

Global Ostracism of HIV-Positive Aliens: International Restrictions Barring HIV-Positive Aliens

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**GLOBAL OSTRACISM OF HIV-POSITIVE ALIENS:
INTERNATIONAL RESTRICTIONS BARRING HIV-POSITIVE
ALIENS**

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For the sake of our common survival, we must act with courage and urgency. With every passing day, HIV claims thousands of lives. The only possible answer to the new AIDS challenge lies in global solidarity.¹

I. INTRODUCTION

With the spread of the Acquired Immune Deficiency Syndrome (AIDS) during the past decade, countries all over the world have set up barriers against those with AIDS to "protect" their citizens from the spread of the disease, despite the constant admonitions of the World Health Organization (WHO). Some have imposed restrictions on all aliens that have tested positive for HIV while other nations have imposed testing requirements as conditions for entry, denying entry to those who test positive for the virus.² While the World Health Organization stresses the importance of cooperation in fighting the pandemic,³ these countries, including the United States, continue to exclude immigrants and aliens who are infected with HIV. Many countries, however, have heeded the World Health Organization.⁴ Some have altered their restrictive travel and immigration laws to allow the entry of HIV-positive aliens.⁵ Several countries require HIV testing, not as a condition for exclusion, but to alert domestic health care facilities or other caregivers within the country.⁶ Still others explicitly admit HIV-positive aliens within their borders, following the World Health Organiza-

1. WORLD HEALTH ORGANIZATION, 11 WHO AIDS SERIES, THE GLOBAL AIDS STRATEGY 23 (1992).

2. See discussion *infra* part III.B (regarding Chinese and Vietnamese policies).

3. See Lawrence Gostin, *Introduction* to INTERNATIONAL LAW AND AIDS INTERNATIONAL RESPONSE, CURRENT ISSUES, AND FUTURE DIRECTIONS xi, xv (Lawrence Gostin & Lane Porter eds., American Bar Association, 1992). [Hereinafter INTERNATIONAL LAW AND AIDS].

4. See discussion *infra* part III.A.

5. See discussion *infra* part III.A.1 (regarding Costa Rica, South Africa and Thailand).

6. See discussion *infra* part III.A.2 (regarding Korea, Bulgaria, Czechoslovakia, and Sweden).

tion's spirit of global solidarity.⁷

Despite internal opposition from the American public⁸ and external opposition from the World Health Organization,⁹ the United States has continued to maintain restrictive policies towards HIV-positive aliens. These restrictions, although ratified by Congress,¹⁰ have been opposed by the President¹¹ and modified, in emergency situations, by the courts of the United States.¹²

This paper samples international regulations regarding the treatment of aliens with AIDS and compares United States and international policies with the ideals of the World Health Organization. A few countries have managed to forestall the spread of AIDS by HIV-positive aliens simply through educational campaigns aimed at both the HIV-positive aliens and their own citizens.¹³ Countries with regulations which bar the entry of HIV-positive aliens are urged by the World Health Organization to implement alternative, non-discriminatory measures to combat the spread of this devastating pandemic. The World Health Organization believes that global cooperation and a showing of good faith towards other countries will reduce the spread of the AIDS pandemic more effectively than laws barring HIV-positive aliens.¹⁴

II. AIDS AND HIV

According to the World Health Organization, "[e]very day, about 5000 more people become infected — one new infection every 18 seconds."¹⁵ The World Health Organization believes that almost thirteen million people have been infected with HIV since the beginning of the pandemic in the mid-1980's.¹⁶ Although national policies may differ in approaches toward the treatment of the disease, all seem to agree that AIDS, the last stage of infection with the HIV virus, is a problem of global proportions requiring immediate attention.

The Human Immunodeficiency Virus (HIV), can be spread through the contact and transmission of semen, vaginal fluids, breast

7. See discussion *infra* part III.A.3 (regarding France and the United Kingdom).

8. See, e.g., discussion *infra* part V.

9. See discussion *infra* part VII.

10. See discussion *infra* part IV.

11. See discussion *infra* part V.A.

12. See discussion *infra* part VI.C.

13. See discussion *infra* part VII.E.

14. *Id.*

15. *World AIDS Day*, 14 WORLD HEALTH FORUM 205 (1993).

16. *Id.*

milk, and blood.¹⁷ Common casual contact, such as shaking hands, sharing eating utensils, or closed mouth kissing does not transmit the virus.¹⁸ Once entering the body, HIV attacks and destroys CD4 cells, which regulate the immune system.¹⁹ The HIV then usurps the DNA of the CD4 cell and directs it to reproduce more HIVs.²⁰ During the primary stage of HIV infection, which lasts up to six weeks, tests for HIV antibodies will be negative.²¹ After six to twelve weeks, the body's immune system will have detected large enough numbers of the HIVs to begin to produce antibodies, which will then become detectable by common medical testing procedures. At this point, tests of blood serum for HIV antibodies will convert from negative results to positive results, through a process known as seroconversion.²²

During the next five to eight years in a stage known as the "asymptomatic period," symptoms of AIDS itself do not become apparent because of the slow rate of destruction of CD4 cells.²³ Symptoms do not begin to manifest until the CD4 count is below 300 per milliliter of blood.²⁴ AIDS develops about five years after the CD4 declines to 300.²⁵ Chronic infections, weight loss and diarrhea are among the symptoms which occur before a diagnosis of AIDS.²⁶

AIDS itself is the last stage of the HIV infection, during which the immune system has become so depleted of CD4 cells that it is unable to fight off even otherwise harmless infections.²⁷ Capitalizing on the body's vulnerability, infections such as pneumonia,²⁸ tuberculosis,²⁹ and herpes simplex³⁰ proceed to devastate the weakened immune system.

The World Health Organization estimates that almost forty million people worldwide will be "devastated" by HIV by the year 2000.³¹ WHO suggests that discrimination against people with HIV often re-

17. JOHN G. BARTLETT, M.D. & ANN K. FINKBEINER, *THE GUIDE TO LIVING WITH HIV INFECTION* 31 (1993).

18. *Id.* at 37.

19. *Id.* at 58.

20. *Id.*

21. *Id.*

22. *Id.* at 59.

23. *Id.* at 60.

24. *Id.* at 61. The average uninfected person has a CD4 count of 1000/milliliter. *Id.*

25. *Id.* at 61.

26. *Id.* at 67.

27. *Id.* at 69.

28. *Id.* at 70.

29. *Id.* at 72.

30. *Id.* at 76.

31. WORLD HEALTH ORGANIZATION, *11 THE GLOBAL AIDS STRATEGY* 3 (1992).

sults from a mistaken belief that HIV can be transmitted through casual social contact.³² This belief has led to laws restricting HIV-positive individuals in all aspects of society, including travel and tourism. The desire of HIV-positive individuals to travel is compromised by discriminatory policies restricting the freedom of international movement. Although countries around the world recognize the importance of preventing the spread of the disease, some countries use prevention as an excuse to discriminate against infected individuals.

III. INTERNATIONAL PERSPECTIVES ON ALIENS WITH AIDS

A. Countries Allowing Free Access to HIV-positive Aliens

Several countries have subscribed to the World Health Organization's policy against AIDS-related discrimination³³ and have allowed HIV-positive aliens within their borders. These countries have developed three main methods of dealing with the presence of HIV-infected individuals. Some countries have repealed their policies against HIV-positive aliens in favor of more lenient laws.³⁴ Others have maintained a HIV testing requirement, but have rejected the idea that all aliens who test positive must be excluded.³⁵ These countries instead require testing in order to alert health care organizations and other caregivers of the necessity of providing care for HIV-positive aliens. Finally, other countries have taken measures specifically to ensure that an alien's HIV infection is not used as a criteria for admission.³⁶

1. Countries That Reconsidered Their Policies

COSTA RICA

Costa Rica is an example of a country that has recently liberalized its policies regarding the treatment of aliens infected with HIV. In 1988, the Minister of Health and the Minister of the Interior and Police issued a decree mandating HIV testing as an "indispensable requirement of residence" in Costa Rica.³⁷ Not only were aliens requesting permanent or temporary residence subject to testing upon their arrival, but "alien residents requesting permission to re-enter Costa

32. *Id.*

33. See discussion *infra* part III.A.

34. See discussion *infra* part III.A.1.

35. See discussion *infra* part III.A.2.

36. See discussion *infra* part III.A.3.

37. 40 INTERNATIONAL DIGEST OF HEALTH LEGISLATION 380 (1989) [hereinafter IDHL].

Rica" and aliens requesting renewal of residence permits after a full year of residence were also subject to testing.³⁸ If an alien tested positive, the infected individual would either be excluded or deported, unless the Minister of the Interior and Police granted an exemption "in the light of special circumstances."³⁹ This "waiver" provision foreshadowed the easing of this decree in the following year.

In 1989, a new decree was made which repealed the 1988 law.⁴⁰ The 1989 decree imposed testing only for aliens requesting permanent or temporary residence "as an indispensable requirement for the issue of a residence permit."⁴¹ Detection of HIV antibodies resulted in exclusion.⁴² The other "indispensable" requirements of testing for returning aliens or aliens who had already resided in Costa Rica for a year had been dispensed with in the 1989 decree.

Finally, a 1991 decree completely repealed all previous restrictions on the entry and residence of HIV-positive aliens.⁴³ In the space of four short years, the rules restricting HIV-positive aliens had been enacted, revised with language indicating a more sympathetic attitude towards the disease, and then repealed all restrictions on the entry of HIV-positive aliens.⁴⁴

SOUTH AFRICA

Like Costa Rica, South Africa has recently reconsidered its immigration policies with respect to AIDS. In 1987, a South African Government Notice identified AIDS and HIV infection as "diseases the affliction with which will render a person a prohibited person,"⁴⁵ thereby prohibiting HIV-positive aliens from entering the country. However, in 1991, a substitution for the 1987 Government Notice also identified "[d]iseases which render a person afflicted therewith a prohibited person."⁴⁶ In the new law, although cholera,⁴⁷ pestilence⁴⁸ and

38. *Id.*

39. 40 IDHL 381 (1989).

40. 41 IDHL 39 (1990).

41. *Id.*

42. *Id.*

43. 42 IDHL 242 (1991).

44. *Id.* This section of the Costa Rican law refers to "persons suffering from AIDS" instead of using the impersonal language ("a-positive result in the examination for antibodies to HIV") employed in the regulation from the previous years. 40 IDHL 380 (1989); 41 IDHL 39 (1990).

45. 40 IDHL 59 (1989).

46. 43 IDHL 39 (1992).

47. *Id.* See also 40 IDHL 59 (1989).

48. *Id.*

yellow fever⁴⁹ remained on the list, AIDS and HIV were deleted. Within four years, the opinion of the South African Government regarding AIDS had changed so substantially that HIV-positive aliens are now permitted to enter the country without governmental stigmatization or restriction.

THAILAND

Thailand also had restrictive regulations regarding aliens with AIDS. In 1985, the Ministry of Public Health of Thailand announced that all aliens, regardless of intention to reside or travel in Thailand, "may not enter the Kingdom" if they had AIDS.⁵⁰ Furthermore, "no alien [was] authorized to take up residence in the Kingdom if . . . the alien [was] 'unable to earn his living because of mental defect or physical infirmity or having any diseases as prescribed by Ministerial regulations.'"⁵¹ These regulations explicitly listed AIDS as a disease disqualifying aliens for entry into Thailand.

However, in 1992, these strict regulations were repealed.⁵² The new Immigration Act excluded aliens with leprosy, infectious tuberculosis, drug dependence and syphilis among others, but did not include HIV infection or AIDS.⁵³ In a direct reference to the previous rule that excluded aliens if "unable to earn [a] living because of . . . having any diseases as prescribed by Ministerial regulations,"⁵⁴ the new rule restricted such diseases to those mentioned specifically, thereby lifting the exclusion on aliens with AIDS.

2. Countries Which Require HIV Testing for Reasons Other Than Exclusion

KOREA

In 1988, the President of Korea issued a decree regarding the prevention of AIDS.⁵⁵ This decree listed among those with a high-risk of HIV infection "crew members of vessels undertaking international voyages" and "any alien entering the country for a stay of long dura-

49. *Id.*

50. MINISTERIAL REGULATION NO. 11 (1986) ISSUED UNDER THE IMMIGRATION ACT, (1979), *reprinted in* LEGISLATIVE RESPONSES TO AIDS, at 192 (World Health Organization ed. 1989).

51. *Id.*

52. 43 IDHL 517 (1992).

53. *Id.*

54. *Id.*

55. 42 IDHL 438 (1991).

tion."⁵⁶ Those in high-risk groups were required to either produce a "certificate of seronegativity" upon entry into Korea or undergo testing for HIV.⁵⁷

Interestingly, once testing is completed, HIV-positive aliens are not explicitly denied entry into Korea. Instead, the "name, age, sex, place of residence, and other information" about the infected alien is to be given to the Chief of Quarantine with a view towards quarantine and treatment.⁵⁸ Quarantine may be waived if the infected person is unlikely to infect others.⁵⁹ Testing, therefore, is required of aliens seeking to reside in Korea for longer than three months, but an HIV positive result will not necessarily result in either quarantine or deportation. Instead, testing is required to facilitate medical treatment.

BULGARIA

Bulgaria requires compulsory HIV testing of "aliens and stateless persons" residing within the country.⁶⁰ Those suffering from AIDS are also "liable to undergo compulsory treatment" involving mandatory hospitalization in the event of a doctor's order.⁶¹ Furthermore, aliens failing to undergo these "compulsory" tests may be fined or "compelled to attend, with the assistance of the police, acting on the basis of an order of the physician in charge of the hospital establishment."⁶² However strict the fines or disciplinary measures might be for failing to undergo compulsory testing, the decree does not require deportation or exclusion of aliens with AIDS or HIV. Instead, the decree requires "treatment involving hospitalization."⁶³

CZECHOSLOVAKIA

A 1988 Czechoslovakian directive mandated that blood or organ donors be tested for HIV prior to any donations.⁶⁴ If the presence of the virus is discovered, the would-be donor is permanently prohibited

56. *Id.* "[L]ong duration" is defined in the Korean law as "a stay of at least 91 days." *Id.*

57. *Id.*

58. *Id.* at 440.

59. *Id.*

60. 41 IDHL 246 (1990). Bulgarian nationals are also "liable to undergo compulsory treatment." *Id.*

61. *Id.* at 246-47.

62. *Id.*

63. *Id.*

64. *Id.* at 48.

from giving blood, organs, tissues, or sperm.⁶⁵ Although this prohibition applies to all residing in Czechoslovakia, the directive makes clear that it also “applies to all aliens and all persons who have . . . returned from long stays in Africa, Western Europe, or the United States of America.”⁶⁶ Furthermore, the directive mandates compulsory HIV screening tests for “persons at special risk,” defined as “foreign students, airline personnel, persons returning from stays of more than six months in Africa, Western Europe, or the United States of America.”⁶⁷ Although foreign nationals are required to undergo testing for HIV, the results of these tests are not used for exclusionary purposes; instead, testing is required to prevent the spread of the disease through blood transfusions, organ and sperm donations, and for the protection of “staff and patients in health care establishments” from HIV infection.⁶⁸

SWEDEN

The Swedish National Board of Health and Welfare’s 1989 General Recommendation on health examinations of foreign adoptive children suggests that such examinations include serological testing for HIV antibodies.⁶⁹ The Board felt HIV testing necessary because “the modes of transmission of HIV, and the impossibility of excluding the risk of infection” warrant such precautionary measures, especially when “the child comes from a country where HIV is ‘widespread.’”⁷⁰ The Recommendation notes that these suggestions “have been issued within the framework of the existing legislation governing refugees and persons applying for asylum,” reasoning that since such testing is advisable for other classes of aliens, it is advisable even in the case of adoptive children.⁷¹ It is interesting to note, however, that the reason given for testing is not to exclude or deport such HIV-positive children, but to allow the adoptive family a chance to “consult an agency authorized to provide support and information.”⁷²

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. 41 IDHL 57 (1990).

70. *Id.*

71. *Id.*

72. *Id.*

3. Countries Explicitly Admitting HIV-positive Aliens

FRANCE

In 1990, in response to the United States enactment of the ban on immigrants and aliens with AIDS,⁷³ the French government boycotted the 1990 San Francisco Conference on AIDS.⁷⁴ French Health Minister Claude Evin felt that "special U.S. visa procedures for victims of the Acquired Immune Deficiency Syndrome [were] an invasion of privacy."⁷⁵ This boycott, unfortunately, came at a time when French researchers believed that they had developed a vaccine which had the potential to retard the spread of the virus.⁷⁶ French law itself does not regard the existence of AIDS in an alien, in the absence of "clinical symptoms," as a ground for exclusion.⁷⁷ According to French law, "[a]s regards testing for anti-HIV antibody, this test, if positive, does not enable one to affirm that the person concerned is in the evolutive phase of infection . . . [T]herefore, manifestation of clinical symptoms is required before testing may take place at all."⁷⁸

France's 1987 law dealt with testing procedures for aliens wishing to reside in France who had manifested clinical symptoms of AIDS. Although classifying AIDS as a potential "[d]isease endangering public health,"⁷⁹ the law noted that "only the presence of clinical symptoms indicative of AIDS or a request on the part of the person concerned may lead to a test for anti-HIV antibody being performed."⁸⁰ The language of the French law declares in no uncertain terms that "the existence of seropositivity, in the absence of clinical symptoms, must not constitute grounds for refusal to grant authorization to reside in France."⁸¹

73. See discussion *infra* part IV.

74. *French Government to Boycott San Francisco AIDS Conference*, The Reuter Library Report, May 10, 1990, available in LEXIS, Nexis Library, NEWS Library.

75. *Id.*

76. *French threat to Boycott California AIDS Meeting*, The Daily Telegraph, Mar. 12, 1990, available in LEXIS, Nexis Library, WORLD Library, ALLWLD File. [Hereinafter ALLWLD]

77. CIRCULAR DGS/1C No. 784 OF 8 DECEMBER 1987 ON THE MEDICAL EXAMINATION OF ALIENS DESIRING TO RESIDE IN FRANCE, reprinted in LEGISLATIVE RESPONSES TO AIDS, at 78 (World Health Organization ed. 1989).

78. *Id.*

79. 39 IDHL 364 (1988).

80. *Id.*

81. *Id.*

UNITED KINGDOM

In 1993, The United Kingdom released an informative "open letter" to foreigners desiring to come into the United Kingdom.⁸² This information noted that "diseases which might jeopardise public health" would justify exclusion, although AIDS was not specifically mentioned.⁸³ Other diseases, such as cholera, yellow fever, smallpox, tuberculosis and syphilis were mentioned, but neither AIDS nor HIV was specifically listed.⁸⁴ Instead, a notice was added to the end of the "open letter," warning readers to "[p]lease note that AIDS is not regarded as an illness which may be invoked to justify refusal of entry" according to this informal amendment to the U.K. Immigration Act of 1971.⁸⁵ However, visitors with AIDS will be expected to pay for all otherwise free medical service, even though testing and counselling will be given freely to visitors in Britain.⁸⁶ Britain, therefore, has shown a humanitarian treatment of HIV-positive aliens by recognizing their need for counselling during the devastating course of the infection. Aliens with AIDS are comforted and welcomed into the United Kingdom.

B. Countries with Restrictions on Aliens with AIDS

While some countries counsel HIV-positive aliens, others prefer to deport them to their countries of origin immediately upon a finding of HIV infection.⁸⁷ Still others take AIDS prevention one step further by conditioning entry upon a definite showing of HIV-negativity.⁸⁸ Many of the countries with restrictive policies barring HIV-positive aliens have rationalized their policies by reference to those of the United States.⁸⁹ In fact, some countries have made headlines in the United States by deporting or refusing to admit HIV-positive American visitors.⁹⁰

82. *Employed Person: Entry Formalities: refused entry: reasons*, Commission of the European Communities INFO-92, Sept. 2, 1993, available in ALLWLD.

83. *Id.*

84. *Id.*

85. *Id.*

86. 39 IDHL 370 (1988).

87. See discussion *infra* part III.B. (regarding China).

88. See discussion *infra* part III.B. (regarding Vietnam, Japan, Philippines, and Indonesia).

89. See discussion *infra* part III.B. (regarding China, Philippines, and Indonesia).

90. See discussion *infra* part III.B. (regarding China and Indonesia).

CHINA

In 1987, China's regulations regarding AIDS made international headlines when an American tourist stricken with AIDS had to be flown out of China by a U.S. Air Force hospital plane because other commercial airlines had refused to take the tourist aboard.⁹¹ China offered to fly tourist Brent Anderson to Shanghai on its own state airline.⁹² This offer, however, was withdrawn because of the belief that the tourist was contagious.⁹³ After Northwest Orient Airlines, an American airline, refused to fly Anderson out of China, it was disclosed that China's airline "had given two conditions for flying Anderson from Kunming to Shanghai — that he charter a whole plane, or failing that, book six rows on a scheduled flight in which a special medical unit with nurses would be set up. Cups and other necessities would be destroyed after the flight and a toilet would be reserved exclusively for the patient."⁹⁴ It was not fully understood by the medical community at that time that AIDS could not be transmitted in the air or through simple contact with skin, but only through bodily fluids, such as blood, sexual fluids, or breast milk.

The Chinese government said that Anderson had violated Chinese travel restrictions by entering China while knowingly carrying the AIDS virus.⁹⁵ Although it seemed that China had been very cooperative in caring for him, Anderson's family, not the Chinese government, shouldered the costs of the "evacuation."⁹⁶ The United States State Department made sure, however, that the American people knew that the Air Force flight "would be paid with private funds and not at U.S. taxpayers' expense."⁹⁷ In covering this story, the media noted that, earlier in the year, China had deported an Irish tourist who had AIDS.⁹⁸

During the Anderson incident, China requested that Japan Air Lines fly Anderson out of China, but the airline also refused.⁹⁹ Japan

91. *U.S. Air Force Plane Flies American AIDS Victim Out of China*, Reuters Ltd., July 15, 1987, available in ALLWLD.

92. *Id.*

93. *U.S. to Bring AIDS Victim Home From China*, Reuters Ltd., July 13, 1987, available in ALLWLD.

94. *Id.*

95. *U.S. Air Force Plane Flies American AIDS Victim Out of China*, Reuters Ltd., July 15, 1987, available in ALLWLD.

96. *Id.*

97. *Id.*

98. *U.S. to Bring AIDS Victim Home From China*, Reuters Ltd., July 13, 1987, available in ALLWLD.

99. *Id.*

Air Lines reasoned that "in view of current uncertainty on the nature of the illness itself, and also possible strong passenger reaction, we are negative in this particular case."¹⁰⁰ Northwest Orient's Tokyo office said the decision not to transport Anderson was based on a general policy not to fly passengers carrying communicable diseases.¹⁰¹

China's rules issued by the Minister of Public Health in 1989 prohibit "any foreigner suffering from AIDS . . . from entering the territory"¹⁰² and require "surveillance of communicable diseases" for "all persons for entry into or exit from the country, staying in the hotels or guest houses with service to foreigners at a frontier port."¹⁰³ Furthermore, the examining doctor in these cases may issue a "FOR YOUR HEALTH" card to infected persons.¹⁰⁴ When such persons enter China, should they proceed to health care facilities, the cards function as signals to these facilities to treat the case as an "emergency case" and to notify the government immediately.¹⁰⁵ This medical identification would almost certainly result in deportation. In effect, China has conditioned the entry of HIV-positive aliens upon their production of proof of HIV negativity.

In March of 1993, a survey on the regulations of the countries in the Asian-Pacific area regarding travellers with AIDS found that not only China, but also Japan and Vietnam routinely denied entry to carriers of the AIDS virus.¹⁰⁶ Despite these harsh realities, the Hong Kong AIDS Foundation's education officer, Mr. Mike Sinclair, who has AIDS, argues that "refusal of entry should be stopped because it was of no use in controlling the spread of the disease."¹⁰⁷ Sinclair, who had also been refused entry to Vietnam on the basis of his condition, protested, "I know my condition and I am committed to taking precautions. Society should grant me the rights of a normal person. It is the first time people have mapped out where I can go and where I cannot go."¹⁰⁸

100. *Id.*

101. *Id.*

102. 43 IDHL 33 (1992).

103. *Id.*

104. *Id.*

105. *Id.* at 34.

106. *HIV Carriers Face Problems In Travelling*, Xinhua General News Service, Mar. 8, 1993, available in ALLWLD.

107. *Asian Countries Bar HIV Carriers*, South China Morning Post, Mar. 8, 1993, available in ALLWLD.

108. *Id.*

VIETNAM

In July of 1993, Vietnam also took itself off the "map" of countries accessible to HIV-positive aliens. The Vietnamese government announced that aliens must show proof of HIV negativity: "foreigners wishing to visit Vietnam will have to first undergo a medical examination to prove they are free of AIDS and other contagious diseases."¹⁰⁹ The reason for the restriction was to prevent the spread of AIDS.¹¹⁰ Unlike the United States, only a few hundred cases of AIDS have been reported in Vietnam.¹¹¹ It would seem, therefore, that Vietnam has more to fear from the spread of the pandemic. An interview with Vietnamese health officials revealed another possible reason for the testing requirement: The United States also employs such restrictions on aliens with AIDS to stem the flow of the pandemic.¹¹²

Vietnam's 1992 Government Decree explained the restrictions by stating that "HIV/AIDS is creating serious economic and social losses for . . . Vietnam."¹¹³ Aliens requesting residence in Vietnam for three months or longer are, therefore, required to "undergo a serum test for the detection of anti-HIV antibody."¹¹⁴ However, the Decree does not specifically exclude those testing positive.¹¹⁵ The only restriction explicitly imposed is that aliens may not marry a Vietnamese citizen.¹¹⁶ Therefore, it would seem that HIV infection prompts immigration authorities to stem the flow of visitors and immigrants in the event of widespread and "serious economic and social losses"¹¹⁷ resulting from the pandemic. Exclusion of HIV-positive aliens is continued at the discretion of Vietnamese immigration officials by reference to the threat of such "losses."

JAPAN

Unlike the rules of China or Vietnam that require testing of all aliens requesting entry, testing of aliens seems necessary in Japan only in circumstances where immigration officials feel that the alien is "lia-

109. *Vietnam Requires AIDS Tests For Foreign Visitors*, Agence France Presse, July 29, 1993, available in ALLWLD.

110. *Id.*

111. *Id.*

112. *Id.*

113. 44 IDHL 230 (1993).

114. *Id.* at 231.

115. *Id.*

116. *Id.*

117. *Id.* at 230.

ble to infect" others.¹¹⁸ The 1988 AIDS Prevention Law of Japan amended Japan's immigration laws to include a provision refusing entry to aliens infected with HIV: "A person who is infected with the AIDS virus and liable to infect numerous persons with the virus" is not permitted to enter Japan.¹¹⁹ Japan's Prevention Law appears to give discretion to immigration officials to determine which aliens should be tested, although this may result in the same number of exclusions and deportations of aliens discovered to be HIV-positive. Despite the granting of apparent discretion, immigration officials routinely deny the entry of HIV-positive aliens.¹²⁰

PHILIPPINES

In 1988, the Philippines also advocated restrictions on HIV-positive aliens.¹²¹ The Department of Foreign Affairs in Manila announced that "[f]oreigners who intend to stay in the Philippines for at least six months will have to present a certificate proving they are AIDS-free."¹²² A spokesman for the Department of Health in the Philippines noted that India, Saudi Arabia and the United States all impose restrictions on immigrants with AIDS.¹²³ Unlike the United States rule, however, the Philippine rule applies equally to all foreigners, including visitors, "alien seamen regardless of their length of stay in the country, and U.S. military personnel."¹²⁴ The only way a "foreigner" can remain in the Philippines for at least six months is if she or he obtains a certificate of good health from a Philippine hospital.¹²⁵ Interestingly, Immigration Commissioner Miriam Defensor-Santiago "did not include short-term residents or tourists in the order because the move could lead to reprisals against Filipino tourists by other nations."¹²⁶

INDONESIA

In early 1994, Indonesia unwittingly facilitated a "reprisal"

118. 40 IDHL 385 (1988).

119. *Id.*

120. *Asian Countries Bar HIV Carriers*, South China Morning Post, Mar. 8, 1993, available in ALLWLD.

121. *Asian News-Philippines: AIDS-Free Proof to be Required for Entry to Philippines*, Kyodo News Service, Apr. 12, 1988, available in ALLWLD.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Manila to Require AIDS Check of Foreign Visitors*, Los Angeles Times, Apr. 12, 1988, available in ALLWLD.

against the United States policy barring aliens with AIDS. Earvin "Magic" Johnson, a prominent HIV-positive American athlete, was denied entry to Indonesia, where he was scheduled to play in an exhibition basketball game.¹²⁷ An official of the exhibition's organizing committee noted that "[a]lthough the basketball player's visit is based on good intentions, that is, for a campaign against AIDS . . . we do not want 'Magic' Johnson's visit to put the government in a difficult position and create national instability."¹²⁸ The "national instability" sought to be circumvented was the potential for criticism of the Indonesian government that could result from Johnson's visit.¹²⁹ Commenting on the rationale for Johnson's exclusion, Sports Minister Hayono Isman speculated that, were Johnson "an Indonesian citizen, he would be barred from entering the U.S."¹³⁰ Indonesia is apparently influenced by the United States to use similar restrictive policies against a HIV-positive American citizen.

When explaining their exclusionary policies, countries around the world reason that since the U.S. maintains restrictive policies towards HIV-positive aliens, they are justified in doing so for the same reason: to protect their territory from further spread of AIDS. The U.S. is a policy leader in the eyes of many international heads of state. It becomes imperative, in order to understand this influence, to examine U.S. law barring HIV-positive aliens.

IV. UNITED STATES LAW

The Immigration Act of 1990¹³¹ mandates that aliens must be excluded from immigration if found to have a "communicable disease of public health significance."¹³² The National Institutes of Health Revitalization Act of 1993¹³³ amended the grounds for exclusion to specifically apply to aliens infected with HIV.¹³⁴ The United States, therefore, now has a statutory ban on the admission of aliens with HIV that

127. Antariksawan Jusuf, *Indonesia Blocks 'Magic' Johnson Visit*, Agence France Presse, Jan. 25, 1994, available in ALLWLD.

128. *Id.*

129. *Id.*

130. *Id.*

131. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990). See also 8 U.S.C.A. § 1182 (1993).

132. 8 U.S.C. § 1182 (1993).

133. The National Institutes of Health Revitalization Act of 1993, Pub. L. No. 103-43, 107 Stat. 122 (1993).

134. 8 U.S.C. § 1182(a)(1)(A)(i); Pub. L. No. 103-43, 107 Stat. 122, § 2007 at 210.

formally declares HIV a "communicable disease of public health significance."¹³⁵

All aliens must undergo medical examinations when applying for a visa,¹³⁶ arriving in the U.S.,¹³⁷ receiving a request by the Immigration and Naturalization Service (INS) to undergo medical examinations to determine admissibility¹³⁸ and applying for adjustment status.¹³⁹ Aliens of 15 years of age or older are required to undergo serologic testing for HIV¹⁴⁰ if they are applying for immigrant visas,¹⁴¹ nonimmigrant visas such as student¹⁴² or refugee,¹⁴³ or to adjust their status.¹⁴⁴ No testing is required if the alien is under age 15 unless there is "reason to suspect infection."¹⁴⁵

As part of a procedure devised by the Immigration Act of 1990, testing is done by a physician, called a "medical examiner,"¹⁴⁶ designated by the Director of the Center for Disease Control.¹⁴⁷ Once the requisite testing has been completed, the medical examiner must submit a document to the Immigration and Naturalization Service certifying the presence or absence of HIV infection or any other "communicable disease of public health significance."¹⁴⁸

If an alien tests positive for HIV, this notification is called a "Class A medical notification."¹⁴⁹ In the event of a Class A notification, documenting the presence of HIV infection, the Director of the Center for Disease Control must authorize reexamination of the alien in question upon either the alien's own request¹⁵⁰ or the request of the INS.¹⁵¹ The "boards" which are authorized to reexamine the alien

135. 8 U.S.C. § 1182(a)(1)(A)(i); 42 C.F.R. § 34.2(b)(4); *See also* Juan P. Osuna, *The Exclusion From the U.S. of Aliens Infected With the AIDS Virus*, 16 Hous. J. INT'L. L. 1, 39 (1993).

136. 42 C.F.R. § 34.1(a) (1993).

137. *Id.* § 34.1(b).

138. *Id.* § 34.1(c).

139. *Id.* § 34.1(d).

140. *Id.* § 34.3(b).

141. *Id.* § 34.3(b)(i).

142. *Id.* § 34.3(b)(ii).

143. *Id.* § 34.3(b)(iii).

144. *Id.* § 34.3(b)(iv).

145. *Id.* § 34.3(b)(v).

146. *Id.* § 34.3(j).

147. *Id.* *See also Id.* § 34.3(a). The Center for Disease Control is a subsidiary of the Public Health Service of the U.S. Department of Health and Human Services. *Id.*

148. *Id.* § 34.2(l)(1).

149. *Id.* § 34.2(d).

150. *Id.* § 34.8(a)(2).

151. *Id.* § 34.8(a)(1).

must be composed of "three medical officers, at least one of whom is experienced in the diagnosis and treatment" of HIV infections, and the majority decision of the board comprises the final report.¹⁵²

A formal reexamination includes a "review of all records submitted by the alien, other witnesses, or the board,"¹⁵³ "[u]se of any laboratory or additional studies which are deemed clinically necessary,"¹⁵⁴ "[c]onsideration of statements regarding the alien's physical . . . condition made by a physician after his/her examination of the alien,"¹⁵⁵ and an independent physical examination performed by the board if the board so requires.¹⁵⁶ The alien, during reexamination, may offer information and witnesses and may cross-examine any witnesses called by the examining board.¹⁵⁷ The alien is also free to have an attorney or be assisted by the board in the presentation of his/her case.¹⁵⁸

Based on a full consideration of all evidence submitted and the results of reexamination of the alien, the board must report its findings to the INS and give prompt notice to the alien.¹⁵⁹ The INS then makes the final decision as to admissibility based upon the board's findings.¹⁶⁰ The alien may request reconsideration only once in connection with the current application.¹⁶¹

Although the exclusion of aliens with AIDS seems clear and indisputable (provided reexamination of aliens with HIV affirms the results of prior examinations), it remains to be seen how the United States will practically apply the statutes. During the years following the enactment of the Immigration Act of 1990, the United States became divided on the issue of whether to allow or refuse entry to HIV-positive aliens.¹⁶² Many public debates on the subject prompted arguments for and against the restrictions. In the wake of the Immigration Act of 1990, there followed a new administration which professed a view against the exclusion of aliens with AIDS. Again, the issue was thrown into the public eye.

152. *Id.* § 34.8(b)(1).

153. *Id.* § 34.8(c)(1).

154. *Id.* § 34.8(c)(2).

155. *Id.* § 34.8(c)(3).

156. *Id.* § 34.8(c)(4).

157. *Id.* § 34.8(f).

158. *Id.*

159. *Id.* § 34.8(h).

160. *Id.*

161. *Id.* § 34.8(k).

162. See discussion *infra* part V.

V. AMERICAN VIEWS ON ALIENS WITH AIDS IN 1993

A. *The Public Reaction to the Promise of Change*

In 1993, President Clinton brought hope to the adversaries of the HIV-positive-alien-exclusion rule. In early February, the President was reported to be:

on the verge of eliminating the restrictions on people with AIDS coming into the United States . . . President Clinton is apparently ready to reverse a policy that many people believe has reflected badly on the United States. Since 1987, when Ronald Reagan was President, it has been American policy to keep out foreigners who were infected with the AIDS virus. The U.S. is the only Western industrialized nation that has such a restriction, which will soon be lifted.¹⁶³

The main reason for the proposed change was that “the Administration says [AIDS is] not spread by casual contact.”¹⁶⁴ The AIDS Action Council noted that Clinton was endeavoring to keep his campaign promise to lift the ban on aliens with HIV.¹⁶⁵ However, Congress remained concerned that “allowing more people with the AIDS virus into the country could burden the health care system here and expose more Americans to the disease . . . not only opening up the United States to this disease, [but also] putting people in danger.”¹⁶⁶

News broadcasts during the months after Clinton’s public resolution to lift the ban on HIV-positive aliens informed the American people that their country seemed to be in the minority: “The United States has been widely criticized at home and abroad for trying to keep out people with the AIDS virus. Removing the restrictions now moves the U.S. into the international mainstream in its approach to the virus and those infected by it.”¹⁶⁷

By February, the Center for Disease Control and Prevention (CDC) had “already recommended that infectious tuberculosis be the only disease” on the list of contagious diseases that would render an

163. *World News Tonight With Peter Jennings* (ABC television broadcast, Feb. 9, 1993), available in ALLWLD.

164. *Id.*

165. *Id.*

166. *Id.*

167. *All Things Considered* (NPR radio broadcast, Feb. 9, 1993), available in ALLWLD.

alien inadmissible.¹⁶⁸ Dr. Jonathan Mann, director of the International AIDS Institute at Harvard, noted that

The countries of Western Europe and virtually all the countries in the world do not have the kind of restriction the U.S. has had. That has put us in league with various discriminatory countries around the world and has really undermined U.S. ability to portray an effective and active AIDS program and to exercise global leadership.¹⁶⁹

Despite CDC's support of lifting the ban on aliens with AIDS, there were many open debates on the subject. On February 11, the television program "Crossfire" hosted one of the first.¹⁷⁰ The show's hosts, Pat Buchanan and Michael Kinsley, were joined by Republican Representative Lamar Smith of Texas, member of the Immigration Subcommittee, and Michael Maggio, cooperating attorney for the Center for Constitutional Rights.¹⁷¹ Mr. Maggio stressed that "people . . . are always going to be coming in [to the United States] with AIDS as long as we have the disease."¹⁷² His opposition, Mr. Buchanan, protested, "[W]hy would you knowingly bring into the United States hundreds and hundreds of people who are carriers of this infection and who could pass it on and kill American citizens?"¹⁷³ Kinsley protested, saying that the American Medical Association also opposed the ban, but Rep. Smith insisted upon the necessity of protecting the "American people" from the spread of the disease.¹⁷⁴ Mr. Maggio responded by telling the story of an "American" person that he was representing: "I represent a woman who's a U.S. citizen, and her son, who is an intending immigrant, [who] has AIDS. One reason why we ought to have that man here is so that he can live and ultimately die in dignity with his mother. It's called being humanitarian."¹⁷⁵

B. The Arguments Surrounding the U.S. Policy

As discussed in the previous section, many public debates surfaced

168. *Id.*

169. *Id.*

170. *Crossfire* (CNN television broadcast, Feb. 11, 1993), available in ALLWLD.

171. *See id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

during 1993 surrounding President Clinton's ultimately unsuccessful plan to lift the U.S. ban on HIV-positive aliens. The main reason cited by proponents of the ban was that such restrictions would stem the flow of AIDS in the United States while eliminating the possibility of added health care costs to American taxpayers brought on by HIV-positive aliens.¹⁷⁶ However, these arguments were refuted with reasons echoed by the World Health Organization's spirit of global cooperation in eliminating the pandemic.¹⁷⁷

Supporters of lifting the ban on HIV-positive aliens noted that HIV is not casually transmitted, unlike other diseases which would exclude aliens from entering the United States, such as tuberculosis.¹⁷⁸ A further inconsistency in the United States law restricting HIV-positive aliens is that only those aliens seeking immigration status are required to be tested, while visitors, students and other non-immigrants are tested only at the discretion of the INS.¹⁷⁹ If aliens and returning nationals are only selectively screened, the objective of curbing the spread of AIDS is undermined by those HIV-positive visitors and other non-immigrants who are not required to be tested. Supporters of lifting the ban of HIV-positive aliens note that U.S. policies seem discriminatory because of the arbitrary nature of the required AIDS testing.¹⁸⁰

Furthermore, as a "highly respected world leader, the United States sends a distressingly bleak message to the rest of the world when it endorses HIV-based discrimination, instead of a global commitment to combat this pandemic disease."¹⁸¹ Indeed, as has been seen, countries all over the world have pointed to the United States restriction on HIV-positive aliens when explaining similar restrictions.¹⁸² Ironically, the United States appears to be a net exporter of AIDS: Over a million people in the U.S. are infected with HIV,¹⁸³ whereas only one in a thousand aliens tested actually have HIV, and that single alien can

176. See *infra* notes 171-72 and accompanying text.

177. See *supra* section VII.

178. Donna E. Manfredi & Judith M. Riccardi, *AIDS and United States Immigration Policy: Historical Stigmatization Continues With the Latest "Loathesome" Disease*, 7 ST. JOHN'S J. LEGAL COMMENT. 707, 728 (1992).

179. *Id.* at 731-32.

180. *Id.*

181. *Id.* at 730.

182. See *supra* section III.B. Many countries have pointed to the United States' restriction on aliens with AIDS when called upon to explain their own restrictions. Other countries discussed in this comment have enacted laws restricting the entry of HIV-positive aliens in order to explicitly or implicitly reduce the spread of the disease within their respective borders. See *id.*

183. Manfredi & Riccardi, *supra* note 178, at 731.

only transmit HIV as a result of high-risk behavior.¹⁸⁴ It would seem erroneous to conclude in light of these facts that the spread of AIDS can be prevented simply by keeping a handful of HIV-positive aliens out of the country.

In response to the argument that added medical costs would be incurred by American taxpayers in the care of HIV-positive aliens, supporters of lifting the ban note that aliens with other chronic diseases are admitted despite large health care costs.¹⁸⁵ Supporters of removing HIV-based exclusions posit that “[i]f cost is truly the bloodline of this policy argument then the United States simply should not admit immigrants with *any* financially draining ailment, such as cancer or heart disease.”¹⁸⁶ However, few in the United States would support turning away a hopeful immigrant simply because she or he had cancer or heart disease. As Mr. Maggio protested on “Crossfire,” “It’s called being humanitarian.”¹⁸⁷

VI. THE “HUMANITARIAN” U.S.: HAITIAN CENTERS COUNCIL, INC.

A. Background

On June 8, 1993, the United States District Court for the Eastern District of New York decided *Haitian Centers Council, Inc., et al v. Chris Sale, Acting Commissioner, INS*.¹⁸⁸ This case was an offshoot of a bifurcated trial involving Haitian refugees who were being detained in Guantanamo Bay pending a declaration of their refugee status.¹⁸⁹ Prior to this time, the Coast Guard had repatriated Haitians who could not qualify for refugee status pursuant to the Alien Migration Interdiction Operation agreement between the U.S. and Haiti.¹⁹⁰ However, after a military coup in Haiti overthrew the government of Jean-Bertrand Aristide on September 30, 1991, the U.S. temporarily suspended the repatriation program and advised the Coast Guard to pick up Haitians en route to the United States.¹⁹¹ These Haitians were taken to Guanta-

184. *See id.*

185. *See id.* at 733.

186. *Id.*

187. *See supra* note 151 and accompanying text.

188. *Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993). For a first-hand account of the media hysteria surrounding the fate of the Haitian refugees from one of the attorneys involved in this case, see generally Harold Hongju Koh, *The Haitian Refugee Litigation: A Case Study in Transnational Public Law Litigation*, 18 MD. J. INT’L L. & TRADE 1 (1994).

189. *Haitian Centers Council*, 823 F. Supp. at 1033.

190. *Id.* at 1034.

191. *Id.*

namo Bay Naval Base in Cuba in November of 1991.¹⁹²

On November 22, 1991, the Office of the Deputy Commissioner of the Immigration and Naturalization Service, issued a memorandum stating that a "credible fear of return" standard was to be used to determine that Haitians with only one or two "refugee-like" characteristics would be allowed to become eligible for political asylum.¹⁹³ Those with no "refugee-like" characteristics would be ineligible for political asylum and subject to repatriation.¹⁹⁴ The "credible fear of return" standard was designed to be far more generous than the "well-founded fear of return" standard usually applied to asylum seekers.¹⁹⁵

Interviews regarding the "refugee-like" characteristics of the Haitians began in earnest at Guantanamo Bay. These interviews were conducted by INS officers, immigration lawyers, and human rights monitors.¹⁹⁶ However, the refugees themselves were disallowed the services of attorneys. Since the date of the trial in mid-1993, 10,500 Haitians qualified for refugee status and were allowed to proceed to the U.S., while 25,000 were returned to Haiti.¹⁹⁷ An additional few proceeded to Belize and Honduras.

Belize and Honduras required that the refugees be tested for AIDS prior to receiving asylum.¹⁹⁸ The results of these tests uncovered a large group of infected Haitians who had been accepted to the U.S. as qualified refugees.¹⁹⁹ On May 30, 1991, Gene McNary, then INS Commissioner, issued a memorandum mandating that "interdicted asylum seekers identified at sea for transfer to the United States will be properly inspected and medically screened upon arrival into the United States."²⁰⁰ Eight months later, on February 29, 1992, Grover Joseph Rees, INS General Counsel, disclosed a new INS policy requiring second, more restrictive, "well-founded fear" interviews of those infected Haitians who had been previously guaranteed refugee status.²⁰¹ In essence, those Haitians who had been determined to have AIDS or be infected with the HIV virus were being given a higher burden to bear in proving that they truly feared returning to Haiti in the midst of

192. *Id.* at 1035.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 1035-36.

political turmoil.

In the next few months of 1992, attorneys for the Haitian Service Organizations were denied communication with the qualified refugee Haitians in Guantanamo Bay.²⁰² Requests by the Haitians for the assistance of counsel were likewise denied, despite the admission of the press, clergy, and non-U.S. contract workers into Guantanamo.²⁰³ Furthermore, the infected Haitians in Guantanamo were denied the assistance of counsel despite the fact that their uninfected counterparts who had been allowed to proceed further into the United States were receiving the assistance of counsel in identical interviews.²⁰⁴ One hundred and fifteen infected Haitians were found to have a "well-founded fear of return" and a number of infected Haitians were repatriated after failing this second, more restrictive interview.²⁰⁵

B. Conditions in Guantanamo

As the refugee-status interviews were conducted, the Haitians were separated into camps: those who had been granted refugee status based on a "credible fear of return" were placed in one camp to be transported to the U.S., while those who had been denied refugee status were placed in another camp to await repatriation. In March of 1992, when it became apparent that several Haitians qualifying for refugee status were infected with the AIDS virus, these infected Haitians and their HIV-negative families were then separated into a third camp, Camp Bulkeley.²⁰⁶ At the date of the trial, June 8, 1993, approximately 200 HIV-positive Haitians were at Camp Bulkeley.²⁰⁷ As Judge Johnson wrote,

[A]pproximately 200 "screened in" HIV Haitians are remaining at Guantanamo. They live in camps surrounded by razor barbed wire. They tie plastic garbage bags to the sides of the building to keep the rain out. They sleep on cots and hang sheets to create some semblance of privacy. They are guarded by the military and are not permitted to leave the camp, except under military escort. The Haitian detainees have been subjected to predawn military sweeps as they sleep by as many as

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 1037.

207. *Id.*

400 soldiers dressed in full riot gear. They are confined like prisoners and are subject to detention in the brig without a hearing for camp rule infractions. Although the Haitian detainees have a chapel, weight room, bicycle repair shop, beauty parlor and other amenities at their disposal, none of these things are currently available to them, as they are now confined to . . . Camp Bulkeley, or to the brig.²⁰⁸

These inhumane conditions were also compounded by the inadequate medical care at Guantanamo. The Battalion Aid Station (the "clinic") at Camp Bulkeley was staffed by two physicians, one of whom is an infectious disease specialist.²⁰⁹ This specialist was responsible for overseeing the AIDS testing, drawing blood for T-cell counts of the Haitians, and prescribing anti-retroviral drugs for HIV, while supervising treatment of any other contagious diseases.²¹⁰

The defendant U.S. government admitted that these medical facilities would be inadequate if a full-blown contagious disease were to attack the HIV-positive refugees.²¹¹ The medical facilities were inadequate to provide medical care to the infected Haitians because of the lack of a variety of specialists that are necessary to treat AIDS patients.²¹² The military doctors themselves had raised these concerns as early as May of 1992, insisting that certain HIV-positive Haitians be medically evacuated from Guantanamo.²¹³ These concerns, however, were ignored or denied by the INS with no explanation.

The Court was outraged by the testimony of Duane "Duke" Austin, the INS Special Assistant to the Director of Congressional and Public Affairs, "who reportedly remarked to the press with regard to the Haitians with AIDS held on Guantanamo, 'they're going to die anyway, aren't they?' It is outrageous, callous and reprehensible that defendant INS finds no value in providing adequate medical care even when a patient's illness is fatal."²¹⁴ In light of this cold unconcern for the infected Haitians, the Court found that Camp Bulkeley constituted a "HIV prison camp presenting potential public health risks to the Haitians held there."²¹⁵ The Court reasoned that because HIV-positive

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 1038.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 1038-39.

individuals are more susceptible to mild contagious disease, the outbreak of such disease would spread more rapidly and be fatal to the entire camp.²¹⁶ The Court also discussed the Haitians' mistrust of the hardworking military doctors, noting that the Haitians were, perhaps reasonably, afraid of them due to their belief that the doctors were somehow involved in their detention.²¹⁷ The Court found that such mistrust led to ineffective medical care for the infected refugees.

C. Court's Conclusions on the HIV-positive Haitian Refugees

The Court granted the attorneys of the infected Haitians the right to counsel the Haitians for their refugee status interviews, reasoning that the lawyers of the Haitian Service Organizations "seek only to communicate, at their own expense, with the clients who have specifically sought them out."²¹⁸ The Court found that the lawyers had been "barred because of the viewpoint of the message they seek to convey to the Haitians," namely, that the infected Haitians should have the right to retain their refugee status, in violation of the First Amendment of the United States Constitution.²¹⁹ The Court reasoned that the attorneys, as U.S. citizens, should be permitted to exercise their First Amendment freedom of speech rights. This right did not depend on the rights of the non-U.S. citizen Haitians, so the Court found no need to reach the question of "whether the Haitian detainees at Guantanamo [possessed] a First Amendment right."²²⁰

The infected Haitians were granted their right to receive counsel during the "well-founded" interviews, basing this right on their "protected liberty interest in not being wrongly repatriated to Haiti" and in "their 'reasonable expectation' of avoiding erroneous return based on the affirmative actions of the Executive and Congress."²²¹ Since one cannot be deprived of a protected liberty interest under the Fifth Amendment of the U.S. Constitution without due process,²²² and since procedural due process mandates a right to counsel, the Haitians were granted the assistance of counsel.²²³

The government was found to have violated the infected Haitian's due process rights by taking away their refugee status pending second

216. *Id.* at 1039.

217. *Id.*

218. *Id.* at 1041.

219. *Id.*

220. *Id.*

221. *Id.* at 1042.

222. U.S. CONST. amend. V.

223. *Id.*

“well-founded fear” interviews.²²⁴ After noting that the Due Process Clause protects “any ‘person,’ rather than members of ‘the people,’” and that the Supreme Court has had a tradition of entitling aliens to due process in civil suits in the United States courts, the Court concluded that the infected Haitian refugees had the same due process rights as the uninfected Haitian refugees who were allowed into the U.S. for further immigration proceedings.²²⁵ The Court indignantly noted that

[t]he Government has continued to detain the [HIV-positive Haitian refugees]. In fact, the Haitian detainees have been confined for nearly two years. As the Haitian’s ties to the United States have grown, so have their due process rights The Haitian detainees are imprisoned in squalid, prison-like camps surrounded by razor barbed wire. They are not free to wander about the base. Guarded by the military day and night, the Screened In Plaintiffs [sic] are subject to surprise predawn military sweeps conducted by soldiers outfitted in full riot gear searching for missing detainees. Haitian detainees have been punished for rule infractions by being flexicuffed and sent to “administrative segregation camp” (Camp Alpha or Camp 7) or the brig. Such conditions cannot be tolerated when, as here, the detainees have a right to due process.²²⁶

Most importantly, the Court found that the infected Haitians had the right to adequate medical care: “As persons in coercive, nonpunitive, and indefinite detention, the Haitian detainees in Guantanamo are constitutionally entitled to medically adequate conditions of confinement.”²²⁷ The Court noted that the military’s own physicians had requested that the infected Haitians be transported to the United States for treatment.²²⁸ Since the INS “repeatedly failed to act on recommendations and deliberately ignored the medical advice of U.S. military doctors,” the INS was found to have violated the Haitians’ due process rights.²²⁹

Regarding the “indefinite detention” of the HIV-positive Haitians, the Court held that because the Haitians had protected liberty inter-

224. 823 F. Supp. at 1041.

225. *Id.*

226. *Id.* at 1042.

227. *Id.* at 1043.

228. *Id.* at 1044.

229. *Id.*

ests, and because the Haitians' confinement was not a result of their actions but instead a result of the government's actions, the Haitians had a right to end their detention at Guantanamo Bay.²³⁰ The Court was shocked to learn from testimony that "the Haitians were told that they could be at Guantanamo for ten to twenty years or possibly until a cure for AIDS is found."²³¹ As the detained Haitians were not criminals or national security risks, the court held that "[w]here detention no longer serves a legitimate purpose, the detainees must be released."²³² The Court also noted that "[t]he Haitian camp at Guantanamo is the only known refugee camp in the world composed entirely of HIV-positive refugees. The Haitian's plight is a tragedy of immense proportion and their continued detainment is totally unacceptable to this Court."²³³

Moreover, in requiring the HIV-positive Haitian refugees to go through a second, stricter interview, the government violated the Refugee Act of 1980, which established the "exclusive mechanisms for determining whether persons met the refugee definition" and which did not mandate second interviews in determining refugee status.²³⁴ Finally, the Court held that the Attorney General had abused her discretion in not waiving the HIV-positive Haitians into the U.S. by virtue of 8 C.F.R. 212.5, which permits the Attorney General to "'parole' aliens out of detention 'for emergent reasons or for reasons deemed strictly in the public interest.'"²³⁵ The Court specified three grounds for finding that the Attorney General had abused her discretion: (1) She had "exercised her discretion to discriminate invidiously," (2) she had allowed agents of the INS to "deviate[] from their own internal regulations," and (3) she had "given effect 'to considerations that Congress could not have intended to make relevant.'"²³⁶

The Court noted that the Attorney General's agent, the INS, had discriminated against the HIV-positive Haitians who had already been granted refugee status by detaining them in Guantanamo Bay for second interviews while the non-infected Haitians with refugee status had been allowed to proceed to the United States.²³⁷ Furthermore, the

230. *Id.* at 1045.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 1046.

235. *Id.* at 1047. Parole of aliens into the United States, 8 C.F.R. § 212.5(a)(1)(2) (1993).

236. *Haitian Centers Council*, 823 F. Supp. at 1048.

237. *Id.*

Court noted that the "Government has admitted that the ban on the admission of aliens with communicable diseases has not been strictly enforced against every person seeking entry. Each year many 'non-immigrants' enter the United States, are legally entitled to remain for years, and are not subject to HIV testing."²³⁸ Therefore, the INS had departed from its own policies by giving consideration to the Haitian's HIV-positive status when determining their refugee status.

The Court reasoned that the Attorney General had incorrectly applied 8 U.S.C.A. 1182(a)(1)(A)(i) in denying the Haitian refugees parole from their detention.²³⁹

There is no mandatory HIV exclusion for either parole (the means by which interdicted aliens who are screened in are brought to the United States in order to pursue their asylum claims) or the grant of asylum in the United States. The statute merely makes aliens with certain communicable diseases excludable from "admission" to the United States, and even the amendment to the statute which recently passed both houses of Congress adds HIV as a communicable disease. The Statute does not mandate such exclusion.²⁴⁰

The Court also noted that "parole" is limited, and constitutes neither admission to the U.S. nor "affects an alien's status."²⁴¹ Therefore, according to the Court, once paroled into the U.S. the infected Haitian refugees can still be denied residency or immigrant status as a result of their AIDS.

D. Analysis

In effect, the infected Haitians were allowed the advice of counsel for their "credible fear" interviews, protected from having to go through "well-founded fear" interviews, and allowed temporarily into the U.S., by virtue of their refugee status and their ailing health, to await further immigration proceedings.

While the Court's opinion seemed to champion the rights of aliens with AIDS, the holding was far more limited. This case allowed the Haitian refugees with AIDS to enter into the U.S., only to await later exclusion based on their disease. While the Court's holding ensured

238. *Id.*

239. *Id.* at 1049. *See also* 8 U.S.C.A. § 1182(a)(1)(A)(i) (1993).

240. *Haitian Centers Council*, 823 F. Supp. at 1049.

241. *Id.*

that aliens would not be denied refugee status on the basis of AIDS and would not be tested for AIDS in the determination of refugee status, the Court only seems to push back these inevitable conclusions to a later date.

This date could occur years later, when the HIV-positive Haitians are seeking resident status, after having established ties to family and community within the United States. Although the Court seems to give a refuge to aliens with AIDS, this refuge is very limited and harshly temporary.

The holding in *Haitian Centers Council*,²⁴² although preserving the temporary rights of HIV-positive refugees, upheld the exclusion of immigrants with AIDS. Although these refugees could be allowed into the United States, they would be repatriated based on their disease only a few years later. Their only hope for remaining in the United States would be to obtain a rare waiver from the INS. The U.S. ban on HIV-positive aliens, therefore, remains in force.

VII. WORLD HEALTH ORGANIZATION

A. *The Consultation on International Travel & HIV Infection*

Bans on HIV-positive aliens prompted the World Health Organization (WHO), a subsidiary of the United Nations, to convene a Consultation on International Travel and HIV Infection in March of 1987.²⁴³ The Report of the Consultation began with the language of Article 81 and noted that member nations were considering additional restrictive measures on HIV-positive aliens.²⁴⁴ The Consultation opposed imposition of travel restrictions on HIV-positive aliens for a number of reasons.

1. Current HIV Testing Procedures Are Inaccurate

Because antibodies to HIV do not appear in the bloodstream for up to six weeks after infection, blood serum tests will have negative results for this period of time.²⁴⁵ Enzyme-Linked Immunosorbent Assays (ELISA tests) are not completely accurate when done alone.²⁴⁶

242. 823 F. Supp. 1028.

243. REPORT OF THE CONSULTATION ON INTERNATIONAL TRAVEL AND HIV INFECTION GENEVA, 2-3 MAR. 1987, *reprinted in* LEGISLATIVE RESPONSES TO AIDS, at 254 (World Health Organization ed. 1989) [hereinafter LEGISLATIVE RESPONSES].

244. *Id.* at 255.

245. *See id.* at 256.

246. *Id.* *See also* JOHN G. BARTLETT, M.D. & ANN K. FINKBEINER, THE GUIDE

The ELISA test detects HIV antibodies.²⁴⁷ Because the test detects antibodies other than HIV antibodies, it may give false-positive results in those who are not infected with HIV.²⁴⁸ The ELISA test is used to screen out those who have not developed antibodies and are therefore not infected.²⁴⁹ Those who have developed antibodies are given a second test, the Western Blot test, to determine if antibodies were developed specifically as a reaction to HIV.²⁵⁰ Combined with ELISA, the Western Blot test is over 99 percent accurate.²⁵¹ However, it is more complicated, and results may not be available for weeks.²⁵² Therefore, testing procedures must involve both types of tests.²⁵³

The danger lies in the number of HIV-positive individuals who will not be detected as carrying antibodies to HIV by virtue of the ELISA test alone. If the ELISA test is used to screen out those who test negative, thereby allowing entry, a number of HIV-positive infectious individuals who undergo the HIV tests will not be detected because they have not yet developed sufficient HIV antibodies to render a positive result. Furthermore, the "false sense of security" which false-negatives and residents of a country would feel would lead to "laxity regarding behaviours which spread the virus and an actual increase in overall risk for HIV transmission."²⁵⁴ These inconsistencies would undermine the "protective" purposes of any such testing requirements for HIV-positive travellers and immigrants.

2. Exclusion of HIV-positive Aliens is Unlikely to Reduce the Spread of AIDS

As of 1987, WHO had found that "91 countries from all WHO regions were reporting AIDS cases" and that "the true number of cases is likely to be far greater than the number reported."²⁵⁵ Ironically, WHO identified the areas likely to have the majority of cases of HIV infections as North America, Western Europe, and Africa.²⁵⁶ As we have seen, the United States is the only country left in these areas

TO LIVING WITH HIV INFECTION 324 (1993).

247. BARTLETT, *supra* note 246 at 324.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. LEGISLATIVE RESPONSES, *supra* note 243.

255. *Id.* at 255.

256. *Id.*

which maintains restrictive policies towards aliens with AIDS.

Giving restrictiveness the benefit of the doubt, the Consultation first considered a hypothetical country with no HIV infection.²⁵⁷ Exclusion of HIV-positive aliens would not stem the flow of the disease because the country would have to readmit its own travelling nationals without testing, thereby admitting some HIV-positive individuals.²⁵⁸ Even if testing were prescribed for nationals, the test's inherent inaccuracies²⁵⁹ would allow some HIV-positive nationals to re-enter and spread the disease. Therefore, it is unlikely that HIV-positive testing for aliens would be effective in protecting the public health even in a country which begins by having no HIV infection.

The Consultation then considered the more likely example of a country which already has HIV-positive residents.²⁶⁰ The restrictions on HIV-positive aliens would, in a worst case scenario, reduce but not eliminate HIV-positive entrants.²⁶¹ Furthermore, the prevention of HIV transmission will depend to a large degree on the sexual behavior of both the HIV-positive residents and the HIV-positive visitors and immigrants.²⁶² The Consultation reasoned that a country's resources would be better allocated to educating its public to change the behaviors which lead to HIV transmission.²⁶³

3. Costs of Testing Would Not Justify the Amount of Actual HIV Prevention

Costs associated with setting up screening and testing procedures for *all* ports of entry (air, sea and land) include the costs of "the testing itself (including repeat and supplemental examinations), the personnel and resources required to establish, maintain and monitor the screening activity, and the infrastructure needed to monitor and manage incoming travellers."²⁶⁴ The Consultation estimated costs in 1987 to be at least \$10 to \$20 per traveller screened.²⁶⁵ This cost will no doubt have increased since 1987. Total costs, therefore, would be excessive and wasteful.²⁶⁶

257. *Id.* at 257.

258. *Id.*

259. *See* discussion *supra* part VII.A.1.

260. LEGISLATIVE RESPONSES, *supra* note 243, at 257.

261. *Id.* at 258.

262. *Id.* at 257.

263. *See id.* at 258.

264. *Id.* at 260.

265. *Id.*

266. *Id.*

Not only would there be the direct costs of testing, but indirect costs resulting from the testing requirements would have a negative effect on a country's economy as well. Restrictive policies on screening for HIV could result in a decline in tourism and international commerce.²⁶⁷ Also, inestimable costs include the "reduction of international movement, with its associated social, cultural, economic and political consequences," along with harsher stigmatization of the disease.²⁶⁸

The Consultation concluded that "[n]o screening programme of international travellers can *prevent* the introduction and spread of HIV infection [Screening programs] would, at best and at *great cost*, retard *only briefly* the dissemination of HIV both globally and with respect to any particular country."²⁶⁹

B. *International Health Regulations*

Since 1969, the World Health Organization has relied on the International Health Regulations to structure its policies.²⁷⁰ The purpose of the Regulations is "to help prevent the international spread of diseases and, in the context of international travel, to do so with the minimum inconvenience to the passenger."²⁷¹ According to WHO, "[t]his requires international collaboration in the detection . . . of the sources from which infection spreads rather than attempts to prevent the introduction of the disease by legalistic barriers that over the years have proved to be ineffective."²⁷²

WHO has repeatedly invoked Article 81 of the International Health Regulations as the basis of its policy against restrictions on HIV-positive aliens by the U.S. and various other countries. Article 81 states that "[n]o health document, other than those provided for in these Regulations, shall be required in international traffic."²⁷³ This Article applies to all aliens who are merely travelers and do not intend to immigrate or stay in a country for an extended period of time.²⁷⁴

267. *Id.*

268. *Id.*

269. *Id.* at 261.

270. WORLD HEALTH ORGANIZATION, INTERNATIONAL TRAVEL AND HEALTH 9 (1993) [hereinafter INTERNATIONAL TRAVEL].

271. *Id.*

272. *Id.*

273. Karen Porter, Jeff Stryker & June Osborn, *HIV, AIDS and International Travel*, in INTERNATIONAL LAW AND AIDS 119, 125 (citing International Health Regulations art. 81 (World Health Organization, 3d ed. 1969)). See also INTERNATIONAL TRAVEL at 9.

274. See Porter, Stryker & Osborn, *supra* note 273, at 125.

Based on this regulation, WHO has stated that "any requirement for an HIV antibody test certificate . . . is contrary to the Regulations."²⁷⁵

C. *Subsequent World Health Assemblies*

In 1988, the Forty-first World Health Assembly urged the Member States of the United Nations to "foster a spirit of understanding and compassion" for HIV-positive individuals "through information, education and social support programmes" and to protect their "human rights and dignity" by avoiding "discriminatory action against and stigmatization of them in . . . travel."²⁷⁶ This request was repeated in 1989²⁷⁷ and in 1990.²⁷⁸

In 1992, the Forty-fifth World Health Assembly recognized that "there is no public health rationale for any measures that limit the rights of the individual, notably measures establishing mandatory screening."²⁷⁹ Again, the Assembly "call[ed] upon Member States" to "reinforce efforts to oppose discrimination" against HIV-positive persons.²⁸⁰

D. *Lack of Enforcement*

These repeated "urgings" by the World Health Organization and the World Health Assemblies continue to go unheeded by many member states. Although the International Health Regulations are binding on all member nations of the United Nations,²⁸¹ WHO desires a unified, global strategy on AIDS, gently noting that any rules that it promulgates "will be useful only to the extent that [they are] *used as a basis for immediate action*."²⁸² This implies that the force of the International Health Regulations must at times yield to the practical problems of convincing member states to adopt WHO's strategies in

275. INTERNATIONAL TRAVEL at 9.

276. WHO/GPA/INF/88.2, WHA41.24, 1. (1)-(2) available in WORLD HEALTH ORGANIZATION, HANDBOOK OF RESOLUTIONS AND DECISIONS OF THE WORLD HEALTH ASSEMBLY AND THE EXECUTIVE BOARD, VOLUME III, 3D ED. 1985-1992 122 (1993)[hereinafter HANDBOOK].

277. WHO/GPA/INF/88.2, WHA42.34(2)(3) available in HANDBOOK 123.

278. WHO/GPA/INF/88.2, WHA43.10 available in HANDBOOK 124.

279. WHO/GPA/INF/88.2, WHA45.35, 6th paragraph available in HANDBOOK 127.

280. WHO/GPA/INF/88.2, WHA45.35(2)(6) available in HANDBOOK 127.

281. See Karen Porter, Jeff Stryker & June Osborn, *HIV, AIDS and International Travel*, in INTERNATIONAL LAW AND AIDS 125.

282. WORLD HEALTH ORGANIZATION, 11 THE GLOBAL AIDS STRATEGY 23 (1992) (emphasis in original).

dealing with the AIDS pandemic. Instead of enforcing the regulation, WHO has merely suggested that member states "give national AIDS programmes their immediate support and sustained political commitment under the leadership of the head of state."²⁸³

In addition, the consistent requests of the World Health Assembly to member nations to end AIDS discrimination have gone unheeded. That these requests are characterized as "urgings" and "calls to action" instead of "requirements" illustrates WHO's reluctance to enforce regulations and resolutions. Although WHO may gently suggest and admonish, through references to the International Health Regulations and the Resolutions of the World Health Assemblies, it does not seek retribution for such violations. WHO seeks to foster a spirit of cooperation and unity in its struggle against AIDS which would not be served through penalizing and creating resentment among member states.

E. Alternatives to Travel Restrictions on HIV-positive Aliens

"In times of increasing international interdependency, it is an illusion to think that [AIDS] can be stopped at any border."²⁸⁴ WHO has strongly suggested that countries concerned about the spread of AIDS from international travelers engage in educational campaigns instead of border restrictions.²⁸⁵ A few countries have begun to look into alternatives to imposing entry restrictions on HIV-positive aliens. These alternatives focus on education of aliens on the high-risk behaviors which can cause HIV infection. Three types of aliens that have been targeted for educational campaigns are refugees, migrant workers, and travelers or tourists.

1. Refugees: The South American Solution

In 1986, Suriname refugees escaped "armed conflict" by fleeing to French Guyana.²⁸⁶ At this time, no educational programs on AIDS had been created to reach the linguistically-isolated refugees.²⁸⁷ To correct this problem, a linguistically compatible education program was cre-

283. *Id.*

284. Georg Broring & Rinske van Duifhuizen, *Mobility and the spread of HIV/AIDS: a challenge to health promotion*, 1 AIDS HEALTH PROMOTION EXCHANGE 1 (1993).

285. *Id.*

286. Diane Vernon, *Adapting information for Maroons in French Guyana*, 1 AIDS HEALTH PROMOTION EXCHANGE 4 (1993).

287. *Id.*

ated for the refugees in 1991 by the AIDS-Guyane group of French Guyana (NGO).²⁸⁸

To implement this plan, it was necessary to research the existing refugee stereotypes of the disease in order to eradicate various misconceptions.²⁸⁹ As the NGO began discussing AIDS with the refugees, the question of the origin of the disease surfaced.²⁹⁰ It is interesting to note that the refugees produced their own answer to this question: "AIDS came to be viewed as a disease whose origin lay with White Western prostitutes who slept with dogs, leading to pollution of their blood."²⁹¹ It is even more interesting that the AIDS-educators chose not to contradict this particular stereotype because they "felt that denying the role of Western sex tourism would have alienated [their] audience."²⁹²

After the research had been conducted, educators tailored their strategies to meet the refugee's interests. For instance, after it had become "clear that young people would only attend group discussions if they were enticed by visual aids," the educators began using slide shows administered by [NGO-]trained refugees rather than medical officials.²⁹³ By choosing peer educators from the members of the group that needed AIDS education, NGO was able to foster receptiveness to AIDS education among the refugees.

The project was evaluated in 1992 through interviews with the refugees.²⁹⁴ At that time, all refugees interviewed had heard of the educational campaign and had "retained the basic prevention message."²⁹⁵ The educators reported significantly less discrimination towards HIV-positive people within the refugee camps. Condoms were destigmatized and more readily distributed. Furthermore, the refugees "developed alternative strategies to better select their sexual partners."²⁹⁶ WHO considered this to be a significant and effective step taken by French Guyana to decrease the spread of AIDS within its borders while at the same time allowing the refugees escape from dangers in their homeland.

288. *Id.*

289. *Id.* The refugees imputed AIDS to theft, breaking taboos, and witchcraft.

Id.

290. *Id.*

291. *Id.*

292. *Id.* at 5.

293. *Id.*

294. *Id.* at 6.

295. *Id.*

296. *Id.*

2. Migrant Workers from Mexico

Temporary migration from Mexico to the United States partially caused the introduction of HIV in Mexico from returning migrant workers.²⁹⁷ However, it was unacceptable to Mexico to refuse repatriation of Mexican citizens. Instead, Mexico sought to formulate an educational project "targeting migrants in their temporary US [sic] homes and places of origin."²⁹⁸

As with the Suriname refugees in French Guyana, the first step in the implementation of the program was research with an eye towards determining if migration altered the habits and attitudes of the Mexican workers.²⁹⁹ Researchers found that migrants had indeed altered their sexual behaviors due to "deep-rooted motivations" such as loneliness in an unfamiliar country.³⁰⁰ Furthermore, the researchers discovered that "[t]elevision was the major source of information on AIDS" for the migrant workers.³⁰¹ Relying on their research, AIDS educators decided to mobilize a prevention campaign in the format of a television soap opera. The characters were displaced Mexican workers in the U.S. who dealt with feelings of loneliness and isolation which "results from living away from family, leading to an urgency to satisfy sexual needs."³⁰²

The soap opera was broadcast in over forty U.S. cities and ninety Mexican cities.³⁰³ Audience estimates showed that over six million people had seen the program and reacted positively to the AIDS-prevention messages it carried.³⁰⁴ Again, education was used to combat the spread of AIDS instead of restrictive and impractical exclusion of HIV-positive Mexican citizens from their home country.

3. Travelers: Swedish "Travel Agents Against AIDS"

The spread of AIDS in Sweden has been traced in part to Swedish nationals contracting HIV while traveling in other countries.³⁰⁵ With

297. Prof. Mario Bronfman Pertzovsky & Victor Ramirez, *Country Watch: Mexico*, 1 AIDS HEALTH PROMOTION EXCHANGE 7 (1993).

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 8.

303. *Id.*

304. *Id.*

305. Anna-Karin Asp, *Country Watch: Sweden*, 1 AIDS HEALTH PROMOTION EXCHANGE 10 (1993).

this in mind, the Stockholm County AIDS Prevention Programme (SCAPP) initiated an educational project in 1992 designed to target Swedish travelers through travel agencies.³⁰⁶ However, the focus of SCAPP's efforts was on nationalized Swedish residents from other countries who sought to visit their home countries.³⁰⁷ Therefore, SCAPP targeted travel agencies that dealt with Swedish citizens originally from Chile, Latin America, Africa, Arab countries, and Europe.³⁰⁸

SCAPP sent the targeted travel agencies informational units on the prevention of AIDS and HIV infection to distribute to their clients.³⁰⁹ Travel agents were invited to special seminars in which they were "given AIDS information, told about the project, and presented with . . . campaign logo and text 'Travel Agents against AIDS.'"³¹⁰ The travel agents showed interest in helping with AIDS prevention efforts and reported receptiveness to AIDS information among their clientele.³¹¹ As a result, the "Travel Agents against AIDS" program is expanding throughout Sweden.³¹² This is yet another example of the success of AIDS-prevention education over restrictive regulations on aliens with HIV. Sweden has chosen to shift the focus off HIV-positive travelers entering Sweden and on to travelers exiting Sweden and entering other countries. This promotes WHO's urged spirit of global cooperation in combating the pandemic.

F. WHO's Spirit of Global Solidarity: The Need for Education

WHO has repeatedly stressed that border restrictions on HIV-positive individuals are an ineffective means of retarding the spread of the pandemic.³¹³ "Such measures create an atmosphere in which blame for spreading HIV is assigned [to aliens, to other countries] and this can lead to discrimination" against HIV-positive individuals in other aspects of a country's society.³¹⁴

A society which discriminates against HIV-positive individuals in travel fosters an environment which is counterproductive to WHO's

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* at 11.

311. *Id.*

312. *Id.*

313. See *Border restrictions and HIV/AIDS: a public health policy disaster*, 1 AIDS HEALTH PROMOTION EXCHANGE 12, 13 (1993).

314. *Id.* at 12.

global health strategies on prevention of AIDS. Any efforts to prevent AIDS require cooperation among countries and unity in policy. Countries must demonstrate their willingness to allow HIV-positive aliens to retain the right to unencumbered travel under Article 81 and to educate their own citizens so that they might avoid spreading or contracting HIV while abroad.

AIDS education and policies focusing on travel must "deal with at least two geographical sites: places of origin and places of new residence. To be as effective as possible, information pertaining to both sites should be used" to structure AIDS education programs instead of restrictive travel laws.³¹⁵

VIII. CONCLUSION

The United States has directly contravened the wishes of the World Health Organization by imposing restrictive travel policies on HIV-positive aliens. The United States has become an example for other countries with similarly restrictive policies and has caused mutual mistrust in its relationships with those countries. This has resulted in American travelers and tourists being expelled from other countries on the basis of their HIV status and in aliens being discriminated against and denied entry to the United States. Countries with restrictive policies have adamantly refused to honor the constant requests of the World Health Organization to strike down discriminatory policies in favor of AIDS education.

Despite the opposition of the President, the U.S. district courts in *Haitian Centers Council*, and many respected members of the American public, the law excluding aliens with AIDS remains in force. Unusual circumstances, such as those surrounding the HIV-positive Haitian refugees, may prompt officially-sanctioned relaxation of restrictions denying entry to HIV-positive aliens. However, the application of these court-modified rules remains to be determined.

"[T]he HIV pandemic can contribute to social disintegration in the 1990s as countries set up barriers to travel and immigration, and as regions blame each other for the spread of infection."³¹⁶ By refusing to adhere to the World Health Organization's ideals of non-discrimination and cooperation, countries that maintain restrictions on aliens with

315. *Id.* at 15.

316. Lawrence Gostin, *Introduction to INTERNATIONAL LAW AND AIDS* xiii (Lawrence Gostin & Lane Porter eds., 1992).

AIDS undermine a unified, worldwide effort to prevent the spread of HIV.

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