITAP was passed out of the Senate Labor & Human Resources Committee on November 13, 1989. The bill was folded into The Comprehensive AIDS Resources Emergency Act of 1990, introduced by Senator Kennedy on March 6, 1990.

114. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONG., CHILDREN'S ACCESS TO HEALTH CARE, HEALTHY CHILDREN: INVESTING IN THE FUTURE, 52-70 (1988).

diatrics, and other specialties refuse to participate. Low fees are the chief reason for nonparticipation, but payment delays and paperwork are also cited.<sup>115</sup>

(3) HEALTH CARE: Blacks are twice as likely as whites to be without a regular source of medical care or to have no regular source of care other than an emergency room. Because health care in the United States varies by state and is so complex, with many specialties and subspecialties, this lack of a constant primary provider will have definite health consequences for blacks.

(4) COSTS: "The AIDS epidemic can be devastating to people who face large medical bills without adequate insurance. . . . The financial costs for the care of persons with AIDS are enormous, ranging from \$23,000 to \$168,000 per patient over a lifetime."<sup>116</sup>

(5) TREATMENT: "The cost of treatment with azedothymine (AZT), an antiviral agent, can range from \$10,000 to \$20,000 a year per patient."<sup>117</sup> Use of AZT is recommended long before symptoms appear, thus extending the cost of treatment,<sup>118</sup> and presenting the dilemma of making the drug available to those who can pay for it and assuring an earlier death for those who cannot.

Discrimination is easier to identify and project for blacks and Hispanics than for homosexuals. This is true in part because there are very few statutes or city ordinances protecting the rights of gay men and lesbian women from discrimination in housing, employment, health care and family structures. No courts are willing to offer heightened scrutiny to homosexuals; no courts are willing to extend privacy protection when there are no traditional due process grounds. The fact then remains that discrimination is practiced — overtly and subtly — against both groups, and because of this discrimination it is particularly scandalous for society to allow a disease such as HIV to target and decimate these persons. It is comparable to genocide. The President's Commission on the Human Immunodeficiency Virus sought to address this discrimination in its June 24, 1988 report.

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115. COMMON DESTINY, *supra* note 80, at 430.

116. Bloom & Carliner, *The Economic Impact of AIDS in the United States*, 239 SCIENCE 604-09 (1988); *See also Perspective*, *supra* note 64, at 222-244.

117. COMMON DESTINY, *supra* note 80, at 421.

118. Chatis, Miller, Schrager & Crumpacker, *Successful Treatment With Foscarnet of an Acyclovir-Resistant Mucocutaneous Infection With Herpes Simplex Virus in a Patient With Acquired Immunodeficiency Syndrome*, 320 NEW ENG. J. MED. 297 (1989); Rhame & Maki, *The Case for Wider Use of Testing for HIV Infection*, 320 NEW ENG. J. MED. 1248 (1989); Specter, *AZT Found to Delay Onset of AIDS; Treatment Urged for Up to 650,000*, Wash. Post, Aug. 18, 1989, at A1, col. 3. *But see* Chase, *AIDS Patients Develop Viruses Resistant to AZT*, Wall Street J., Mar. 14, 1989, Section 2, at 1, col. 3 (similar to what happens in cancer cases).

## III. CONTINUATION OF DISCRIMINATION

The President's Commission on HIV is the nation's report card of response to the epidemic. In more than forty hearings, the Commission listened to witnesses detail the complexities of the disease and then Commission members made recommendations in the areas of education, public health, legislation, and discrimination. This report is not the only one concerning HIV,<sup>119</sup> but it is seminal and remains, like the 1968 Kerner Commission and the 1989 *A Common Destiny*, the milestone to which society shall look in the future. This truth is demonstrated in the recommendations that were made by the Commission, recommendations that remain the focal point of legislative and humanitarian efforts. A review of these recommendations is important for a number of reasons. First, a review offers a critique of what has been done. Second, a review delineates what needs to be done. Finally, a review offers a second look at the continuation of discrimination that makes HIV distinctive.

The Presidential Commission reported that at virtually every hearing, witnesses attested to the occurrence of discrimination and its serious repercussions for both the individual who experiences it and for this nation's efforts to control the epidemic. "Many witnesses have indicated that addressing discrimination is the first critical step in the nation's response to the epidemic."<sup>120</sup> But discrimination is not being addressed,<sup>121</sup> resulting in increasing number of cases of HIV discrimination: The New York City Commission on Human Rights HIV-related discrimination cases have risen from 3 in 1983, to more than 300 in 1986, and almost 600 in 1987.<sup>122</sup> To address the problem, "leaders at all levels — national, state, and local —

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119. See generally U.S. DEP'T OF HEALTH & HUMAN SERV., PUB. HEALTH SER., NAT'L INSTITUTES OF HEALTH, 1 AIDS BIBLIOGRAPHY (Apr. - June 1988) (E. Abrams ed.) (continuing bibliography of the materials received by the National Library of Medicine related to AIDS); U.S. DEP'T OF HEALTH & HUMAN SERV., PUB. HEALTH SER., CENTERS FOR DISEASE CONTROL, AIDS RECOMMENDATIONS AND GUIDELINES: NOV. 1982 - DEC. 1987, (compilation of all AIDS-related regulations and recommendations made by the Public Health Service); Connor & Joyce, *Medical Panel Condemns American Response*, 118 NEW SCIENTIST 41 (1988) (report of the National Academy of Science faults the government for its lack of a coordinated approach to the medical and social aspects of the disease); Sis, *Issues Related to Care of AIDS Patients Addressed by Task Force Report*, 103 PUB. HEALTH REP. 326-27 (1988) (report of the Intergovernmental Task Force on AIDS); Weiss & Thier, *The Institute of Medicine, National Academy of Sciences: Formulating AIDS Policy*, 103 PUB. HEALTH REP. 289-92 (1988).

120. PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 119.

121. See generally Ezzell, *Academy and Presidential Panel Issue AIDS Report*, 333 NATURE 485 (1988) (comments on the critical nature of the Commission's report); *White House Earns Black Marks for AIDS Policy*, *supra* note 28. ("Presidential Commission on AIDS has issued a report that is critical of the administration's response to the AIDS epidemic").

122. PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 120.

should speak out against ignorance and injustice, and make clear to the American people that discrimination against persons with HIV infection will not be tolerated."<sup>123</sup> Particular attention should be given to the following:

**EMPLOYMENT:** The President should issue an executive order banning discrimination based on HIV infection or ARC, thus including HIV status within the ambit of handicap protection. The Justice Department and Congress should complement the order with strict legislation and enforcement,<sup>124</sup> applying to both the private and public sectors. State, local and community response should be swift and emphatic.<sup>125</sup>

**EDUCATION:** Schools should have a policy<sup>126</sup> in effect before a

123. *Id.* Obstacles to progress identified by the Commission are: (1) there is a lack of clear statement saying that discrimination would not be tolerated; (2) there is a lack of comprehensive legislation at the national level prohibiting discrimination; (3) there is a lack of leadership from public and private institutions; (4) the patchwork of federal, state, and local laws is confusing and, ultimately, ineffective; (5) enforcement of existing laws is slow and ineffective; and (6) education of the public is ineffective. *Id.*

124. To date, HIV-positive persons have been included within the protection of federal handicap legislation through *School Board of Nassau County v. Arline*, 480 U.S. 271 (1987). See also *Perspective*, *supra* note 64, at 225-27; *Legal Authorities on Effects of Arline*, 124 Lab. Rel. Rep. (BNA) 163 (1987); Memorandum for Arthur B. Culvahouse, Jr., Counsel for the President, from Douglas W. Kmiec, the Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, Sept. 27, 1988 (discussing application of section 504 of the Rehabilitation Act to HIV-infected persons); Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 9, 102 Stat. 28, 31-32 (1988) (protection is afforded to those persons who, even though contagious, do not pose a direct threat and can still perform the duties of the job); Health Omnibus Programs Extension Act of 1988, Pub. L. No. 100-607, 102 Stat. 3048 (1988) (provides funding for education, block grants for states, testing and counseling, and established a commission which will make recommendations on federal policy). *But see* 3 AIDS POL'Y & L. 1 (Aug. 10, 1988) (federal administration expressly rejected extending handicap protection to the private sector). The Fair Housing Amendments Act of 1988 is the first federal statute that extends nondiscrimination protection for people with disabilities to the private sector, thus prohibiting private landlords and owners from discriminating against persons with HIV. See also Americans With Disabilities Act (ADA), S. 933, 101st Cong., 1st Sess. (1989) (extending protection to employment, accommodations, restaurants, and stores, regardless if private or public). Gostin, *supra* note 29, at 1628. Statute goes further than Sec. 504 of the Rehabilitation Act.

125. See AMERICAN BAR ASSOCIATION, AIDS: THE LEGAL ISSUES (1988). Forty-two states and the District of Columbia have passed laws that prohibit private employers from discriminating against a person based on a handicap. An additional five states have laws prohibiting handicap discrimination by public employers. Thirty-three states and the District of Columbia have indicated that they either will accept HIV-related discrimination complaints or have already declared that their statutes prohibit such discrimination. In addition, some states and municipalities have laws specifically prohibiting employment discrimination against people with HIV. *Id.* at 164-65. The number of states with such provisions is expanding. See Gostin, *supra* note 29, at 1622-23, 1628.

126. See, e.g., U.S. DEPT OF EDUCATION, AIDS AND THE EDUCATION OF OUR CHILDREN: A GUIDE FOR PARENTS AND TEACHERS (1988). For judicial integration, see, e.g., *Ray v. School Dist. of Desoto County*, 666 F. Supp. 1524 (M.D. Fla. 1987); *Thomas v. Atascadero*

student with HIV is identified. The student then should be "dealt with on an individual basis, based on medical facts."<sup>127</sup> Importance is attached to consultation with the community, with experts, using appropriate educational materials, maintaining confidentiality, with the goal of minimizing fear and discrimination.<sup>128</sup>

**HEALTH CARE:** Hospital personnel should be educated, discriminatory treatment punished, and plans made for the future of the epidemic. Efforts should begin to "mobiliz[e] political, community, and religious leaders for support; bring[] in legal and public health experts; meet[] with people who have concerns and listen[] to their concerns."<sup>129</sup>

**PRIVACY:** "Aside from the illness itself, it is discrimination that is most feared by the HIV-infected."<sup>130</sup> To protect against dis-

Unified School Dist., 662 F. Supp. 376 (C.D. Cal. 1987); Board of Education of Plainfield v. Cooperman, 105 N.J. 587, 523 A.2d 655 (1987); The National PTA, Position Statement: Comprehensive School Health Education (1984) (rev. 1987), reprinted in AIDS COORDINATING COMMITTEE DRAFT PAPER at 67-68; *School Attendance of Children and Adolescents with Human T-Lymphotropic Virus III/Lymphadenopathy-Associated Virus Infection*, 77 PEDIATRICS 430 (1986).

127. PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 125. Possibility of transmission depends upon medical judgement and, unless and until a real and valid threat can be established, students shall be admitted to school. See *Martinez v. School Board of Hillsborough County, Florida*, 861 F.2d 1502 (11th Cir. 1988); *Ray v. School Dist. of Desoto County*, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987).

128. Increasing numbers of HIV-positive children will accentuate the dilemma of the state's duty to educate and the state's duty to safeguard health and safety. Public education is not a right. See generally *Plyler v. Doe*, 457 U.S. 202 (1982). But education is an important duty and lower courts have consistently prohibited exclusion of children with handicaps from public schools. See e.g., *Timothy W. v. Rochester, New Hampshire, School District*, 875 F.2d 954, 972-73 (1st Cir.) *cert. denied*, 110 S. Ct. 519 (1989) (court of appeals held that Education For All Handicapped Children Act entitled all handicapped children, regardless of the severity of their handicapping condition, to a public education); *Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); 20 U.S.C. §§ 1400 *et seq.* (mandating that children should be assured education and this mandate does not mean they should be separated from other non-handicapped children).

129. PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 126. Response to these recommendations has varied. See, e.g., Judson & Vernon, *The Impact of AIDS on State and Local Health Departments: Issues and a Few Answers*, 78 AM. J. PUB. HEALTH 387-93 (1988) (impact of the disease is varied geographically and so is the response); Richland, *Role of State Health Agencies in Responding to AIDS*, 103 PUB. HEALTH REP. 267-72 (1988) (political issues sometimes weigh more heavily than health issues in making decisions about AIDS); Kawata & Andriote, *NAN: A National Voice for Community-Based Services to Persons With AIDS*, 103 PUB. HEALTH REP. 299-304 (1988) (community-based response can best care for persons with AIDS).

130. PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 126. See generally INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, *CONFRONTING AIDS: DIRECTIONS FOR PUBLIC HEALTH CARE AND RESEARCH* (1986 and 1988 update). See also American Medical

crimination, the President's Commission seeks to ensure confidentiality through federal legislation,<sup>131</sup> that will include prisoners,<sup>132</sup> the insured, and both the public and private sectors.<sup>133</sup>

These items within the Commission's report — and these are in no ways to be substituted for the totality of the report — represent the essence of a program of response to the HIV epidemic. Legislation that has developed to date, especially the federal Health Omnibus Programs Extension Act of 1988 which directs \$1.2 billion towards AIDS treatment, services, and research, find their beginnings in the Commission's recommendations.

The Presidential Commission was outspoken in its critique of federal policy during the early years of the epidemic.<sup>134</sup> Partially as a result of the

Association Board of Trustees, *Prevention and Control of Acquired Immunodeficiency Syndrome: An Interim Report*, 258 J. A.M.A. 2097-103 (1987); AMERICAN BAR ASSOCIATION AIDS COORDINATING COMMITTEE, AIDS: THE LEGAL ISSUES (1988).

131. Legislation would mandate that identifying information obtained by any provider, laboratory, payor, or agency through HIV testing and counseling cannot be disclosed without the written consent of the individual unless: (1) to the health care team; (2) to health care workers accidentally exposed to blood; (3) for statistical purposes as long as the identity of the person is protected; (4) to the state health care agency if required by state or federal law or regulation for epidemiologic or partner notification purposes; (5) for a blood or organ donation; (6) to a spouse or sexual partner when the HIV-positive persons will not warn; (7) to the victim of a sexual assault; or (8) by court order. Violation is a misdemeanor, punishable by a fine up to \$10,000. PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 127.

132. HIV-infection presents unique problems in prisons. Issues such as mandatory testing, prevention, housing, and treatment of prisoners vary with localities and incidence. As of November 1988, fourteen states and the Federal Bureau of Prisons had mass-screening programs for new or current inmates or releasees. Numerous state prison systems segregate all prisoners with AIDS (20 states) or AIDS-related complex (8 states) or who are seropositive for HIV infection (6 states). HAMMET, UPDATE 1988: AIDS IN THE CORRECTIONAL FACILITIES, (2d ed. 1989). See generally *Perspective*, *supra* note 64, at 232 n.105. In a case of first impression, the United States Court of Appeals for the Tenth Circuit, declared that there is no fourth amendment impediment to a state prison's policy of blood-testing all inmates for AIDS since this is a "special need" and a person "has only a limited privacy interest in not having his blood tested." *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 871 (1990). See also *Treasury Employees v. Von Raab*, 109 S. Ct. 1384 (1989); *Skinner v. Railway Labor Executives' Association*, 109 S. Ct. 1402 (1989).

133. To date, there is still no federal legislation banning discrimination, causing one author to write:

Anti-discrimination is so politically divisive that it was removed from the federal AIDS Policy Act. Discrimination based on an immutable condition like an infection should be so repugnant in our society that it is unconscionable to leave it to the vagaries of state laws; states where people with HIV infection need the greatest protection may afford the least. It is a vital function of law to protect people from the loss of a home, jobs, treatment, education, or other benefits simply because the person harbors a virus. Discrimination against people with HIV infection has reached a level that requires protective federal legislation that reaches into the private as well as the public sector.

Gostin, *supra* note 29, at 1628.

134. See generally Ezzell, *AIDS Commission Report Confounds Critics*, 332 NATURE 3

Commission's recommendations, federal, state and local governments are targeting drug abuse, educating health providers, accelerating drug treatment programs, and seeking to recruit persons to serve in hospitals and alternative care programs. President Reagan called on "society to respond equitably and compassionately to those with HIV infection and to their families."<sup>135</sup> But the Commission's Report and subsequent legislation are too polite, too general, too circumspect when it comes to concluding and announcing that HIV has a voracious appetite for *minorities* — gay men and lesbian women, black and Hispanic persons, poor women and children — and that it is particularly scandalous that these persons are the ones that are dying. All of the reports are too polite in concluding that the distinctive element about HIV is that it is infecting and killing persons already burdened with past discrimination. This particular burden needs to be stated, to be held up to strict scrutiny, to be analyzed, to be addressed. Statements need to come from black and Hispanic persons as well. Otherwise, the present confusion surrounding the persons affected by the disease remains, inviting vacuity, muting mobilization.<sup>136</sup>

#### CONCLUSION

Societal attitudes need to be confronted: they always have and they always will. The statistics, cases, statutes, and projections within this Article testify to this fact. Discrimination surrounding housing, education, privacy and health is just as invidious when it is directed towards sexual minorities as it is when it is directed towards racial minorities. This proposition is not often stated, but when treatment differs on irrational grounds, it matters little if the resulting discrimination occurs because you cannot change the color of your skin or you cannot change your sexual preference. If it is true that sexual orientation occurs independently of choice, any discussion of orientation will eventually lead to a discussion of activity, and this progression

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(1988) (comments on the 180 specific recommendations in the areas of drug abuse, patient care, and AIDS research); Booth, *AIDS Policy in the Making*, 239 *SCIENCE* 1087 (1988); Dagoni, *War Against AIDS: Reports Urge Federal Policy Changes*, 66 *CHEMICAL & ENGINEERING NEWS* 4 (1988); Edwards & Beil, *Pessimistic Outlook on AIDS Report*, 133 *SCIENCE NEWS* 372 (1988) (suggests the system has failed in controlling the disease).

135. Implementing Recommendations of the Presidential Commission on the Human Immunodeficiency Virus Epidemic, Office of the Press Secretary, White House, Aug. 2, 1988.

136. See, e.g., AMERICAN BAR ASSOCIATION, *AIDS COORDINATING COMMITTEE, DRAFT REPORT* (1989). While the report is a thoughtful commentary on the current posture of legal issues surrounding AIDS, phrases such as: "is consistent with ethical obligations," *id.* at 3; "reporting should be anonymous," *id.* at 12; and "urges states," *id.* at 29, lack the strength that is available to the nation's largest association of attorneys.



may lead to consistency in the treatment of sexual activity by a secular society prone to accept the right of an individual to sexual personhood.

Insofar as religious denominations derive opinions from creedal formulas and revelation, a rational basis is present to differentiate; and a right of free expression inures to participate in the legislative debate to follow. Nonetheless, everyone has the obligation to object to treatment which would subject persons to treatment having no basis in fact: "With respect to the fundamental rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, color, social condition, language, or religion is to be overcome and eradicated."<sup>137</sup>

The most recent court decisions concerning homosexual activity *or* orientation, such as *Watkins* and *Ben-Shalom*, do not evidence a change in attitude towards due process or equal protection guarantees based on sexual preference. Also, the statutes that bar discrimination based upon HIV are almost always silent when it comes to sexual preference. Such treatment seems particularly irrational in a society that condones through media expression and privacy protection sexual freedom for a majority of the population. Nonetheless, any change that comes will likely be as a result of legislative pronouncements concerning the definition of the family to include persons of the same sex, Congressional action or Executive orders to allow participation by homosexuals in the military, and increasing numbers of localities willing to extend housing, employment and insurance coverage to persons regardless of sexual preference.

Court application of strict scrutiny, legislative enactments, presidential orders and even constitutional amendments have not eliminated discrimination experienced by racial minorities within the United States. The fastest growing minority population — Hispanics — faces many of the same obstacles to housing, insurance, employment and education as other racial groups. The common element is discrimination. This is not likely to change. In the course of this Article many statistics testify to the on-going discrimination in the nation. It is easy to become disillusioned when the attempts at reform are compared to the evidence of success. It is then that the only real solution to discrimination reveals itself: each individual does something about it.

Today, as the numbers of persons with AIDS changes in size as well as color — from white gay males to black or Hispanic poor women, children, and men — the temptation is to spend money, legislate entitlement, or lament over the lack of both. Admittedly, money is needed to respond to the epidemic and a federal recognition of the gravity of the health care system and the reach of the disease is long overdue. But in the process of respond-

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137. ABBOTT, THE DOCUMENTS OF VATICAN II 227-28 (1966).

ing to HIV, a pointed difference can be identified between this epidemic and others: the consistent past discrimination applied to homosexuals, blacks and now Hispanics. AIDS is an intolerable addition. Herculean efforts are justified by the medical and legal communities to address it before it becomes the straw that breaks the camel's back.

