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AIDS, PROSTITUTION, AND THE USE OF HISTORICAL STEREOTYPES TO LEGISLATE SEXUALITY

BETH BERGMAN*

INTRODUCTION

The Acquired Immunodeficiency Syndrome ("AIDS") virus has killed over 33,000 people as of April, 1988. Currently, between one and a half million to two million people are thought to be AIDS carriers.¹ Experts estimate that the death toll will increase tenfold by 1991. Furthermore, resultant patient care by that date will cost between eight and sixteen billion dollars.² In response to widespread fear, legislators nation-wide have introduced AIDS-related bills calling for the testing of those "suspected" of infection, and the quarantining of known AIDS carriers under broad-based state police powers over public health.

The language of these bills is strikingly similar and frequently identical to that of quarantine and testing provisions written nearly a century ago. These antiquated provisions were created in an era when syphilis was considered synonymous with filth, and when some presumed that women carried gonorrhea regardless of whether or not they had ever been exposed. Where medicine and science were lacking, citizens, legislatures, and courts based their actions on cultural stereotypes. The ancient relationship between disease, filth, and taboo naturally oriented the citizenry at the turn of the century to vent their fears upon society's most polluted members — prostitutes.

This article argues that, in a fruitless and irrational response, the legislatures and courts have placed the blame and unchecked

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1. CENTER FOR INFECTIOUS DISEASES, CENTERS FOR DISEASE CONTROL, AIDS WEEKLY SURVEILLANCE REP., UNITED STATES AIDS PROGRAM, CASES OF AIDS AND CASE-FATALITY RATES BY HALF-YEAR OF DIAGNOSIS (April 11, 1988) [hereinafter AIDS WEEKLY SURVEILLANCE REP., April 11, 1988].

2. N.Y. Times, June 13, 1986, at 1, col. 1. In 1991 alone, an estimated 54,000 people will die from AIDS. *Id.* at A17, col. 1.

hysteria for AIDS on groups whose behavior is considered to be sexually abnormal. In so doing, we have revived the ancient practice of equating dirt and disease with sexual disorder.

Part I of the article summarizes the state-of-the-art knowledge about the AIDS Human Immunodeficiency Virus ("HIV"), in hope of dispelling misconceptions and providing the most current information. The first half of Part II is an examination of the nation's response to contagious disease in the late 1800s, including the use of quarantining and involuntary testing. This is followed by a closer look at the symbolic role of the scapegoating of prostitutes during this era and compares it with our current ill-conceived need to distance ourselves from socially unacceptable behavior and sickness. Part III is an analysis of potential constitutional protections from, and policy arguments against the resurrection of these dated procedures, and proposes that the current legislation is punitive in nature, obscuring the real need for the government to focus on the least restrictive alternative: education.

I. WHAT AIDS IS—AND WHAT AIDS IS NOT

The first reported case of AIDS in the United States was in 1981,³ and by the end of 1987, the number of cases reported was over 46,000.⁴ The AIDS virus affects the body's immune system by slowly killing the white blood cells crucial to fighting off infection.⁵ Specifically, the number of white blood cells capable of recognizing and combatting foreign proteins, known as antigens, via the synthesis of antibodies to combat antigens, are greatly diminished.⁶ This diminution results in eventual poor body responsiveness to microorganisms, which are otherwise harmless in normal healthy individuals.⁷ This phenomenon is known as "opportunistic" infection.

3. Health and Pub. Policy Comm., Am. College of Physicians and the Infectious Disease Soc'y of Am., *Position Paper "Acquired Immunodeficiency Syndrome,"* 104 ANNALS INTERNAL MED. 575 (1986); *Human Immunodeficiency Virus Infection in the United States*, 36 MORBIDITY & MORTALITY WEEKLY REP. 801 (1987).

4. AIDS WEEKLY SURVEILLANCE REP., April 11, 1988, *supra* note 1.

5. Hofstadter, *How AIDS Virus Kills Cells Documented By Researchers*, STANFORD CAMPUS REP., May 28, 1986, at 12. Some of the earliest studies of the effects of the virus on the human immune system came out of Stanford Medical School, where research found that infection by the AIDS retrovirus resulted in the fusion of these cells with normal, healthy cells into what are called "giant cells." *Id.* After reproducing large amounts of the virus, these agglomerates die. *Id.*

6. *Id.*

7. *Classification System for Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infections*, 105 ANNALS INTERNAL MED. 234 (1986). An example of "opportunistic" infection is pneumocystis carinii pneumonia, a rare form of noncommunicable pneumonia generally unheard of in individuals with normally functioning immune systems. *Id.* at 236. Cytomegalovirus, another common "opportunistic" infection, causes an enlargement of the epithelial cells, especially of the salivary glands, and is thought to bring about abnormalities in newborn infants

A. Modes of Transmission

Much of the past and current fear generated about AIDS revolves around exaggerated notions of transmission. The degree of hysteria regarding contagiousness is reflected in a September, 1985 CBS poll, where nearly half of those interviewed thought one could contract AIDS from sharing a drinking glass, nearly a third associated transmission with kissing, and twenty-eight percent linked the disease to contact with toilet seats.⁸ The strong conviction that the HIV could be spread by casual contact led to expulsion of all antibody-positive men serving in the military, as well as the removal of infected children from school.⁹

With an almost unanimous voice, the scientific community has declared AIDS to be a disease spread by extremely specific modes of transmission — infected blood, semen, or perinatally from mother to fetus.¹⁰ Studies completed in 1985 and 1986 reveal with increasing

affecting various organs and causing mental retardation. *Id.* In addition, Kaposi's sarcoma, a rare cancer of the blood vessels visible on the skin, is considered a classic AIDS symptom, and is linked to immune suppression. *Id.* This is not a complete list of the viral symptoms, as the virus manifests itself in related forms of acute to long-term signs, generally classified as AIDS-Related Complex ("ARC"). *Id.*

8. Liberson, *The Reality of AIDS*, N.Y. Rev., Jan. 16, 1986.

9. *AIDS Fear Forced Pupils Out*, N.Y. Times, Oct. 4, 1985, at B1, col. 4; see Sander, *Transmission of AIDS, the Case Against Casual Contagion*, 314 *NEW ENG. J. MED.* 380 (1986) [hereinafter *Transmission of AIDS*]; see also Korvok, *AIDS Hysteria: A Contagious Side Effect*, 133 *CAN. MED. A. J.* 1241 (1985). Ironically, the crucial discovery that the etiologic agent was a virus produced little or no relief:

The identification of the . . . virus—although of critical scientific importance—did little to quell the fears of either the medical community or the general population. Instead, people reacted to the fact that AIDS is caused by a virus with a hysteria reminiscent of another viral infection—the polio epidemic of the early 1950s.

Transmission of AIDS, supra.

10. Friedland & Klein, *Transmission of the Human Immunodeficiency Virus*, 317 *NEW ENG. J. MED.* 1125 (1987). Nonetheless, Friedland comments that, given the epidemic proportions of death caused by the virus, one cannot help but pose the "unrealistic requirement for absolute certainty about the lack of transmission by other routes . . . despite the knowledge that it is not scientifically possible to prove that an event cannot occur." *Id.* at 1133; see Grouse, *HTLV-III Transmission*, 254 *J. A.M.A.* 2130 (1985). Grouse has also detected the HIV virus in human saliva and vaginal mucosal membranes. *Id.* Nevertheless, to date there are no reported AIDS cases due to such exposure. *Id.*; see also Ho, *Infrequency of Isolation of HTLV-III Virus from Saliva in AIDS*, 313 *NEW ENG. J. MED.* 1606 (1985). A study compared the rate of viral activity in blood and saliva in AIDS patients. *Id.* The study found significantly lower rates in saliva than in blood. *Id.* Of 83 persons tested, one positive saliva test resulted, yet, from the identical sample group, 28 of 50 tested were positive based on blood samples. *Id.* Ho noted:

These findings are consistent with epidemiologic data indicating that casual transmission of HTLV-III does not occur, even among household members exposed to the saliva of infected persons. These results may be useful in allaying public concern regarding the casual spread of AIDS and HTLV-III infection.

Id. Perinatal exposure represents only a fractional cause of transmission. See Scott, *Acquired Immuno-Deficiency in Infants*, 310 *NEW ENG. J. MED.* 76 (1984).

frequency that while transmission by anal intercourse is the prevalent means of transmission, AIDS effectively reaches the heterosexual community as a result of intimate sexual practice.¹¹ While uncertainty remains as to the degree of spread of AIDS by heterosexual sex, current literature points to heterosexual sex as an increasingly significant factor in contracting AIDS.¹²

Beyond the above reported ways in which the AIDS virus is spread, it seems unlikely that it is transmitted by any other kinds of contact. Studies have shown that the virus is not spread casually within a family unit,¹³ prisons,¹⁴ or schools.¹⁵ However, there is

11. Burger, *Transient Antibody to Lymphadenopathy-Associated Virus/ Human T-Lymphotropic Virus Type III and T-Lymphocyte Abnormalities in the Wife of a Man Who Developed the Acquired Immunodeficiency Syndrome*, 103 *ANNALS INTERNAL MED.* 545 (1985) (partners of those at high risk of AIDS are themselves at high risk); Melbye, *Anal Intercourse as a Possible Factor in Heterosexual Transmission of HTLV-III to Spouses of Hemophiliacs*, 314 *NEW ENG. J. MED.* 344 (1986).

12. Recent statistics from the Centers for Disease Control ("C.D.C.") attribute two percent (801 people) of identified AIDS cases to heterosexual contact with someone with AIDS or at risk for AIDS. *CENTERS FOR DISEASE CONTROL, AIDS WEEKLY SURVEILLANCE REP., UNITED STATES AIDS PROGRAM*, (July 27, 1987) [hereinafter *AIDS WEEKLY SURVEILLANCE REP.*, July 27, 1987]. Men accounted for 167 of these identified cases, and 634 of those infected, for whom the only known risk factor was heterosexual contact, were women. See also Des Jarlais, *Heterosexual Partners: A Large Risk Group for AIDS*, *THE LANCET*, Dec 8, 1984 at 1346; Luzi, *Transmission of HTLV-III Infection by Heterosexual Contact*, *LANCET*, Nov. 2, 1985, at 1018 (in a study of 108 blood samples from healthy partners and relatives of seropositive individuals at risk of AIDS-related complex ("ARC") or AIDS (male homosexuals, hemophiliacs, and drug addicts), there was at least a 50% chance of male and female partners being infected); Ragni, *Heterosexual Partners of Hemophiliacs Must Refrain from Blood Donation*, *LANCET*, May 3, 1986, at 1033.

The other important mode of transmission is through the exchange of blood products, including transfusions with contaminated blood (which especially affects hemophiliacs), and intravenous drug users who share dirty, infected needles. Jones, *AIDS and Hemophilia: Morbidity and Mortality in a Well-Defined Population*, 291 *BRIT. MED. J.* 695 (1985). Interestingly, the safest blood bank for transfusions is from lesbians. *Gay Women and the Risk of AIDS*, *L.A. Times*, Apr. 2, 1986, at V1, col. 2.

The limited pathways of transmission are reflected by government statistics. *AIDS WEEKLY SURVEILLANCE REP.* July 27, 1987. The government statistics included: adult patients, 73.6% of whom are homosexual or bisexual men (10.2% of whom are also IV drug users); 16% are heterosexual IV drug users; 2% are recipients of whole blood transfusions or blood products; 1% are hemophiliacs; and 3% are heterosexuals with no identified risk factors (NIR).

13. Friedland, *Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis*, 314 *NEW ENG. J. MED.* 344 (1986) (household contacts who are not sexual partners or born to AIDS patients are "at minimal or no risk of infection with HTLV-III/LAV"). Infection control measures commonly used by health care personnel were remiss in these households. For example, eating utensils, drinking glasses and showers were commonly shared. *Id.* See also Sande, *The Case Against Casual Contagion*, 314 *NEW ENG. J. MED.* 380 (1986) [hereinafter *Against Casual Contagion*].

14. *Acquired Immunodeficiency Syndrome in Correctional Institutions*, 35 *MORBIDITY & MORTALITY WEEKLY REP.* 195, 198 (1986) (no reported cases of transmission between infected inmates and custodians).

15. The C.D.C. recommended that children infected with AIDS should be permitted to attend school, with limited precautionary guidelines related to the chil-

clearly a risk to health care workers who are exposed to the blood of infected patients.¹⁶

When the HIV is transmitted to another person, the incubation period before the virus manifests itself clinically can vary greatly, with the mean interval between the date of HIV infection and the onset of disease exceeding seven years.¹⁷ Between thirty and fifty percent of all who have tested positive for the virus actually develop clinical manifestations of AIDS.¹⁸ The Centers for Disease Control ("C.D.C.") state that individuals with the AIDS virus are clearly employable during the prolonged incubation period.¹⁹ The lag time between infection and diagnosis of the actual illness has innumerable consequences in the legal arena, some of which have been particularly addressed in relation to chemical exposures and occupational hazards.²⁰

B. *Prostitution, Intravenous Drug Use, and Transmissibility of the AIDS Virus*

In Africa, AIDS is a bi-directional heterosexually transmitted disease, with a nearly equal male-to-female spread ratio.²¹ In the

dren's age and capacity. *Education and Foster Care of Children Infected with HTLV-III/LAV*, 34 MORBIDITY & MORTALITY WEEKLY REP. 517 (1985).

16. *Update: HIV Infections in Health-Care Workers Exposed to Blood of Infected Patients*, 36 MORBIDITY & MORTALITY WEEKLY REP. 285 (1987). In this update, the C.D.C. documents the six currently reported cases of persons with HIV infection who provided care to HIV-infected patients and who denied other sources of exposure. Two of these six had extensive contact with the patient's blood, while the others involved needle-stick exposure to the infected patients. *Id.*

17. *Human Immunodeficiency Virus Infection in the United States*, 36 MORBIDITY & MORTALITY WEEKLY REP. 801 (1987). See also Fultz, *Persistent Infection of Chimpanzees with HTLV-III/LAV Virus: A Potential Model for AIDS*, 58 J. VIROLOGY 116 (1986). Since the HIV infection persists in an individual, persons previously infected continue to remain at risk for developing AIDS. However, Fultz found the number of infected peripheral blood cells in chimpanzees to decrease with time, thus illustrating an inverse relationship between the number of infectious cells and the time after infection. *Id.* at 118. This suggests that those infected with AIDS become increasingly less contagious over time. This is a critical finding in light of current disease control strategies such as quarantining, an issue that will be discussed in later sections of the article.

18. *AIDS Trends: Projections from Limited Data*, 230 SCIENCE 1018 (1986). Thus, it may be possible for an infected person to live a disease-free life. *Position Paper: Acquired Immunodeficiency Syndrome*, 104 ANNALS INTERNAL MED. 575 (1986).

19. *Position Paper: Acquired Immunodeficiency Syndrome*, 104 ANNALS INTERNAL MED. 575, 576.

20. The best example of the critical effects of latency periods is found in countless workmen compensation and product liability suits brought by asbestos workers dying of asbestos-related diseases after a ten to twenty year lag time. For these workers, this lag time has frequently complicated issues of causality and distribution of blame among typically numerous employers. See generally, PREVENTING ILLNESS AND INJURY IN THE WORKPLACE, U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT (1985).

21. Peterman, *Sexual Transmission of Human Immunodeficiency Virus*, 256 J.

United States, however, controversy remains as to the efficiency of female-to-male transmission. Male-to-female transmission is well-documented, yet there are few reported cases of infection from women to men.²² In an attempt to determine both the prevalence of HIV-antibody among prostitutes and the relative risk of female-to-male transmissibility attributable specifically to prostitution, the C.D.C. has conducted various cross-sectional studies of female prostitutes in collaboration with different organizations, including prisons, sexually transmitted disease ("STD") clinics, methadone clinics, and outreach efforts such as direct contacts in urban streets.²³

In terms of prevalence, the C.D.C. studies showed that the risk of contracting AIDS among female prostitutes in seven cities nationwide was similar to the risk of contracting AIDS in other women living in these cities.²⁴ "The prevalence of HIV antibody in prostitutes so far tends to parallel the cumulative incidence of AIDS in women in the seven research sites"²⁵ One reason the rate of infection among prostitutes does not exceed that of women generally is due to the traditional use of condoms by prostitutes.²⁶

Even with minimal numbers of infected prostitutes, efficient transmission of the virus from prostitute to "john" would have resulted in many more reported cases of white, heterosexual males with AIDS today, as the average street prostitute sees 1,500 custom-

A.M.A. 2222, 2224-25 (1986); Piot, *Acquired Immunodeficiency Syndrome in a Heterosexual Population in Zaire*, 2 LANCET 65, 68 (1984); Van de Perre, *Acquired Immunodeficiency Syndrome in Rwanda*, 2 LANCET 62, 65 (1984).

22. Peterman, *Risk of HTLV-III/LAV Transmission to Household Contacts of Persons with Transfusion-Associated HTLV-III/LAV Infection*, Program and Abstracts of the Second International Conference on AIDS (Paris, 1986). Compared to the nearly 1:1 male-to-female ratio of cases found in many African samples, the ratio in the United States is about 14:1. *Id.* Of the 180 cases spread by heterosexual transmission in the United States as of February, 1986, 152 of the cases were transmitted from a man to a woman. *Against Casual Contagion*, *supra* note 13, at 381. Doctor Sande noted:

[E]xamples of sexual transmission from a woman to a man are more difficult to document; only 28 cases have been reported in the United States [W]e still do not know the relative risk of spread of the virus through vaginal intercourse and are even less secure in our knowledge about transmission from women to men.

Id. As was noted above, the number of reported infected men by heterosexual transmission by mid-1987 has risen to 167. However, women still represent the large majority of those reportedly infected by heterosexual transmission. *Id.*

23. *Antibody to Human Immunodeficiency Virus in Female Prostitutes*, 36 MORBIDITY & MORTALITY WEEKLY REP. 157 (1987) [hereinafter *HIV in Female Prostitutes*].

24. *Id.* at 158.

25. *Id.*

26. *AIDs before the California Legislature Senate Select Committee on Substance Abuse and Select Committee on AIDs*, (Oct. 20, 1987) (remarks of P. Alexander, Co-Director of COYOTE, or Call Off Your Old Tired Ethics). COYOTE is the nation's largest prostitute's rights organization.

ers a year.²⁷ Moreover, the C.D.C. collaborative study concludes that "the major risk factor for HIV infection in prostitutes appears to be IV-drug use," and not infection by transmission from the male partner.²⁸ This is especially true of "street" prostitutes, fifty percent of whom are estimated to have a history of IV-drug use.²⁹ In the Los Angeles prison-based study, all of the women who were HIV-positive had a personal history of IV-drug use.³⁰

Current statistics reveal that prostitutes are an unremarkable source of AIDS infection, even given the strong correlation between prostitution and intravenous use of drugs. Nor is the virus spread effectively from the female prostitute to the customer. Yet, it is argued that a disproportionate focus on prostitutes as a source of infection diverts critical attention and resources from greater risk factors.

C. Testing Bias in Descriptive Epidemiological Data Gathering

One of the greatest hindrances present in any attempt to extrapolate patterns of transmissibility of the AIDS virus is the variation inherent in descriptive epidemiological data gathering. Contrasted with controlled laboratory testing, it is nearly impossible to eliminate all variables in conducting surveillance reports such as those used to learn of sources of AIDS exposure and viral transmission between individuals.

The most difficult problem in descriptive data gathering in AIDS patients is the resultant finding of "no identified risk" ("NIR") where the patient does not recall or disclose any source of infection.³¹ Many see the NIR category as an illustration of the

27. National Task Force on Prostitution, *Summary of Data on Prostitutes and AIDS*, August 1987 [hereinafter *Summary of Data*]. Even if only five percent of all street prostitutes in New York City in 1981 were infected with AIDS (the year the virus was initially identified), there would be 100,000 to 300,000 white, heterosexual, mid-aged, married men infected with AIDS today, assuming female-to-male transmission was at all efficient.

28. *HIV in Female Prostitutes*, *supra* note 23, at 159.

29. *Summary of Data*, *supra* note 27, at 2. "Street" prostitutes, as compared with prostitutes who work off the streets — in massage parlors, brothels and for escort services, comprise 10-20% of all prostitutes. *Id.*

30. *HIV in Female Prostitutes*, *supra* note 23, at 158; *Summary of Data*, *supra* note 27, at 2. Similarly, a C.D.C. study in a Miami prison found that each of the 47 women who tested positive had either a personal history of use of intravenous drugs, or had a relationship with a man who had a history of drug use. *Id.* at 3. These results can be compared with the C.D.C. findings in a Nevada brothel, where all 34 women tested negative. *Id.* at 2. Prostitutes are legally employed in Nevada brothels and drug use is less common. In addition, health standards, which include regular testing for STD's and the use of condoms, are enforced.

31. Lifson, "No Identified Risk" Cases of Acquired Immunodeficiency Syndrome, Program and Abstracts of the Second International Conference on AIDS (Paris, 1986).

shortcomings and bias built into the testing process,³² and point in particular to the detrimental effects of relying on a standardized questionnaire that uses highly explicit language about sexual practices.³³ In essence, the test may cause an already reticent individual to deny any history of homosexual behavior or drug use, effectively negating the value of the study and creating another NIR.³⁴

D. Antibody Screening Tests—How Accurate are They?

The most widely used test to detect antibodies to the AIDS virus is the enzyme-linked immunosorbant assay, or E.L.I.S.A. blood test.³⁵ The test was originally approved by the Food and Drug Administration in 1985 to screen blood and plasma for HIV-contami-

32. *Id.*

33. Recent data from the New York City Department of Health AIDS Surveillance Unit indicates that of 7600 known cases of AIDS in New York City, 156 appear to have been contracted through heterosexual transmission. Of these, 154 are females. Only two men were found who stated their exposure to AIDS was due to sexual contact with woman at risk of AIDS. Interview with Dr. Rand Stoneburner, Director, AIDS Surveillance Unit, N.Y.C. Department of Health (Dec. 18, 1986) [hereinafter Stoneburner Interview]. In the telephone interview, Dr. Stoneburner and a social worker who works with NIR AIDS cases, discussed with the author what they consider to be difficult sources of bias in the epidemiological research they conduct. This bias, they explained, is due to the obvious barrier in presenting the individual with a standardized questionnaire that only increases the uneasiness of a NIR subject. For example, two of the questions are:

2a. If we define sexual intercourse as the entrance of your penis into another person's mouth, anus, or vagina, or the entrance of a penis into your mouth, anus or vagina, how old were you when you first had sexual intercourse with a female (woman or girl)?

b. How old were you when you began to have regular intercourse with a female?

3. How old were you when you first had sex with a male (man or boy)?

How old were you when you began to have regular intercourse with a male?

There is only one form, regardless of the patient's sex. The social worker stated that the administration of such a matter-of-fact questionnaire to someone dying of AIDS is an unpleasant task. The first sixteen times she interviewed people with this form, she received no positive responses. The social worker noted that such a form is useless in obtaining information from a person who has already denied participating in any high-risk activity. She therefore no longer uses the form.

34. Stoneburner Interview, *supra* note 33. The social worker noted that most NIR patients are unwilling to admit homosexual or bisexual behavior, particularly the married men. After the media announced the role of Haitian prostitutes in spreading AIDS, the social worker saw a marked increase in NIR patients attributing their exposure to prostitutes. She noted that she has had to learn how to detect exaggeration in these instances. The social worker said that 63% of those who initially link their AIDS exposure with prostitutes eventually changed their answers after she spent time with them and won their trust. In particular, three men who recently claimed their AIDS was due to sex with Haitian prostitutes later admitted their past homosexual relationships.

35. The test assays for the presence of antibodies formed by the body's immune system in response to the presence of the foreign HIV antigen cells. In the near future, this test will likely be replaced by a newer, more precise test which detects the presence of the virus itself. Interview with Dr. Don Francis, AIDS Advisor, C.D.C. (April 15, 1987) [hereinafter Francis Interview].

nated donations.³⁶ The ramifications of extending this test from blood banks to individuals is the focus of this section.

If the test results are positive, the individual has AIDS viral antibodies and is "seropositive." A significant drawback of the test is that it is sensitive only to the buildup of AIDS antibodies, and as a result, most victims will not test positively until between three weeks and six months after the date of infection.³⁷ In the event of a positive finding, the test is usually repeated several times to verify the result, and is followed up by the confirmatory, second-tier Western blot test.³⁸ The specificity of the repeated E.L.I.S.A. in conjunction with the Western Blot has improved remarkably over the last two years, and is currently 99 percent, or its joint false positive rate is .01 percent.³⁹ Nonetheless, false positive results do occur.⁴⁰ The production of a false positive result in an individual being tested for a sexually transmitted disease may lead to unneeded medical costs and anguish. Yet, this cannot compare with a false diagnosis of being an AIDS carrier. The effects of learning that one carries a lethal virus are much greater, including psychological harm⁴¹ and the stigmatization and privacy invasions where this knowledge is made accessible to local public health authorities.

The two key criteria that must be understood so as to assess the likelihood of producing false positive test results are the sensitivity of the test—or the accuracy of the test in correctly identifying those with the condition⁴²—and the prevalence of the condition in the population that is being tested. This latter criterion is especially important in AIDS testing because the frequency of the disease is not uniformly distributed and the potential pool of test subjects could include the entire population.⁴³

36. *Update: Serologic Testing for Antibody to Human Immunodeficiency Virus*, 36 MORBIDITY & MORTALITY WEEKLY REP. 833, 833 (1988) [hereinafter *Update*].

37. Francis Interview, *supra* note 35.

38. *See generally, AIDS Serology Testing in Low and High Risk Groups*, 253 J. A.M.A. 3405 (1985).

39. *Update, supra* note 36, at 834.

40. *See generally Meyer, Screening for HIV: Can We Afford The False Positive Rate?* 317 NEW ENG. J. MED. 238 (1987) [hereinafter *Meyer*] (widespread HIV-antibody testing, which must include a large percentage of low-risk individuals, should be approached with extreme caution due to the possibility of false positive rates). False positives is also an issue for both serologic testing for syphilis and tuberculosis testing. Tuffanelli, *Fluorescent Treponemal Antibody Absorption Tests: Studies of False-Positive Reactions to Tests for Syphilis*, 275 NEW ENG. J. MED. 258 (1967). The number of false positive reactions depends on the population being studied; this is a crucial point that will be discussed shortly. *See id.* at 260-61.

41. *The Hidden Risks of Antibody Screening*, Village Voice, May 27, 1986, at 29.

42. A. LILLENFIELD & D. LILLENFIELD, FOUNDATIONS OF EPIDEMIOLOGY 151 (1980). Sensitivity is the ratio of those testing truly positive compared to all testing positive, both true and false. *Id.*

43. The C.D.C. formally defined "persons at increased risk" in November, 1985.

E. The Sensitivity of HIV Testing

The introduction of expensive confirmatory testing, such as the Western Blot, serves an important function in improving the sensitivity of the HIV test. Confirmatory tests typically use a different testing medium to distill out false positive results gathered from the initial test. This helps increase overall test sensitivity. Where data exists for both the specificity of the E.L.I.S.A. and Western Blot tests, a joint false positive rate can be calculated.⁴⁴

However, the labor intensive laboratory techniques used in assessing the results of Western Blot tests are not fully standardized, leading to variation in the interpretation of results from one laboratory to the next.⁴⁵ As a result, various laboratories examining the same specimens may arrive at different conclusions regarding the number of true positive test results.⁴⁶ Moreover, an initial positive finding can produce negative results with the same patient using the Western Blot.⁴⁷ Also, a widespread screening program is more likely to produce variances in results due to the increased number of laboratories and techniques used.⁴⁸ Widespread and decentralized testing also hinders standardization because the level of skill among lab technicians will vary, and smaller labs often have inferior quality equipment.⁴⁹

F. The Prevalence of HIV Infection

The prevalence or rate of infection in a given population also greatly shapes the predictive value of the test. As the prevalence of the infection decreases in the chosen population, the likelihood that

This list included "homosexual and bisexual men, intravenous ("IV") drug abusers, persons transfused with contaminated blood or blood products, heterosexual contacts of a person with HTLV-III/LAV infection, and children born to infected mothers." This list formerly included male and female prostitutes. 34 MORBIDITY & MORTALITY WEEKLY REP. 681, 682 (1985). However, the definition of "high risk" groups has recently been modified to include those involved in high risk *behavior*, as members of the less educated heterosexual and teenage communities are also at risk, depending on individual sex practices. *Symposium on AIDS Risk Reduction*, September 15, 1986, Los Angeles.

44. Meyer, *supra* note 40, at 239. Thus, sensitivity is the complement of the false positive rate, and the two respective percentages will always equal one. See *infra* notes 51-54 and accompanying text for an illustration of how this equation works.

45. Meyer, *supra* note 40, at 238. This problem is inherent in Western Blot tests, as a positive finding is based on the identification of several virus specific protein bands which react with the HIV virus. *Update, supra* note 36, at 834. The exact location of these bands is disputed, and where fewer bands are present, the results are "indeterminate," and thus the results may be viewed on a continuum from positive to indeterminate to negative based on how many bands the tester can find. *Id.*

46. *Update, supra* note 36, at 837.

47. Meyer, *supra* note 40, at 239.

48. *Id.*

49. *Id.*

an individual with a positive result actually has the condition will *decrease*.⁵⁰ The C.D.C. revealed that the prevalence of the HIV virus is highest among homosexuals and IV drug users, with rates in these two categories ranging from five to seventy percent.⁵¹

While the accuracy of the repeated E.L.I.S.A. in conjunction with the Western Blot has improved remarkably over the last two years,⁵² the testing of a large cross section of the population could nonetheless produce highly inaccurate results.⁵³ The reason these results occur is due to the population chosen for the test. Widespread testing, especially of lower-prevalence populations will produce a high rate of false positives.⁵⁴ Thus, as we move from ideas of testing gays and IV drug users to groups of lower disease incidence, such as immigrants, prisoners, prostitutes, veterans and to applicants for marriage licenses, the false positive rate will escalate, greatly diminishing the value of the test itself as a useful public health measure while simultaneously infringing the rights of healthy individuals who fall into the false positive statistics.

II. THE HISTORY OF QUARANTINE LAWS AND TESTING IN THE UNITED STATES

This section of the article traces the evolution of public health decision making from the late 1800s through the Progressive era (approximately 1890-1920). It is during this period that the courts increasingly deferred to state police powers to quarantine individuals.

A. *Early Quarantine Decisions*

The concept of broad, discretionary state police powers created a framework for quarantining individuals around the turn of the

50. This phenomenon is known as Bayes theorem, and allows the calculation of the predictive value of a positive test, or the determination of the likelihood that a person with a positive test actually has the condition. *Id.*

51. *Summary: Human Immunodeficiency Virus, Year 1987*, 36 MORBIDITY AND MORTALITY WEEKLY REP. 1, 2 (1987). The rate will vary, depending on the location. The rate for homosexuals is highest in San Francisco, while the rate for IV drug users is highest (50-60%) in New York City. *Id.* The infection rate among multiple transfusion recipients is 5%, .16% among army recruits, and .01% for female blood donors. Meyer, *supra* note 40, at 239-40.

52. *Update, supra* note 36, at 834.

53. Consider the following hypothetical. 100,000 female blood donors take the test. Female blood donors have an infection rate of .01%. *See supra* note 51. At this rate, 10 of the 100,000 women tested will test positive. Since the false positive rate is also .01%, the test will produce 10 false positive results from the remaining 99,990 women. The total results would reveal that 20 women have AIDS, when in fact only 10 are infected. Thus, after administering an extremely sensitive array of tests, fifty percent of those diagnosed as AIDS carriers do not carry the virus at all.

54. *See supra* note 53.

twentieth century, especially during World War I. The power to quarantine was and still is one of several undeniable and exclusive rights of the states to police their internal affairs.⁵⁵ Tuberculosis and venereal disease sufferers were especially targeted.⁵⁶ In response to the smallpox epidemic in the early 1900s, the United States Supreme Court in *Jacobson v. Massachusetts* molded an early and lasting decision supporting state police powers in the area of disease control.⁵⁷ The court upheld a smallpox vaccination statute over plaintiff's due process argument that such a compulsory vaccination infringed on his personal liberty.⁵⁸ As the state increasingly flexed its powers to quarantine those afflicted with tuberculosis, syphilis, and gonorrhea, several issues regarding the purpose of quarantine and the due process rights of disease victims surfaced. In the next section, these issues will be examined specifically with regard to

55. See generally L. PARKER & R.H. WORTHINGTON, *THE LAW OF PUBLIC HEALTH AND SAFETY, AND THE POWERS AND DUTIES OF BOARDS OF HEALTH* 2, 3 (1892) (police powers included safeguarding citizens against disease). The Supreme Court's decision in *Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878), affirmed this power: "That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another." *Id.* at 667. This regulatory power included "inspection laws, quarantine laws, health laws of every description" *New York v. Milan*, 36 U.S. 102, 141-42 (1837).

56. P. ADAMS, *HEALTH OF THE STATE* 92-147 (1982). Tuberculosis and venereal diseases, continuously present in both the United States and Britain in the nineteenth century, escalated during World War I, attacking young men and women of all classes, greatly draining manpower during the war. *Id.* at 92-96, 115-17. In 1937, tuberculosis was the most common cause of death of those between ages 10-40 in Britain. *Id.* at 95. Almost half of all women who died between ages 20-25 had tuberculosis. *Id.* The reality of the disease, combined with the strong influence of reformers and social critics of the Progressive era, created a radical force nationwide to eradicate "social evils" and adhere to the duties of moral, chaste, and healthy individuals. See generally P. MORROW, *SOCIAL DISEASES AND MARRIAGE; SOCIAL PROPHYLAXIS* 331-81 (1904) (hygienic training and moral education for young men were advocated as a means of preventing the spread of venereal disease); A. BRANDT, *NO MAGIC BULLET: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880* (1985) (the repression of prostitution and education aimed at restoring restraint between the sexes were the primary methods of dealing with venereal disease) [hereinafter BRANDT].

57. 197 U.S. 11 (1905). The court plainly recognized the authority of a state to enact quarantine laws and "health laws of every description," *Id.* at 25, citing *Gibbons v. Ogden*, 22 U.S. 203 (1824).

58. A litany of cases upholding the state's police power to quarantine were decided along with *Jacobson*. In each case, the enforcement of state powers was entrusted to the local health boards. *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Bd. of Health*, 186 U.S. 380 (1902); *Smith v. St. Louis & S. W. R. Co.*, 181 U.S. 248 (1901); *State v. Rackowski*, 86 Conn. 677, 86 A. 606 (1913); *Daniel v. Putnam County*, 113 Ga. 570, 38 S.E. 980 (1901); *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 134 N.E. 815 (1922); *Ex parte McGee*, 105 Kan. 574, 185 P. 14 (1919); *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 11 N.E. 929 (1887); *Rock v. Carney*, 216 Mich. 280, 185 N.W. 798 (1921); *In re Smith*, 146 N.Y. 68, 40 N.E. 497 (1895); *Ex parte Roman*, 19 Okla. Crim. 235, 199 P. 580 (1921); *Kirk v. Wyman*, 83 S.C. 372, 65 S.E. 387 (1909); *Ex parte Hardcastle*, 84 Tex. Crim. 463, 208 S.W. 531 (1919).

prostitution.

By the early 1920s, the increasing difficulties of determining who should be quarantined led to judicial intervention and limitation of the states' exclusive police powers. This occurred when plaintiffs began arguing that quarantining was unconstitutional because it was based on "unreasonable" grounds,⁵⁹ fear of disease,⁶⁰ and "mere suspicion" of contagion.⁶¹ These arguments questioned the "preventative" aspect of the quarantine laws and left the definition of who should be confined less clear.

The Illinois Supreme Court attempted to clarify exactly who was eligible for quarantining in *People v. Robertson*:

It is not necessary that one be actually sick, as that term is usually applied, in order that the health authorities have the right to restrain his liberty by quarantine regulations. Quarantine is not a cure—it is a preventative. As the term is used in this opinion, quarantine is the method used to confine the disease within the person in whom it is detected, or to prevent a healthy person from contracting the infection Quarantine, in the very nature of the regulation, is not a definite or uniform measure, but it must vary according to the subject. One of the important elements in the administration of health and quarantine regulations is a full measure of common sense. It is not necessary for the health authorities to wait until the person affected with a contagious disease has actually caused others to become sick by contact with him before he is placed under quarantine.⁶²

The court, however, failed to clarify who was eligible for quarantining. Instead, the court knowingly created an open-ended definition of quarantinability. The court noted, "It is not necessary that one be actually sick" It is possible that the court derived this open-ended definition—encompassing virtually anyone—with the idea of maintaining the supremacy and discretion of the state police power over individuals.⁶³ Another explanation for the court's evasive definition could be that little was known about the etiology of various diseases, and even less about accurate detection and testing measures. In either case, the court left behind two clauses to smooth the

59. *Wragg v. Griffin*, 185 Iowa 243, 170 N.W. 400 (1919); *Welch v. Shepherd*, 165 Kan. 394, 196 P.2d 235, 243 (1948); *Rock v. Carney*, 216 Mich. 280, 185 N.W. 798, 799-800 (1921).

60. *Pierce v. Dillingham*, 203 Ill. 148, 67 N.E. 846, 849 (1903).

61. *Rock v. Carney*, 216 Mich. 280, 185 N.W. 798 (1921). Also, several courts looked to the criteria of "exposure" in determining if the quarantine violated due process. At least one court stated that quarantine could be based on mere exposure. *In re Smith*, 146 N.Y. 68, 69, 40 N.E. 497, 498-99 (1895).

62. 134 N.E. 815, 819-20 (1922).

63. The court prefaced this warning with language supportive of the state's police power, however, noting that generally such laws or regulations "are not subject to judicial review." *Id.* at 817. This may be unlikely, as elsewhere in the decision the court warns of the possibility of judicial intervention in the future where "regulations adopted for the protection of public health are arbitrary, oppressive and unreasonable." *Id.* at 817.

edges. First, the court left quarantining decisions in the hands of local health authorities by stating that quarantine "is not a definite or uniform measure, but it must vary according to the subject."⁶⁴ The second disclaimer follows closely: "One of the important elements in the administration of the health and quarantine regulations is a full measure of common sense."⁶⁵ Given the limited available science, the vagueness injected into a layman's definition of eligibility for quarantine may have been the most desirable option. Regardless, this and earlier decisions ultimately left local health officials open to attack due to the nearly unlimited scope of the quarantine laws.

The appellate court's decision in *Jew Ho v. Williamson*⁶⁶ represented an early attempt to undercut the broad-based police powers, and in so doing, set a precedent for the judicial intervention into state and local quarantine regulations. In response to the discovery that nine people allegedly died from bubonic plague, the San Francisco Board of Supervisors passed an ordinance empowering the city health officials to "quarantine persons, houses, places and districts within this city and county, when in its judgment it is deemed necessary to prevent the spreading of contagious or infectious diseases."⁶⁷ The health officials deemed it necessary to quarantine over 10,000 people in a twelve block area, including petitioner Jew Ho.⁶⁸

Based on the facts that several of the quarantined blocks displayed no evidence of the plague, the court found that a quarantine including disease-free blocks would actually offer the disease the opportunity "to enlarge its sphere and increase its danger and its destructive force . . . [t]his quarantine is not a reasonable regulation to accomplish the purposes sought. It is not in harmony with the declared purpose of the board of health."⁶⁹ The court held that while a municipal regulation may, on its face, be fair, it may be "rendered invalid on constitutional grounds by the manner in which it is administered by the public authorities charged with its execution."⁷⁰ By breaking in two the question of fairness of quarantining, the court avoided an unpleasant direct confrontation with the state's closely guarded authority to quarantine.

Thus, without ever questioning the source of power to quaran-

64. *Id.* at 820.

65. *Id.*

66. 103 F. 10 (N.D. Cal. 1900).

67. *Id.* at 12.

68. *Id.* at 12-13.

69. *Id.* at 22-23. The court pointed out that the overinclusiveness of the quarantine was actually detrimental, unnecessarily exposing healthy people to disease. *Id.* at 22. Thus, far from being harmless, the quarantine increased the danger of spreading disease.

70. *Id.* at 23-24.

tine, the court dismantled the regulation on procedural due process grounds. The court went further by noting that most houses in the twelve-block area belonging to non-Chinese families were excluded from the quarantine. The court seized this opportunity to invoke the equal protection clause of the fourteenth amendment: "The evidence here is clear that this is made to operate against the Chinese population only, and the reason given for it is that the Chinese may communicate the disease from one to the other."⁷¹

The *Jew Ho* decision illustrated that the quarantine regulation was oppressive, and that it exploited the Chinese population. In so doing, the court effectively revealed an irrational interpretation of public health laws and unveiled the underlying rationale for the quarantine: racial discrimination.⁷²

B. Prostitution, Morality, and Disease

The sexual regulation of prostitutes was a major focus of the Progressive era.⁷³ Some argue that the moralistic reform movement which defined this era was based on society's heightened need to collectively determine a common sense of good and evil, of normal and taboo.⁷⁴ As will be shown, dating back to the early 1800s and especially through the 1920s, sexual disease represented a manifestation of contamination and corruption in society, and as a result was reflected largely as an example of the immorality of prostitutes. These cultural and social overtones, it is argued, are inextricably tied to society's interpretation of disease, and created a pattern that has resurfaced with the outbreak of AIDS.⁷⁵

71. *Id.* at 23.

72. To add strength to the equal protection argument, the court necessarily stepped outside of the public health area in search of an analogous situation. The court chose *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), a decision upholding an equal protection claim on behalf of Chinese launderers because a city ordinance was administered "with an evil eye and unequal hand," even "[t]hrough the law itself be fair on its face and impartial in appearance. . . ." *Jew Ho*, 103 F. at 23, quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

73. See generally Feldman, *Prostitution, the Alien Woman, and the Progressive Imagination, 1910-1915*, 19 AM. Q. 192 (1967) (much of the focus of the movement to eliminate prostitution in the early 1900s was directed at immigrants); CONNELLY, *THE RESPONSE TO PROSTITUTION IN THE PROGRESSIVE ERA* 91-113 (1980) [hereinafter CONNELLY]; BRANDT, *supra* note 56.

74. See M. DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO* (1966) [hereinafter DOUGLAS]. See generally Walters, *Sexual Matters as Historical Problems: A Framework of Analysis*, 6 SOCIETAS 157.

75. See generally S. SONTAG, *ILLNESS AS METAPHOR* (1978) (discussing the use of metaphors in relation to cancer and tuberculosis and societal views of those diseases) [hereinafter SONTAG].

1. *The Role of Disease in the Moralistic Equation*

Moralists of the nineteenth and early twentieth centuries based the integrity of social life on repression and restraint.⁷⁶ Sexual purity and family life were central values. This ideal, however, embodied a double standard: one set of values for the chaste woman, and another for the male.⁷⁷ This standard remained intact through the Progressive era, and symbolized a split between moralism and rationalism in that period.⁷⁸

To date, prostitutes clearly fall outside the delineated, required behavior for women and as such represented the evil/taboo half of the moralistic equation. Cultural anthropologist Mary Douglas argues that this bifurcation in society allows us to create a sense of legitimacy in our societal roles:

For I believe that ideas about separating, purifying, demarcating and punishing transgressors have as their main function to impose system on an inherently untidy experience. It is only by exaggerating the difference between within and without, above and below, male and female, with and against, that a semblance of order is created.⁷⁹

Thus the presence of taboo, of "social evil," allows us to sense an opposing societal norm of good versus bad.⁸⁰

Within this framework, the moral half of society endowed venereal disease, highly prevalent in the Progressive period, with its own set of social constructs.⁸¹ Because there was no known treatment for venereal diseases, they were not just medical phenomena. Instead, they symbolized dirt, pollution, and ultimately were envisioned as punishment for the sexually irresponsible.⁸² Diseases with unknown causes and treatment took on even higher significance.⁸³

Disease evolved into a metaphor for those considered to be socially unacceptable.⁸⁴ In this sense, prostitution became more than the focus of blame for the spread of venereal disease. Prostitution

76. See CONNELLY, *supra* note 73, at 91-113.

77. See Reiss, *The Double Standard in Premarital Sexual Intercourse, A Neglected Concept*, 34 SOCIAL FORCES 224-230 (March 1956); F. HENRIQUES, MODERN SEXUALITY (1968). Henriques discusses how the double standard concept originated in Victorian sexual ethos. "The cornerstone of Victorian sexual morality," according to Henriques, was the manifest "chastity of the wife and the sexual freedom of the husband." *Id.* at 226.

78. *Id.* at 304-19. See generally PIVAR, THE PURITY CRUSADE 204-249 (1973) [hereinafter PIVAR].

79. DOUGLAS, *supra* note 74, at 4.

80. See generally, BENJAMIN, PROSTITUTION AND MORALITY (1964).

81. BRANDT, *supra* note 56, at 5.

82. See DOUGLAS, *supra* note 74, at 5. See also SONTAG, *supra* note 75, at 58.

83. SONTAG, *supra* note 75, at 60. Sontag also noted how moralists have always linked morality with disease, *id.* at 54, and further extended the metaphor to include unpopular philosophies and political views. *Id.* at 73-75.

84. SONTAG, *supra* note 75, at 58.

came to be viewed unto itself with horror as a social evil which in turn validated all sexual behavior not associated with it, filling a gaping social space and giving definition and order to society by creating a new social construct.

According to Professor Douglas, ideas about contagion, dirt, and disorder are natural catalysts from which to develop our own sense of purity and danger.⁸⁵ Our perceptions are based on self interest, and the introduction of disorder (e.g., disease) represents a natural "chaos of shifting impressions," out of which "each of us constructs a stable world in which objects have recognizable shapes, are located in depth, and have permanence."⁸⁶ With time and experience, each of us develops a conservative bias, based on a system of labels, and these labels "give us confidence."⁸⁷ The pattern is accumulative, as we construct and accommodate each of our experiences to be consistent with the past and thus augment our sense of confidence.⁸⁸ In this setting, the political and judicial institutions undertook their respective roles to repress taboo sexual behavior.

2. Attempts At Sexual Regulation of Prostitution

The fact that the anti-prostitution and anti-venereal disease movements were commonly called the "vice crusade" illustrates the inevitable mixing of morality and medicine.⁸⁹ Where scientific knowledge was missing, prostitutes and woman generally received most of the blame for spreading venereal disease. For example, nineteenth century scientists believed woman could spread gonorrhea without having the disease,⁹⁰ while some thought women innately possessed the disease.⁹¹ In this light, women symbolized contamination and a permanent threat to society.

Even after the discovery of causes and contagion patterns of ve-

85. Douglas, *supra* note 74, at 36.

86. *Id.*

87. *Id.*

88. *Id.*

89. In fact, the label "social disease" grew out of the notion that venereal diseases were social evils, "cruelly linking the debasing harlot with the virtuous wife." See generally P. MORROW, *SOCIAL DISEASES AND MARRIAGE* (1904) [hereinafter MORROW]. This stemmed in part from the lack of knowledge regarding the cause of syphilis and gonorrhea during the early nineteenth century. As was true with past attempts to dispel the false ideas surrounding HIV contagion, it is apparent the separation of myth and science is a difficult undertaking. See *supra* notes 76-88 and accompanying text for a discussion of society's ability to reconstruct experiences to fit most comfortably with its own biases.

90. MORROW, *supra* note 89, at 84.

91. *Id.* (quoting the scientist Verchere): "One denied the right to a woman *not* to have gonorrhea; she possessed it *innately*, permanently, and imminently. She was contagious without having been contagioned. The woman was considered dangerous *ipso facto*, and she contained in herself all the elements necessary to give gonorrhea." *Id.*

nereal diseases, the stigmatization based on the idea of filth due to disease continued.⁹² The targeted population narrowed from women in general to the social horror of prostitution. With new knowledge about the spread of gonorrhoea, an even clearer split arose based on the moralistic patterns of good against evil, because the majority of the "chaste" women remained disease-free. This new bifurcation furthered the anti-vice movement.

The early goal of vice movements was to physically segregate the "red-light district" from the rest of the city.⁹³ Vice commissions, set up in large cities, hoped to bring about the demise of "the commercialization of urban prostitution," drawn in by the "white slave trade."⁹⁴ In line with the anti-monopolistic tone of the Progressive era, urban prostitution was often referred to as "vice trusts."⁹⁵ One of the earliest pieces of legislative regulation was, fittingly, aimed at limiting the traffic of prostitution across state borders.⁹⁶

Beyond the Mann Act, no other explicit, legislative attempts were made to regulate prostitution. This may have been due largely to the inability of feminists, progressive reformists and rationalists—a combined coalition that grew during the Jacksonian era—to find compromise grounds between two opposing policies: state toleration of prostitution, with regulation, known as reglementation, and complete eradication of the "social evil."⁹⁷ Essentially, "reglementa-

92. BRANDT, *supra* note 56, at 26-29.

93. See KNEELAND, *COMMERCIALIZED PROSTITUTION IN NEW YORK CITY* (1913). This study was one of four financed by John D. Rockefeller, Jr., who personally originated, financed, and chaired the New York City Bureau of Social Hygiene. Studies conducted in other major cities also focused on urban prostitution, some analyzing economic and social conditions of cities and finding them to be large factors in "tempting" young, innocent girls into the trade:

The life of an unprotected girl who tries to make her living in a great city is full of torturing temptations. She faces the problem of living on an inadequate wage. She quickly learns of the possibilities about her, of the joys of comfort, good food, entertainment, attractive clothes. Poverty becomes a menace and a snare. One who has not beheld the struggle or come in personal contact with the tempted soul of the underpaid girl can never realize what the poverty of the city means to her. One who has never seen her bravely fighting against such fearful odds will never understand. A day's sickness or a week out of work are tragedies in her life. They mean trips to the pawn-brokers, meager dinners, a weakened will, often a plunge into the abyss from which she so often never escapes.

Committee of Eighteen Citizens, *Report of the Moral Survey Committee on the Social Evil* 52 (1913).

94. *Id.*

95. See BRANDT, *supra* note 56, at 33. Brandt writes, though, that there was little solid evidence of a fully organized traffic in prostitution. *Id.* at 34.

96. The Mann Act was passed in Congress in 1910, and forbade the transportation of women across state lines for "immoral purposes." *Id.* The Mann Act, although clearly ineffective, may have nonetheless served an important function as symbolic legislation, reinforcing social norms.

97. Weiss, *The Prostitution Problem in its Relation to Law and Medicine*, 25 J. A.M.A. 2071, 2073 (1906). The author notes that regulation, attempted in five major

tion" would have meant registration and frequent examinations by physicians of prostitutes, with the practice of prostitution limited to specific zones in cities. Advocates of relementation included European physicians who were considered the most advanced in the field of modern hygiene.⁹⁸ The Progressives, on the other hand, favored complete repression and abatement of prostitution, and considered the regulation of prostitution as synonymous with tacit societal approval of the practice.⁹⁹ By the 1830s, women's organizations began to coalesce, nearly all of them taking a strong stand to reform behavior and suppress prostitution.¹⁰⁰

The debate over the Page Law in 1910 illustrates the paradox between attempted regulation and the reform of sexual practices, and the undeniable result of reinforcing the status quo of double standards and sexual inequality. The New York State Legislature created the Page Law, or Section 79, to slow venereal disease by forcing prostitutes to undergo mandatory testing when arrested for soliciting.¹⁰¹ If infected, the prostitute was detained until she was no longer contagious. Despite the fact that this law punished prostitutes, but not their customers, women's organizations favored the Page Law.¹⁰² This served to increase the moralistic division between

cities in the United States between 1872 and 1902 "signally failed," and cited the reasons for this, including the difficulty of regulating "clandestine prostitution," the arbitrary power given to the police and the "impossibility for an inscribed woman to return to orderly society." *Id.* at 2074. See also FLEXNER, *THE REGULATION OF PROSTITUTION IN EUROPE* 3-14 (1914).

98. Harwood, *A Practical Lesson in Reglementation*, 25 J. A.M.A. 2076 (1906); see also Smith-Rosenberg, *Beauty, the Beast and the Militant Woman: A Case Study in Sex Roles and Social Stress in Jacksonian America*, 23 AM. Q. 562, 568-72 (1971) [hereinafter Smith-Rosenberg].

99. Committee of Fifteen Citizens; *The Social Evil* 85 (1902); see also Hichborn, *Arguments Which Are Used Against the California Redlight Abatement Act* (1915); The Committee of Fourteen, *The Social Evil in New York City* (1910); Congressional Hearings on Kenyan Injunction Act, *Abatement of Houses of Ill Fame* (Dec. 9, 1912).

100. Smith-Rosenberg, *supra* note 98, at 564-66; see also J. NEWTON, *SEX AND CLASS IN WOMEN'S HISTORY* 8-13 (1983). Although women in Jacksonian America had virtually no power or rights, several cohesive, activist groups grew in strength in the mid to late 1800s, including the Moral Reform Society, the Female Reform Society, and the Ladies National Association. *Id.*

101. See Mayer, *Clause 79 of the Page Bill and the Sanitary Supervision of Prostitution*, 1 Soc. Dis. 20 (Oct. 1910).

102. Vicinius, *Sexuality and Power: A Review of Current Work in the History of Sexuality*, 8 FEM. STUDIES 133, 134 (1982) [hereinafter Vicinius]. In retrospect, feminists realized that women who supported repressive laws like the Page Law actually harmed the women's movement in two important ways. Such laws "separated the prostitute from her community," and made it difficult for her to return. This disrupted an already tenuous support system available for the poor, and led to the professionalizing of prostitution. *Id.* at 143.

Also, detention and mandatory testing led to prostitutes being unfairly blamed for the spread of venereal disease, rather than to effective disease control. Men were not subject to these procedures. By supporting these laws, feminists helped further the existing double standard for sexual behavior. Smith-Rosenberg points out that

"pure" and "impure" women and confirmed the idea that only females were sick, infected, and polluted.¹⁰³

C. Quarantining, Testing, and the Role of the Courts

When war came to the United States in 1916, prostitution and venereal disease were viewed as critical threats to the health and effectiveness of the troops.¹⁰⁴ Between 1916 and 1918, regulatory efforts to control venereal disease surged, resulting in increased legislative activity to quarantine prostitutes.¹⁰⁵ Again, attempted reforms had little impact, as the venereal disease rate in the military and elsewhere remained high.¹⁰⁶ Nonetheless, courts upheld quarantining and testing, adopting the thinking of the Progressive moralists

the purpose of the Female Moral Reform Society was to "[assert] . . . female moral superiority and the right and ability of women to reshape male behavior." Smith-Rosenberg, *supra* note 98, at 578. Ironically, the focus of these groups was on the examination of male behavior, and not on the idea that "women could forge their own sense of identity." *Id.* It appears that most reform movements actually supplement the existing power structure of the white patriarchy. Vicinius, *supra* at 143.

103. Vicinius, *supra* note 102, at 133-43. Two other significant ideas arose in the debate over the Page Law. One of these approached the problem from an economic viewpoint, arguing that mandatory testing and detaining prostitutes did little to change the supply of prostitutes, but did create an illusory view that the quality and safety of the prostitute's product was raised. Seligman, *The Sanitary Supervision of Prostitution*, 2 N.Y. SOC. HYGIENE SOC'Y 10-14 (Jan. 1911). The author's analysis, though not coming from an economic perspective, fits into Seligman's theory quite well: The symbolic value of fear and filth of venereal disease is a necessary ingredient in the fight for sexual morality, and as such, prostitution must be perpetuated, even at the cost of the prostitute's health.

The only analysis that capably avoided the double standard was that of Prince Morrow, a physician and leader in the field of public health and preventative medicine at that time. See Keyes, *Morrow Memorial Series: The Pioneer Qualities of Dr. Morrow as a Social Reformer*, 5 (1916); MORROW, *supra* note 89. Morrow believed that the Page Law was violative of a prostitute's liberties, and that forced hospital stays were oppressive. Morrow, *The Sanitary Aspects*, 1 N.Y. SOC. HYGIENE SOC'Y 6, 7 (Oct. 1910). He also spoke out against the double standard:

The most distinctive character of this bill, then, is that of class legislation; speaking broadly, it is based upon sex. It is directed against a particular class of women for the protection of a particular class of men. Not the good citizens who lead regular lives and whom the prostitute with her cortege of infections carries no menace, but for the protection of the licentious class of men who seek these women for immoral purposes.

Id. at 8.

104. Pfeiffer, *Social Hygiene and the War*, 4 SOC. HYGIENE 417-18 (1918). Pfeiffer noted that "the Army and Navy could not be clean or free from disease if the community into which soldiers and sailors went when on furlough were harboring prostitutes ready to spread disabling contagion . . ." *Id.* at 418.

105. See Seymour, *A Year's Progress in Venereal Disease Control*, 5 SOC. HYGIENE 49 (1919); Mayer, *Social Hygiene Legislation in 1917*, 5 SOC. HYGIENE 67 (1919). In 1917 alone, thirteen bills were introduced regarding quarantine measures, ten of which became law that year. Nearly 300 "social hygiene measure" bills were introduced in 1917, more than 160 of which were enacted that year. The state of Wisconsin alone submitted 36 bills. Thirty-eight bills were directed at "commercialized vice." *Id.*

106. BRANDT, *supra* note 56, at 80.

in their decisions.

It is easy to analyze the cases involving the testing and quarantining of prostitutes during this era as the product of judicial conservatism involving the state police power.¹⁰⁷ Despite this explanation, there were still a great deal of substantive due process violations. For example, many courts simply based the proof of venereal disease for quarantine on status grounds: "In the case of a woman of ill fame, that fact in itself afforded sufficient ground for the inference that she might be affected with the disease."¹⁰⁸ The identical decision was reached regarding a vagrancy arrest.¹⁰⁹ The health officer was authorized to consider the female petitioner to be within the "class" of those "reasonably suspected of being a source of infection."¹¹⁰ Moreover, finding that the prostitute was diseased was sufficient grounds for denying her procedural due process rights.¹¹¹

Even given the overinclusiveness of the courts' affirmation of state police powers to quarantine every prostitute—sick or healthy—there was never an instance of a male similarly treated. The closest courts came to this question was in *Wragg v. Griffin*.¹¹² Both male petitioner Wragg and Isabel Newman were charged and found guilty by a grand jury of "lewd and vicious cohabitation."¹¹³ Wragg was released on bail, but held subject to the order of the board of health for venereal disease testing. Wragg filed a writ of habeas corpus, demanding release from the order. The Iowa Supreme Court granted Wragg's writ, on the grounds that he showed "no visible evidence, sign, or symptom of such disease," and as such

107. See *supra* notes 55-72 and accompanying text for an explanation of the use of state police power in public health decision making.

108. *Ex parte* Dayton, 52 Cal. App. 635, 199 P. 548 (1921); see also *People v. Strautz*, 386 Ill. 360, 54 N.E.2d 441, 444. (1944) ("all known prostitutes and persons associated with them shall be considered as reasonably suspected of having venereal disease" (quoting *Ex parte* Company, 106 Ohio St. 50, 139 N.E. 204, 205 (1922)).

109. *Dowling v. Harden*, 88 So. 217 (Ala. Ct. App. 1921).

110. *Id.* at 217.

111. *Ex parte* Brown, 172 N.W. 522 (1919). Brown was arrested, tried, and found guilty of being "an inmate from an ill-governed house." She was to be released on bail "on the ground that she had furnished an appeal bond, as provided by law." *Id.* at 522. Yet while awaiting release, she was involuntarily tested for venereal disease, and found to be infected. Thereafter, she was isolated and quarantined. This case makes no mention of the petitioner filing a writ of habeas corpus, although based on the fact that her bond release was denied *after* she was ordered released, it was unlikely a writ would have had any effect.

Only in a few cases was the status based "mere suspicion" standard disputed. See *Ex parte* Shepard, 195 P. 1077 (1921); *Ex parte* Arata, 198 P. 814 (1921); *Rock v. Carney*, 216 Mich. 280, 185 N.W. 798 (1921). However, even where courts raised the standard to reasonable probable cause, the results were largely the same. *Carney*, 185 N.W. at 798-99.

112. 170 N.W. 400 (1919).

113. *Id.* at 401.

"violation of his person" would be "for no better reason than that he is 'suspected'. . . ."114

Incredibly, the court elaborated for exactly one sentence on the legal proceedings involving Isabel Newman. The opinion simply states that she had already been taken to a hospital, tested, and found to have gonorrhea, and was quarantined for twenty-five days.¹¹⁵ Moreover, the court did not consider weighing the increased likelihood of Wragg having contracted gonorrhea based on Newman's positive test.¹¹⁶ This likelihood could easily justify reasonable suspicion for Wragg having contracted a sexual disease and thus for subjecting Wragg to the same array of personal and physical intrusions. It is doubtful the court contemplated this correlative form of reasonable suspicion, or if it did, that it ever acknowledged it.

In essence, the court used every tool at its historical and cultural disposal to continue a pattern of mixing morality, medicine, and law to stigmatize the "polluted" prostitute, simultaneously reinforcing societal norms of sexism and patriarchy. Disease as a social construct successfully augmented this system of values.

III. CURRENT DUE PROCESS AND EQUAL PROTECTION RIGHTS AVAILABLE

During the Progressive era, the delegation of power by courts to local public health authorities effectively placed the blame, along with the accompanying stigmatization for venereal disease, on the prostitute. As such, she was viewed as the responsible "infector" of the healthy population, and, as will be seen, this vision of the prostitute is perpetuated today by current legislative efforts to control the AIDS epidemic.

The court's decision in *Jew Ho* was unusual in an era when the use of state police power to promote public health was rarely questioned.¹¹⁷ Because society has been relatively free of epidemic diseases, the courts have had little need to speak in the area of quarantine regulation. This is due to the tremendous advances in medicine, including many vital new vaccines and treatments. These same de-

114. *Id.*

115. *Id.*

116. Gonorrhea is the most contagious sexually transmitted disease, with over one million cases reported in 1980 alone, despite known effective anti-microbial treatment. SEXUALLY TRANSMITTED DISEASES 51 (9. Felman ed. 1986) [hereinafter STD]. Gonorrhea is highly contagious, infecting roughly 50% of those exposed. See INFECTIOUS DISEASES AND THEIR ETIOLOGICAL AGENTS 1198 (1980). Although certainly no such statistics were available then, the public generally was no doubt aware of the increased susceptibility of the partner of an infected person.

117. See *supra* notes 66-72 and accompanying text for an explanation of the *Jew Ho* decision.

velopments, however, have led to increased intrusions in personal privacy. Current legislative interest in these areas triggers new constitutional concerns and raises the possibility of increased litigation.

A. A Hypothetical Quarantining

Currently, several states have bills pending that mandate quarantining of AIDS carriers.¹¹⁸ Much of this pending legislation is the product of legislators feeling the pressure to "do something" about the AIDS outbreak. The LaRouche initiative¹¹⁹ in California is a good example. The initiative called for the categorization of AIDS as a communicable disease, allowing the detention and testing of those suspected of carrying the virus. The initiative, though irrational, revealed that citizens wanted the government to act boldly in dealing with AIDS. Unfortunately, it is too late to take the kind of effective action that would have been possible during the initial stages of the epidemic.¹²⁰ In its seven year history, the AIDS outbreak has proven itself to be an excellent example of what happens when institutions wait too long to react to a growing problem.¹²¹

Because there is currently no quarantine law in effect, a hypothetical case and an examination of the means used to quarantine will be based on California's LaRouche Initiative. In relevant part, the initiative requires both AIDS patients and HIV carriers to report their status as infected, and both would be "subject to quarantine and isolation statutes and regulation."¹²² The related statute in the California Health and Safety Code states that the state department may "quarantine . . . whenever in its judgment such action is necessary to protect or preserve the public health."¹²³

To effectively catch all AIDS carriers and quarantine them, all people must take the HIV test. The costs of testing every person in

118. *E.g.*, Alabama, HB-25 (requiring that prisoners with AIDS be quarantined); Colorado, HB-1290 (pending); Ohio, HB-704 (referred to committee); Texas, Agenda 9 (proposal to add AIDS to the list of quarantinable diseases under 25 TEX. CODE ANN. § 97.11) and Washington, SB-5049 (not enacted).

119. Also known as Proposition 64, the LaRouche Initiative was defeated in November, 1986.

120. *See* Schram, *AIDS: 1991*, L.A. Times Magazine, Aug. 10, 1986, at 11.

121. As explained in part I, it is difficult to justify the quarantining of AIDS carriers without also conducting a universal testing program. Because it may take years to manifest clinical symptoms, it is virtually impossible to identify latent carriers of the AIDS virus without a blood screening test. This long latency period distinguishes the HIV virus from the majority of other sexually transmitted diseases common in the nineteenth and early twentieth centuries that led to quarantining. *See* STD, *supra* note 116, at 51-64. *See also supra* notes 104-16 and accompanying text for the early history of quarantining of venereal disease carriers.

122. California Proposition 64 (defeated Nov. 1986).

123. CAL. HEALTH & SAFETY CODE § 3051 (West 1979).

the country would be staggering.¹²⁴ The cost of mobilizing the forces needed to conduct the testing would also be substantial. It will take at least an hour to test each household. To insure thoroughness, everyone would be confined to their homes for two weeks, in order to account for every individual. The test must be repeated often to catch those who have not seroconverted since the last test date.¹²⁵ In California alone, approximately 250,000 people are seropositive today. To quarantine such a crowd, a city the size of Sacramento would have to be fenced in.

If the disease in this hypothetical case were tuberculosis—infecting randomly and involuntarily through airborne particles—this scenario might be warranted. But for a disease of very restricted modes of transmission, such as AIDS, the costs of a comprehensive testing and quarantine program would be impossibly high, to say nothing of the concomitant infringements on personal liberty.

Without doubt, quarantining would deprive seropositive individuals of fundamental rights: the right to travel and freely associate with community and family, and the right to privacy. Moreover, quarantining would only worsen patterns of discrimination and stigmatization already existent among AIDS carriers. These resultant infringements should trigger the closest scrutiny of the legislation, shifting the burden to the state to prove that the quarantine is based on a "compelling state interest."¹²⁶ This requirement is a relatively easy one for the state to satisfy—rarely have a state's police powers in the area of public health been denied.¹²⁷ Moreover, given the fears and actual numbers of individuals with AIDS, the state's motive to protect the public health is extremely compelling. The next step in the judicial analysis would entail a closer examination of the manner in which the state intends to fulfill its purpose: is the method of implementation overinclusive, underinclusive, or a "good fit?" The quarantine measure must be narrowly tailored to its stated purpose, including an exploration of less intrusive alternatives.¹²⁸

Presently, of the approximately 250,000 infected Californians,

124. The cost per person, in a conservative estimate, might be fifteen dollars. Francis Interview, *supra* note 35.

125. *Id.*

126. For a general analysis of the tiered level of state interests involving infringement of personal liberties, see generally Grey, *Eros, Civilization, and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83 (1980) [hereinafter Grey]. See, e.g., *Kramer v. Union Free School District*, 395 U.S. 621, 633 (1969).

127. See generally *supra* notes 55-72 and accompanying text regarding the history of quarantine laws. But see *Jew Ho v. Williamson*, 103 F. 10 (C.C.N.D. Cal. 1900).

128. See *Korematsu v. United States*, 323 U.S. 214, 218 (1944); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

80,000 or more will at some point develop AIDS or a related illness.¹²⁹ Yet, a majority of those citizens to be quarantined are AIDS carriers, asymptomatic and capable of normal functioning and working in society.¹³⁰ In determining whether quarantining 250,000 infected people will meet the state's designed goal of protecting the public health, it is necessary to examine the safety of those who have not been isolated. If the state has fulfilled its established purpose, then the incidence of AIDS should decrease significantly and hopefully eventually disappear.¹³¹ Yet, a closer look at the implementation of such a regulation, given current knowledge about transmission of the AIDS virus dictates otherwise.

Theoretically, quarantining all known AIDS carriers is impossible. Recalling the approximate six month latency period for infection and seroconversion, it is impossible to detect all AIDS carriers at any one point in time.¹³² Even if everyone were retested for the presence of the virus every week, some carriers would escape detection.¹³³ Consequently, the regulation is underinclusive. As a result, it may lead to false impressions in society that those who are not quarantined are completely healthy, and hence that all sexual practices outside the parameters of those detected are safe. This consequent reduced caution would unnaturally increase the spread of the disease. Moreover, cooperation with high risk groups will be lost due to fear of quarantining. Those who need help will be less likely to come forward voluntarily, for the same reasons.

In addition to being fundamentally underinclusive, the quarantine proposed in the LaRouche Initiative is also overinclusive in several respects. Most importantly, the regulation bears no relevance whatsoever to the critical scientific knowledge regarding how the disease is spread. It is futile to quarantine citizens carrying a disease that, unlike tuberculosis, smallpox, or measles, cannot be spread casually. Most quarantined will remain asymptomatic carriers for a significant period of time. Thus, those asymptomatic carriers will be forced to live otherwise healthy lives during this period in futile de-

129. Francis Interview, *supra* note 35.

130. The C.D.C. has stated that AIDS carriers should be allowed to continue working at their jobs, and are not a threat to society. See *supra* note 19 and accompanying text.

131. Through history, quarantining has never proven itself effective in confining communicable diseases. See Morgenstern, *The Role of the Federal Government in Protecting Citizens From Communicable Diseases*, 47 U. CIN. L. REV., 537, 543 (1978). This is due to the difficulty of quarantining *all* carriers. For example, during an epidemic of scarlet fever, 10-15% of the population may carry the virus causing the disease. *Id.* n.48.

132. See *supra* text accompanying notes 17-20 for discussion on latency and seroconversion.

133. Francis Interview, *supra* note 35.

tention.¹³⁴ Finally, those fortunate enough to never develop the clinical and largely fatal manifestations will be rewarded with life-time confinement.

As a possible quarantine law, the LaRouche Initiative is overinclusive and underinclusive, and in no way satisfies its stated purpose. With such a poor fit, the statute, if enacted, would have been unconstitutional, regardless of the compelling state interest.¹³⁵ Also, the overinclusiveness of the initiative opens it to attack on grounds of vagueness.¹³⁶ The issue of underlying discrimination in such a statute is addressed in the next section.

B. Mandatory Testing

The goal of universal mandatory testing—namely the identification of HIV carriers—is of little value unless the intended outcome is quarantining, which, as has been shown, would result in heightened fear, discrimination and privacy invasions without the requisite substantial benefit in the face of a grave epidemic. However, current legislative actions include AIDS testing on a less than universal basis, typically calling for testing of those “reasonably suspected” to carry the AIDS virus. For example, Colorado House Bill 1177 allows for the testing of any person reasonably believed to have AIDS. Upon positive findings, the state may then “isolate or quarantine persons with AIDS or the viral infection causing AIDS.”

1. Defining High Risk

The critical problem with legislative language regarding testing for the virus is the problem of identification: how do we identify those “reasonably suspected” of carrying the virus? Who is at high

134. See, e.g., *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644, 649-50 (2d Cir. 1979). In *Carey*, petitioners successfully challenged the city board's decision to isolate and exclude some mentally retarded children from regular classes based on the finding that contagion was based only on a “remote possibility,” and isolation would have “detrimental effects.” A similar result could be predicted regarding isolating of school children with AIDS. Also, the AIDS virus is less contagious than hepatitis B. See *supra* text accompanying notes 61-70 for comparison of modes of transmission of disease. See also Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1290-92 (1986) for discussion of the impact of AIDS on a public education setting.

135. Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1290-92 (1986).

136. A statute that sweeps too broadly is potentially vague. Cf. *Shelton v. Tucker*, 364 U.S. 479 (1960). An Arkansas statute requiring teachers to list every organization to which they belonged was found unconstitutional because it was vague, too broad, and because a less restrictive alternative was available. The state's interest in assuring that teachers were not spending too much time on outside activities was valid, but that interest could be achieved by means that were less restrictive, thereby not infringing on petitioner's freedom of association. *Id.* at 487-88.

risk? For five years, until fall of 1986, the C.D.C. reported four categories or "high-risk groups": homosexuals, intravenous drug users, Haitians and hemophiliacs. Originally, this list also included prostitutes. This system of categorization undoubtedly contributed to the homophobic fears spreading throughout the nation and further distorted an accurate understanding of the true risk for AIDS.¹³⁷ Ironically, the homosexual and hemophiliac communities are the best educated on safe sex practices.¹³⁸

Recently, the C.D.C. changed its definition of high risk, basing risk on behavior instead of by membership to a group: anyone having sex with more than three partners during a one year period of time is at high risk for AIDS.¹³⁹ The C.D.C. has correctly identified the real issue regarding risk: high risk *behavior* leads to increased likelihood of contracting AIDS, transcending categorization of individuals into groups.

Unfortunately, while the C.D.C. has now more accurately defined "high risk," many organizations, including the Justice Department, have upheld the legality of discrimination based on suspected homosexuality.¹⁴⁰ In response to a request by the General Counsel of Health and Human Services regarding the applicability of the handicap laws to persons with AIDS, A.R.C., or those infected with the AIDS virus, former Attorney General Edwin Meese refused to denounce employer discrimination and firing based on their own individualized sense of fear of disease, regardless of whether it stemmed from homophobia or any other personal bias.¹⁴¹ This memorandum, the subject of much controversy and criticism, was issued shortly before the Supreme Court heard arguments in the appeal of *School Board of Nassau County v. Arline*.¹⁴²

The Justice Department's attitude, combined with the overinclusive and vague category of those "reasonably suspected"¹⁴³ to

137. *Special Report: Recommended Infection-Control for Patients with Human Immunodeficiency Virus Infection*, 315 NEW ENG. J. MED. 1562, 1563 (1986).

138. Los Angeles Symposium on Risk Reduction and AIDS (Sept. 15, 1986).

139. Francis Interview, *supra* note 35.

140. Memorandum from the Office of the Attorney General, U.S. Department of Justice to Ronald E. Robertson, General Counsel, Health and Human Services (1986).

141. *Id.*

142. In *School Board of Nassau County v. Arline* 107 S. Ct. 1123 (1987) a 7-2 Supreme Court decision rejected the Justice Department's earlier view, ruling that people with contagious diseases are covered by federal laws prohibiting discrimination against the handicapped in federally aided programs. The majority refused to decide whether the anti-discrimination law applies to carriers of a disease who have none of the disease's symptoms or physical effects, thereby avoiding a direct confrontation with the AIDS issue. *Id.* Nonetheless, this decision was hailed as a victory by AIDS carriers and the gay community. Wall Street Journal, March 4, 1987, at 3, col. 2.

143. The creation of such a classification, potentially irrational, furthers stigmatization by providing a societal outlet in which the fear of illness can flourish. See generally SONTAG, *ILLNESS AS METAPHOR* (1977). See *supra* notes 73-88 and accompa-

carry the AIDS virus builds a strong case for equal protection intervention by the courts. Where the legislature or an administrative body lacks rationality and neutrality, oversight by the courts is unusually important. Yet, it is in this critical position that the courts have so frequently deferred to the decision-making powers of state and local public health authorities.

C. *Current AIDS Testing and Quarantining Legislation:
Reviving Tokenistic Trends*

1. *Mandatory Testing Bills and Prostitution*

A recent Colorado case relied on a Denver regulation authorizing public health officers to order anyone "reasonably suspected" of having a venereal disease to be tested. In *Reynolds v. McNichols*, the court dismissed the plaintiff's complaint that her rights were violated by repeated two day detentions for venereal disease examination.¹⁴⁴ The court also concluded that presuming that prostitutes subject to detention were "likely" to have a sexually transmitted disease was rational.¹⁴⁵ This ruling reflected the rationale of the many mandatory testing cases of the 1920s, where the prostitute's status determined the extent of her constitutional rights. The inference of being infected based on status is blatantly prejudicial.¹⁴⁶

Nearly ten states have written their own bills requiring testing for AIDS seropositivity—directed at prostitution.¹⁴⁷ The language

nying text for an explanation of this societal phenomenon.

144. 488 F.2d 1378 (10th Cir. 1973).

145. *Id.* at 1382.

146. The decision to base sickness on status also raises eighth amendment concerns. See *Robinson v. California*, 370 U.S. 660, 665 (1962) (conviction based on status of narcotics addict unconstitutional, despite state's broad power to regulate drug traffic). Similar to the AIDS situation, the Court noticed that the appellant would be "continuously guilty of this offense," and added:

It is unlikely that any state at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with venereal disease. A state might determine that the general health and welfare require that the victims of these and other human afflictions be dealt by compulsory treatment, involving quarantine, confinement, or sequestration. But, in light of contemporary human knowledge a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth amendments.

Id. at 666.

147. Connecticut HB-5055 would have authorized a court to order a defendant charged with sexual assault, adultery, or prostitution-related offenses to be tested for AIDS. This bill, however, failed to pass in 1987. Georgia HB-1047 would require those convicted of sexual offenses to submit to testing for AIDS within 45 days of date of sentencing. This bill has been carried over to 1988. Michigan HB-4008 provides that those charged with prostitution, solicitation or illegal drug use may be subjected to AIDS testing, at the discretion of the judge. This bill has been referred to the Committee on Public Health. Hawaii HB-1612 provides that anyone arrested on charges

used in establishing the criteria for such a suspicion is especially vague, similar to *Reynolds*, because it depends on the appearance of a status. The Washington measures also call for the examination and testing of all persons reasonably suspected of being infected with AIDS, as does California's SB-4048. Both bills are vague and overinclusive, failing to solve a central problem addressed in the next section: How can the state identify those that should be reasonably suspected of carrying AIDS without intrusively probing into a person's sexual habits? In addition, Washington's SB-5049 has another provision requiring "anyone" participating or reasonably suspected of participating in high-risk sexual activities to be tested for AIDS. The bill designates places used for such high-risk activities as "public health nuisances." Under the current definition of high-risk by the C.D.C., the most likely location of "public health nuisances" are not bathhouses or massage parlors, but bedrooms.

Beyond the difficulties of identifying those suspected of being prostitutes, several currently pending state bills classify prostitution with felonious sexual crimes, including rape and the use of intravenous drugs. Alabama House Bill 47 calls for mandatory testing of convicted rapists and prostitutes for sexually transmitted diseases, including the HIV virus.¹⁴⁸ California's AB-1492, similar to other bills mentioned above, would require the court to test a prostitute upon conviction. However, California Senate Bill 1007 classifies prostitution, rape, and sodomy together, requiring courts to mandatorily test every person in one of these categories.¹⁴⁹ In addition, prostitutes are classified with drug users. Several bills call for the forced testing of individuals arrested and charged with prostitution, solicitation, or the prohibited injection of illegal drugs.¹⁵⁰ In 1987, a Nevada Senate bill requiring the testing of persons convicted for unlawful prostitution or possession of controlled substances commonly injected became law.¹⁵¹ The shortcoming of these bills—beyond the disproportionate focus on prostitution as a source of transmission of the virus—is the fact that they critically overlook

of prostitution would be tested for the AIDS antibody before release. Action is pending on the bill after introduction. Delaware HB-486 is similar to the Hawaiian bill and also requires that test results would be reported to the judge responsible for setting the conditions of the accused's pending trial. The Delaware bill is receiving floor action and is pending in the House. Washington HB-1112, also currently pending, requires all people arrested for prostitution or reasonably suspected of being a prostitute to submit to AIDS testing. This bill has been carried over to 1988. Florida SB-576 and HB-279 would require anyone convicted of prostitution to be screened for AIDS.

148. H.R. 47, 84th Leg. (1987) (referred to the Committee on Health on April 21, 1987).

149. S.B. 1007, 64th Leg. (1987) (amended May 4, 1987).

150. See, e.g., H.R. 4008, 72nd Leg. (1987) (referred in 1987 to the Committee on Public Health).

151. H.R. 550, 52nd Leg. (1987).

the consensual nature of prostitution (and sodomy), as compared to the act of rape.

Recently, however, some exceptions to this trend have appeared. A bill pending in the Illinois House called for an increase of the penalty for "patronizing a prostitute" from a Class B to a Class A misdemeanor.¹⁵² More importantly, this bill provides that "any person convicted of prostitution or of patronizing a prostitute is to be tested for exposure to AIDS."¹⁵³

2. Quarantining Legislation

The language adopted by many states in the wave of quarantine bills that have arisen is streamlined and, predictably, written with a broad brush in terms of the breadth of local health authorities' power.¹⁵⁴ Given the language in these bills, there is little preventing a local health official from deciding to require a prostitute, or perhaps only a woman suspected of practicing prostitution, to undergo testing and isolation, regardless of the woman's actual sexual practices and safety precautions taken, and also without regard to actual knowledge of the likelihood of her being infected or of her ability to transmit the virus.

With such a low correlation between AIDS and prostitution, it is remarkable that so many states are attempting to attack the AIDS problem by writing bills requiring testing, temporary detention, and potential quarantining of prostitutes. Combined with the evidence of the generally limited efficiency of transmission from female to male in the United States, it is clear that prostitutes are being disproportionately blamed for the epidemic.¹⁵⁵

152. H.R. 2242, 84th Leg. (1987) (introduced April 10, 1987).

153. *Id.* In terms of mandatory testing, prostitutes are being classified with drug users. In Nevada, for example, there is a new law requiring the testing of all persons convicted of unlawful prostitution or possession of controlled substances commonly injected. NEV. REV. STAT. § 762 (1987).

154. Intergovernmental Health Policy Project, George Washington University, *A Synopsis of State AIDS Related Legislation* (July 1987). In 1987, eleven state bills were introduced, four of which are now law. For example, Colorado's House Bill 1177, enacted into law June 8, 1987, allows local health department officials to examine, test, and potentially isolate an individual which the official "has reason to believe . . . is a danger to public health." Similarly, in 1987, Oregon enacted HB-2067 into law, basing grounds for quarantining on the determination of who is and who is not "reasonably suspect" of HIV infection.

155. Curan, *The Epidemiology of AIDS: Current Status and Future Prospects*, 229 SCIENCE 1352, 1352-57 (1985); see also Alexander, *Prostitutes Given A Bum Rap For Heterosexual AIDS*, NAT'L NOW TIMES (June 1986).

D. Equal Protection Arguments

With the Court's recent decision in *Bowers v. Hardwick*,¹⁵⁶ it seems unlikely that discrimination against a homosexual as an identifiable member of the gay population will be granted heightened scrutiny under the fourteenth amendment, albeit the class of homosexuals would appear to meet the requisite criteria to trigger careful scrutiny: a long history of discrimination and prejudice, and immutability of their sexual orientation.¹⁵⁷ Perhaps the middle tier of scrutiny under an equal protection test is a safer goal, as intermediate review has been triggered where sensitive, although not necessarily suspect criteria of classification are used,¹⁵⁸ including the role of outdated stereotypes regarding gender¹⁵⁹ and the impact of a history of disadvantageous treatment to aliens and illegitimate children.¹⁶⁰ Certainly the implications of seropositivity, including the fears of discrimination, stigmatization, job loss, loss of personal relationships and revocation of insurance based on the reportability of one's "status" as a carrier fit the description of a "sensitive" class of individuals. Whether or not AIDS carriers qualify as a "discrete and insular minority," "resemblance to such minorities warrants more than casual judicial response when they are injured by law."¹⁶¹

However, the strongest argument under the fourteenth amendment's equal protection clause evolves out of the Supreme Court's 1985 decision in *City of Cleburne v. Cleburne Living Center*.¹⁶² In *Cleburne*, Justice White examined a state zoning ordinance requir-

156. 478 U.S. 186 (1986).

157. In order to receive protection under the heightened scrutiny test, homosexuals would have to prove they are a discrete and insular class. See *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). Based on the Court's recent holding in *Hardwick*, it is unlikely the Court will extend the list of suspect classes beyond race, national origin, and alienage. See also Note, *An Argument for the Application of Equal Protection, Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 812 (1984); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1302 (1985) (discussion of homosexuality as an immutable physical characteristic). See generally W. BARNETT, *SEXUAL FREEDOM AND THE CONSTITUTION* (1973).

158. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1, 1090 (2d ed. 1978) [hereinafter TRIBE]. Minimal scrutiny exists largely as the criteria for economic legislation, and arguably the unwritten standard for the majority of quarantining decisions in the late 1800s and early 1900s.

159. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (federal statutes providing that spouses of male members of armed services were "dependents" for purposes of obtaining military benefits, but that spouses of female members were not "dependents" unless they depended on wives for more than half of their support were found unconstitutional by a plurality); see also *Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

160. *Trimble v. Gordon*, 430 U.S. 762 (1977) (Court invalidated a portion of the Illinois intestate succession scheme that prevented illegitimate children from inheriting from their fathers); see also *Levy v. Louisiana*, 391 U.S. 68 (1968).

161. TRIBE, *supra* note 158, at 1090.

162. 473 U.S. 432 (1985).

ing a special permit for the mentally retarded and held that as a class, the mentally retarded were not a suspect or even quasi-suspect class.¹⁶³ Nonetheless, the Court found that the zoning ordinance violated the equal protection clause, based on the state's reliance on a classification "whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."¹⁶⁴ The Court added that "objectives—such as a 'bare . . . desire to harm a politically unpopular group,—are not legitimate state interests."¹⁶⁵

The Court in *Cleburne* criticized the attenuated link between state purpose and its means of goal achievement via apparent prejudice in its reasoning to invalidate the ordinance on equal protection grounds. In effect, the Court's decision amounted to rationality with "bite," calling for "intrusive oversight by the judiciary" where "lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice . . ."¹⁶⁶

The *Cleburne* decision combined several important factors in pinpointing the constitutional flaws with mandatory testing and quarantining by unearthing suspicion of infection as a predetermined predisposition to disease based on fear, status, and historical patterns of discrimination. First, the Court in *Cleburne* incorporated the early language in *Jacobson* calling for state actions that are not arbitrary or irrational.¹⁶⁷ Quarantining and mandatory testing have both been shown to be over and underinclusive, lacking a rational relationship for even legitimate state interests. Last year, two lower courts incorporated this rationality argument in the area of isolating "infected" school children, which is a public health decision rarely subject to more than minimal scrutiny by the courts.¹⁶⁸ Second, the Court's decision in *Cleburne* reinforced the Supreme Court's earlier decision in *Robinson*¹⁶⁹ by deciding to overturn a zoning ordinance that "rested on irrational prejudice" towards the mentally retarded.¹⁷⁰ This added scrutiny over the typically undeterred

163. *Id.*

164. *Id.* at 446.

165. *Id.* at 447.

166. *Id.* at 433.

167. *Jacobson v. Massachusetts*, 197 U.S. 11, 27 & 38 (1905). See also *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 134 N.E. 815 (1922).

168. *New York Ass'n for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979); *27 Community School Bd. v. Board of Educ.*, 130 Misc. 2d 398, 502 N.Y.S.2d 325 (1986). In *Carey*, the court found the school's identification and exclusion of only some of the children carrying hepatitis-B to be an irrational and incomplete identification procedure which undermined its compelling purpose.

169. See *supra* note 146 for a discussion of the *Robinson* ruling.

170. *Cleburne*, 473 U.S. at 440; see also *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) ("mere public intolerance or animosity cannot constitutionally justify deprivation of a person's physical liberty"); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (the desire to "harm a politically unpopular group" is not a legitimate state interest); *Gay Student Services v. Texas A&M Univ.*, 737

use of state public health police powers is reminiscent of the court's increased intrusiveness in the racial segregation enacted by the state in *Jew Ho*.¹⁷¹

E. Substantive Due Process

The second way in which to conduct mandatory testing is to require testing of all those who maintain high-risk *behavior*. This complies with the updated C.D.C. definition, and at least initially circumvents constitutional questions regarding over and underinclusiveness based on pigeon-holing of group members. However, this procedure of identification is incredibly invasive: instead of assuming behavior based on status, one instead must question the current and past sexual practices of an individual.¹⁷² To determine if an individual is an AIDS carrier, relevant questions would probably deal with personal matters such as sexual practices (number of partners, male or female, frequency, types of protection used), past and present drug use, and medical history.

This kind of intrusive questioning falls into the scope of currently protected privacy interests that have evolved since the 1965 *Griswold v. Connecticut* decision.¹⁷³ In its wake, *Griswold* opened a new area of litigation focusing on individual privacy interests.¹⁷⁴ Some of these cases have crossed over into questions regarding privacy in choice of sexual relations and sexual practice, with many decisions involving freedom of homosexual expression in intimate, consensual sexual relations.¹⁷⁵ The fundamental right to privacy has

F.2d 1317, 1329-30 (1984). Citing *Robinson*, the court in its dicta wrote: "[D]enying recognition to a gay group 'smacks of penalizing persons for their status [as homosexuals] rather than their conduct, which is constitutionally impermissible.'" *Id.* at 1330. In denying the University's claim that homosexual conduct resulted in an increase in the number of people with "psychological and physiological problems," the court found this "public health argument . . . precisely the kind of 'undifferentiated fear of apprehension'" that the Supreme Court has held to not overcome one's right to freedom of expression. *Id.* at 1330 (citing *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 508 (1969)).

171. See *Jew Ho v. Williamson*, 103 F. 10 (N.D. Cal. 1900).

172. See, e.g., *Priest v. Rotary*, 98 F.R.D. 755 (N.D. Cal. 1983) (discovery of plaintiff's sexual history prohibited).

173. 381 U.S. 479 (1965).

174. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). The direction of *Griswold's* progeny has been written about frequently over the last fifteen years, and is therefore not the focus of this part of the note. See, e.g., Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CALIF. L. REV. 1447 (1976) [hereinafter Comment, *A Taxonomy of Privacy*]; Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83 (1980) [hereinafter Grey, *Eros*]; Note, *Roe and Paris: Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161 (1974).

175. See, e.g., *Doe v. Commonwealth's Attorney*, 403 F. Supp 1199 (E.D. Va. 1975) (a three judge court held that the petitioner's constitutional privacy rights were not violated by a criminal statute forbidding consensual sodomy). See also *Bowers v.*

been interpreted by the Court to mean freedom "in independence in making certain kinds of important decisions,"¹⁷⁶ freedom from intrusion,¹⁷⁷ and the individual's interest in avoiding disclosure of personal matters.¹⁷⁸ Statutes requiring quarantining involve the former two privacy issues, while mandatory regulations raise the latter two rights.¹⁷⁹

The idea of testing on a large scale has not been limited to the AIDS virus. Indeed, mandatory drug testing in the workplace recently has gained momentum.¹⁸⁰ Even where drug testing may be considered to be only a minimal intrusion into the privacy of the employee such that probable cause or even reasonable suspicion is not required, the courts have determined that the method of choosing individuals involved in the testing may be objectionable because of its arbitrariness.¹⁸¹ Similarly, courts have prohibited random strip

Hardwick, 478 U.S. 186 (1986) (the Court held a similar Georgia anti-sodomy statute constitutional, reversing the lower court's holding that the criminal statute violated respondent's fundamental rights); *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (upholding anti-sodomy statute over plaintiff's privacy arguments).

176. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

177. *Griswold*, 381 U.S. at 482.

178. *Id.* These three ideas have been closely examined in Comment, *A Taxonomy of Privacy*, *supra* note 174. The author redefines these three areas as the right to repose, the right to sanctuary, and the right of intimate decision-making. *Id.*

179. See generally *Roe*, 410 U.S. 113; *Eisenstadt*, 405 U.S. at 453; *Griswold*, 381 U.S. at 487 (Goldberg, J. concurring). *But see* *Olmstead v. United States*, 277 U.S. 438 (1978) (Brandeis, J., dissenting). Justice Brandeis, in his dissent, noted:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only part of the pain, pleasure and satisfaction of life are found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most valued by civilized men.

Id. at 478. See also *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977) (fornication statute infringed on right of privacy, and government regulation of private, personal behavior under state's police power is sharply limited by constitutional freedom of personal development). The court in *Saunders* interpreted *Wade* and its progeny to have defined "liberty" under the fourteenth amendment as "safeguarding an individual's freedom to decide certain matters without unwarranted government interference or compulsion, regardless of marital status or family relationships. *Id.* See, e.g., *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); see also *Henkin, Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1419 (1974); *Grey, supra* note 126.

180. See *Committee for G.I. Rights v. Calloway*, 518 F.2d 466 (D.C. Cir. 1975) (warrantless, unannounced urinalysis of servicemen permissible under fourteenth amendment); *Jones v. McKenzie*, 833 F.2d. 335 (D.C. Cir. 1987) (bus attendants may be subjected to urinalysis testing if testing is part of routine, reasonably required medical examination and part of nexus to safety); *Shoemaker v. Handel*, 619 F. Supp. 1089, 1098 (D. N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir. 1986) (urine and breathalyzer tests administered to jockeys constituted a search because blood and urine testing "involved the forced extraction of bodily fluids").

181. See *Storms v. Coughlin*, 600 F. Supp. 1214 (S.D.N.Y. 1984) (less than purely random urinalysis of prisoners invalid).

searches and drug testing of prison employees.¹⁸²

Finally, if the test is completed, what privacy rights are at stake if the test results are not kept confidential?¹⁸³ The Supreme Court in *Whalen v. Roe* recognized "an individual interest in avoiding disclosure of personal matters," and the right of an individual to control information about himself or herself.¹⁸⁴ Medical records, as a source of information about one's biochemical makeup or general state of health, have historically been considered to be highly private.

In litigation over discovery access to names of blood donors, one or more of whom were suspected of transmitting AIDS to a plaintiff's decedent, a Florida appellate court recently refused to permit disclosure of the names, citing the zone of privacy enjoyed by blood donors under state and federal constitutions.¹⁸⁵ The court called the *Whalen* interest in avoiding disclosure of personal matters a "second zone of privacy . . . essentially an interest in confidentiality,"¹⁸⁶ and stated that the release of information regarding intimate details of each of these donor's lives—including their sexual practices, drug usage, and medical background—breached "sanctuaries of privacy entitled to protection."¹⁸⁷

This case alludes to heightened stakes where disclosure of blood testing may indeed reveal that the test subject has contracted AIDS. For the AIDS carrier, fear, stigma, and discrimination may follow disclosure, along with the psychological impact upon discovery that one is seropositive.¹⁸⁸ One study discusses how researchers who are known to release information to legal authorities or even the C.D.C. chronically suffer from a lack of participants due to predictable fears of stigma, reprisal, and discrimination as a by-product of the

182. See *Security and Law Enforcement Employees Dist. Council 82 v. Carey*, 737 F.2d 187, 209-10 (2d Cir. 1984) (random strip searches of prison employees invalid under reasonable suspicion and warrant requirements of the fourth amendment).

183. Lamb, *Colorado AIDS Bill Raises New Discrimination Fears*, L.A. Times, Jan. 26, 1987. Lamb describes the damages resulting from a leak in the confidentiality of the names of those tested for AIDS in terms of jobs, litigation and personal relationships, based on the reportability of testing results in Colorado. Lamb writes that this list of names "has come to symbolize the fear . . . of Colorado's homosexual and bisexual groups . . . that they are an unprotected minority." *Id.*

184. 429 U.S. 589, 597-601 (1977) (state's computerized storage of medical prescription for controlled substance valid given broad police powers); see generally *TRIBE, AMERICAN CONSTITUTIONAL LAW* § 15-17 (1978).

185. *South Florida Blood Service, Inc. v. Rasmussen*, 467 So. 2d 798, 802 (Fla. App. 1985).

186. *Id.* at 802.

187. *Id.* The Court cited *Lampshire v. Proctor & Gamble Co.*, 94 F.R.D. 58 (N.D. Ga. 1982), where the identity of subjects for a C.D.C. study were entitled to court ordered protection in a study which contained information about "medical history, personal hygiene, menstrual flow, sexual activity, contraceptive methods, history of pregnancies, douching habits and tampon use."

188. See *Village Voice*, May 27, 1986, at 29.

release of names.¹⁸⁹ This study suggests that "the simplest answer to the problems of confidentiality, short of failing to conduct AIDS research at all, would be to keep no identifiable data."¹⁹⁰

Privacy and Bodily Invasion

Trying to identify those who "should" be tested represents a personal and emotional invasion of privacy. However, the second step in mandatory testing for the AIDS virus antibodies is a purely physical invasion: the extraction of blood from an individual's veins. The compulsory extraction of bodily fluids is a search and seizure within the meaning of the fourth amendment.¹⁹¹ As such, an invasive body search may be conducted constitutionally only when based upon reasonable suspicion and supportive, objective facts, or pursuant to administrative standards.¹⁹² The issue of reasonable suspicion brings us back to the original argument undermining the purpose of quarantining: quarantining to protect the public health from AIDS is bound to fail precisely because we can never quarantine all AIDS carriers unless we test the entire population—and test them frequently. And can we ever test an entire population based on "rea-

189. J. Gray & G. Melton, *The Law and Ethics of Psychosocial Research on AIDS*, 64 NEBR. L. REV. 637 (1985); see also Marwick, *Confidentiality Issues May Cloud Epidemiologic Studies of Aids*, 250 J. A.M.A. 1945 (1983) [hereinafter Marwick].

190. Marwick, *supra* note 189, at 658. While it is beyond the scope of this paper, this study treats the issue of statutory and judicial means of protecting confidentiality in great detail, including the Privacy Act, the implications of the FOIA, and ideas for legal reform of current research reporting methods.

191. *But see* *People v. Strautz*, 54 N.E.2d 441, 443 (1944) (authority to detain an individual for involuntary examination rests in the state's police powers). The Illinois Supreme Court wrote in *Strautz* that "It has almost universally been held in this country that constitutional guarantees must yield to the enforcement of the statutes and ordinances designed to promote public health as part of the police powers of the State . . ." *Id.* Nonetheless, the *Strautz* court held that such regulations may not be "arbitrary, oppressive, and unreasonable." *Id.* at 444. See *Barmore v. Robertson*, 302 Ill. 422, 432, 134 N.E. 815, 819 (1922) (regulations governing quarantine may not be "arbitrary and unreasonable" mere suspicion is not enough to justify quarantine). The relationships between police power, "status discrimination" and prostitution in the *Strautz* decision are discussed *infra*.

192. See *Schmerber v. California*, 384 U.S. 757, 766-72 (1966) (fourteenth amendment limits searches and seizures); *Rochin v. California*, 342 U.S. 165 (1952) (due process clause limits searches and seizures). The Court in *Schmerber* recognized the critical role of the fourth amendment to protect privacy and dignity against unwarranted intrusions by the state: "In *Wolf* we recognized '[t]he security of one's privacy against arbitrary intrusion by the police as being at the core of the Fourth Amendment and basic to a free society.'" *Id.* at 767 (citing *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)). The Court in *Schmerber* noted that, while *Mapp v. Ohio* overruled *Wolf* by holding that the exclusionary rule applies in state proceedings, *Mapp* reaffirmed this broad view of the amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961). The fourth amendment expressly provides that "[t]he right of persons to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ." *Schmerber*, 384 U.S. at 767.

sonable suspicion"? All of the supportive, objective facts on the topic tell us *not* to conduct the search.¹⁹³ Moreover, unlike most search and seizure cases, where the courts assess reasonable suspicion based on the acts and behavior of one individual, we are questioning here the ability to assess the suspect nature of a population! Based on the latest assessment of risk, any individual has the potential to be at high risk, making it virtually impossible to establish reasonable suspicion—unless we cross over the *Griswold*¹⁹⁴ zone of privacy and the *Olmstead*¹⁹⁵ right to be left alone.

F. The "Combination" Approach

Regardless of which method of identification the government uses to conduct mandatory testing, numerous civil rights concerns arise. While alone these factors may not of themselves trigger obvious strict scrutiny under equal protection, the Supreme Court has ruled that a combination of substantive due process interests and

193. *Hunter v. Auger*, 672 F.2d 668 (8th Cir. 1982) (strip searches of prison visitors based on uncorroborated anonymous tip unreasonable under fourth amendment); see also *Winston v. Lee*, 470 U.S. 753 (1985). In *Winston*, the Court affirmed the fourth circuit's finding that forcing the defendant to undergo surgery under general anaesthetic to remove a bullet lodged beneath the skin as evidence in a criminal proceeding was a violation of fourth amendment rights. *Id.* The Court reaffirmed and underscored the privacy issue discussed in *Schmerber*:

Another factor is the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity. Intruding into an individual's living room, see *Payton v. New York*, 445 U.S. 573 (1980), eavesdropping upon an individual's telephone conversations, see *Katz v. United States*, 389 U.S. at 361, or forcing an individual to accompany police officers to the police station, see *Dunaway v. New York*, 442 U.S. 200 (1979), typically do not injure the physical person of the individual. Such intrusions do, however, damage the individual's sense of personal privacy and security and are thus subject to the Fourth Amendment's dictates.

Id. at 761-62 (emphasis added).

194. See *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

195. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Also, compare this with the facts in *Schmerber*, where after being involved in a car accident, petitioner was subject to a blood-alcohol test once the officer detected alcohol in petitioner's breath, and his eyes were bloodshot with a glassy appearance. 384 U.S. at 768-69. What would the parallel be in the case of testing an AIDS patient? There would be no obvious external signs such as these, unless the person had fully developed AIDS or ARC. See discussion of symptoms in part I of text. The only way to gain reasonable suspicion or probable cause would be to intrusively question each individual. Yet the Court in *Schmerber* explicitly forbade testing on the "mere chance" of gaining the desired information:

The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Id. at 769-70 (emphasis added). Clearly the impact of a seropositive test has a large effect on the "dignity" as well as the privacy interests of the individual, especially if the results are later reported to the state's public health offices.

equal protection arguments are nonetheless effective in overturning a statute.¹⁹⁶ While the Court has used this "combination" approach in *City of Cleburne*,¹⁹⁷ the Court has also used this technique in earlier decisions, including *Plyler v. Doe*.¹⁹⁸ In *Plyler*, the majority struck down a Texas statute denying local school districts funds for the education of illegal alien children, based on the presence of a disadvantaged group (illegal aliens) and an unusually important interest (education).¹⁹⁹

Even before *Plyler*, Justice Marshall voiced strong discontent with the two-tiered, "rigidified approach to equal protection analysis," calling for a sliding scale or continuum of review where judicial scrutiny would be based on "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."²⁰⁰

Justices Stevens and Burger discarded the two-tier test and instead analyzed the legislation under an encompassing "rationality test," based on several fundamental questions to determine whether there was an equal protection violation.²⁰¹ These criteria include a description of the class harmed by the legislation, whether this class had been subject to disfavor in the past, and a definition of the public purpose of the law and the identification of the characteristics that justify unequal treatment of the class.²⁰² With this analysis, Justices Stevens and Burger found ignorance and prejudice in the city's decision to require special permits of the mentally retarded

196. See *Plyler v. Doe*, 457 U.S. 202 (1982) (although undocumented alien children are not a "suspect class" and education is not a "fundamental right," such children have a right to public education under the due process clause and equal protection clause of the constitution).

197. 472 U.S. 432 (1985).

198. *Id.*

199. *Id.* In so doing, the Court also avoided the need for deciding whether either claim alone justified intermediate scrutiny. *Id.*

200. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting); *Dandridge v. Williams*, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).

In his concurrence in *Cleburne*, Justice Stevens stated:

[O]ur cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' on the other. I have never been persuaded that these so called 'standards' adequately explain the decisional process. Cases involving classifications based on alienage, illegal residence, illegitimacy, gender, age, or—as in this case—mental retardation, do not fit well into sharply defined classifications.

Cleburne, 473 U.S. at 432 (Stevens, J., concurring). Tribe also voices his dissatisfaction with the two-tier approach and examines the ground between the "largely toothless invocation of minimum rationality and the nearly fatal invocation of strict scrutiny" TRIBE, *supra* note 158, at 1082.

201. *Cleburne*, 473 U.S. at 452-53 (Stevens, J., and Burger, C.J., concurring).

202. *Id.* at 453.

before granting them housing, citing a "history of unfair and often grotesque mistreatment."²⁰³ Similar to the reasoning in the Court's decisions in *San Antonio Independent School District v. Rodriguez*, *Plyler v. Doe*, *Dandridge v. Williams*, and several other decisions,²⁰⁴ Justice Marshall stressed that the new "rationality" test combined important considerations of fundamental interests with a careful eye for invidious discrimination.²⁰⁵

This combined approach may provide the most effective approach to examining the fairness and neutrality of AIDS legislation because the approach abandons any single criteria or level of scrutiny in the process of more closely approximating true motives and constitutional values at stake. By combining equal protection and substantive due process approaches in the identification of potentially discriminatory purposes, including asking "what class is harmed by the legislation," and whether the class has been subject to disfavor in the past,²⁰⁶ Justices Burger and Stevens were, in essence, "flushing out" unconstitutional motives.²⁰⁷

Homosexuals and prostitutes, among others, have been shown to be subject to both discrimination and stigmatization as a result of legislative attempts to define certain groups to test and quarantine. These definitions involve presumptive, overinclusive, culturally-based categorizations of "suspect" carriers; moreover, the status of being a carrier has been shown to bear no medical relationship with public contagion or casual transmission. It is impossible to identify current seropositivity without extraordinary costs and without any guarantee that those who may be subject to quarantine will ever manifest or suffer from AIDS. Combined with the various infringements of fundamental privacy interest discussed earlier, there are extraordinarily strong grounds for striking any legislation calling for mandatory testing or quarantining in the near future.

203. *Id.* at 454.

204. Other cases in the category of "intermediate review" combine sensitive criteria of classification and important interests. See, e.g. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (aliens deprived of federal employment in civil service); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) (households containing unrelated members denied food stamps); 405 U.S. 645 (1972) (unwed fathers denied child custody).

205. *Cleburne*, 473 U.S. at 432, 460 (1985) (Marshall, Brennan and Blackmun J.J., concurring in part, dissenting in part); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J. and Douglas, J., dissenting).

206. *Cleburne*, 473 U.S. at 451-56 (Burger, C.J. and Stevens, J., concurring).

207. S. ELY, *DEMOCRACY AND DISTRUST* 136-45 (1980). Similarly, the doctrine of irrebuttable presumption, unpopular today, required the legislature to articulate the current state purpose for the regulation or legislation. *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 641 n.9 (1974) (evidence presented revealed that compulsory unpaid maternity leaves were motivated in part by school board fears that students might believe their teacher had "swallowed a watermelon").

G. The Recalcitrant Prostitute

Finally, fifteen states are considering legislation invoking criminal sanctions against those who have sex, knowing they carry the AIDS virus.²⁰⁸ At a recent state health conference, county health officials submitted a proposal to quarantine AIDS carriers "who knowingly and willfully" infect others.²⁰⁹ Doubtless, legislative enactment of any of the above proposals would lead to a disproportionate percentage of prostitutes among recipients of criminal sanctions or quarantining: prostitutes comprise a highly available and an assuredly captive audience for testing purposes as they are constantly picked up and detained for practicing their illegal occupation.²¹⁰

Singling out a specific group for a regimen of screening, arrest and isolation should require a specific and compelling justification so as to avoid invidious discrimination.²¹¹ Some of the proposed bills target prostitutes, while others target anyone who "knowingly and willfully" infects others. How do we identify this group? The only viable way to ascertain even a fraction of those displaying "recalcitrant" behavior is through intrusive questioning and forced examinations, as was done throughout the Progressive era and as long ago as the earlier European outbreak of syphilis in the sixteenth century.

Identifying and isolating only a fraction of the recalcitrant AIDS carriers is not only fruitless in terms of controlling and halting the epidemic and wasteful of limited resources, it is actually detrimental in terms of the overall goal of public health: prevention.²¹²

208. California SB-2447 (hearing conducted, committee action pending); Colorado, HB-1144 (a class five felony to willfully expose another when infected, not enacted); Delaware, HB-485 ("enhanced penalties" for those who, after being diagnosed with AIDS, continue to engage in prostitution); Hawaii, HB-2289-86 (Class C felony); Idaho, HB-662 (anyone with a significant likelihood of carrying HIV in his blood who willfully engages in an activity which would cause another to be infected); Maryland, HB-1282 (making it a felony to knowingly transmit the AIDS virus); Pennsylvania, HB-1787 (knowingly transmitting the AIDS virus is a first-degree misdemeanor); and West Virginia, HB-1393 (not enacted, purpose of bill to include in the definition of first-degree murder the act of murder by transmission of AIDS by one having the disease).

209. *State Plan For AIDS Quarantine*, S. F. Chronicle, Feb. 26, 1987, at 1, col. 4.

210. In Oakland, sheriff investigators are "cracking down" because of reports that one or more prostitutes working in the area "may have AIDS." *Five Arrested in Prostitute Sting*, Oakland Tribune, Dec. 10, 1986.

The reason cited by the Georgia AIDS task force for testing convicted prostitutes is "to keep members of high risk groups from 'pushing the disease underground.'" *AIDS Virus May Have Infected Almost 5,000 in Georgia*, Atlanta Journal, Sept. 17, 1986.

211. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

212. See SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME. In his report, Surgeon General Koop criticizes compulsory testing as counterproductive to the needed preventive behavior:

The idea is to educate each individual to *assume* that his or her partner is infected, and consequently to take all precautions by practicing safe sex with their partner.²¹³ According to Francis, quarantining recalcitrant prostitutes gives the public the exactly opposite message: "[I]t's okay to have sex with anyone you wish, including prostitutes, because we've got the infected ones put away."²¹⁴ The unavoidable underinclusive nature of such a regulation, a common occurrence in legislation, presents a real danger in controlling the AIDS epidemic, as public health goals are undermined and lives are endangered by the false sense of security generated by a few token displays of local public health powers being flexed.

In trying to neutralize and ameliorate community fears and outrage over AIDS, both the legislature and the public have misplaced responsibility by tagging a disproportionate amount of the blame on prostitutes.²¹⁵ In many ways, punishing prostitutes represents what Douglas would depict as a necessary process of scapegoating built on a comfortable system of labels which heightens confidence in the community. Pinpointing prostitutes as a group that is largely responsible for furthering the epidemic, given the scientific reality of low transmission of AIDS by prostitutes, is a recreation of the "vice

Compulsory blood testing of individuals is not necessary. The procedure could be unmanageable and cost prohibitive. It can be expected that many who *test* negative might actually be positive due to *recent* exposure to the AIDS virus and give a false sense of security to the individual and his/her sexual partners concerning necessary protective behavior . . . prevention behavior will protect the American public and contain the AIDS epidemic.

Id. at 33.

213. Interview with Dr. Donald Francis, C.D.C. Aids Advisor (March 13, 1987).

214. *Id.*

215. Alexander, *Prostitutes Given a Bum Rap for Heterosexual AIDS*, News Release, National Organization for Women ("NOW") (June 1986). "As of May 19, 1986, 55 men and 249 women had been diagnosed with AIDS in this country for whom the only known risk factor was heterosexual contact with a person with AIDS or at risk for AIDS, or one percent of the 20,766 cases diagnosed since the Centers for Disease Control (C.D.C.) began keeping records in June 1981." *Id.* at 1. Quarantining all seropositive prostitutes, Alexander writes:

Would not prevent the spread of AIDS. It would only provide an illusion of protection because other women would take the place of the women who had been arrested: some would already be users of IV drugs, others would become IV users, some would contract the virus from infected customers (no one has suggested that all men should be tested) because they failed to use a condom, etc. And AIDS would still be transmitted by nonprostitute men and women who were not rounded up by police.

Id. at 6.

It was also recently recommended by the Food and Drug Administration that prostitutes not be allowed to donate blood, even given the low percentage of prostitutes to date that have become infected with the virus. The National Task Force on Prostitution (COYOTE, or Call Off Your Old Tired Ethics) condemned the FDA recommendation, and suggested that guidelines for donating blood be based on behavior, as opposed to group labels. See *COYOTE Condemns FDA Blood Bank Recommendations - Prostitutes Are Not a High Risk Group: It's Not Who You Are, It's What You Do That Puts You At Risk*, COYOTE News Release (Nov. 7, 1986).

crusades" of the late 1800s and of society's inability to separate myth, medicine and morality.

The perpetuation of this mixing of symbolic and contextual values has been shown to not only undermine the real needs and goals of public health—to save lives—but also to enhance a historical and sexist vision of the prostitute as the infector and the "john" as the unwitting victim of the prostitute's dirty and diseased state.²¹⁶ This bias is reflected in various definitions of prostitution, including the definition of prostitutes as those who "[allow themselves] to be used for sexual acts indiscriminately, without affection, and in exchange for money or money's worth."²¹⁷

This bias not only influences how prostitutes are viewed historically, but also how they are viewed culturally. More importantly, this bias is reflected in how scientific findings are interpreted as epidemiological data and, as a consequence, serves to perpetuate the historical vision that is so well in place. The best example of this is found in the interpretation of results of AIDS testing among military personnel and recruits. Between October 1985 and September 1986, of 640,683 military recruits tested for AIDS, 962 were positive.²¹⁸ The Department of Defense justification for mandatory testing of recruits is that each one is a possible blood donor and in the event of an emergency at the front, it would be impossible to screen for AIDS.²¹⁹ However, it is questionable whether these kind of transfusions are of any medical use anymore.²²⁰

216. M. DOUGLAS, *PURITY AND DANGER* (1966); S. SONTAG, *ILLNESS AS METAPHOR* (1977).

217. Darrow, *Prostitution and Sexually Transmitted Diseases*, *SEXUALLY TRANSMITTED DISEASES* (1984) [hereinafter Darrow]. After examining numerous definitions of prostitution, including "the indiscriminate sexual intercourse of a woman for hire," and women and girls who "habitually gain their livelihoods, partly or wholly, by the proceeds of sexual relations," Darrow finds that "each of these definitions implies the involvement of others: a second party who provides money in exchange for sexual services (the client, or 'john') and third parties who evaluate the transaction in moralistic, legal or other terms ('judges')." *Id.* at 109.

218. Data compiled by the AIDS program, Centers for Disease Control, based on current military recruit applicant data provided by the Department of Defense, January 15, 1987.

219. Norman, *Military AIDS Testing Offers Research Bonus*, 232 *SCIENCE* 818-20 (1986).

220. Bayer, *HIV Antibody Screening*, 256 *J. A.M.A.* 1768, 1771 (1986). Moreover, a single screening test is insufficient protection as it is considered a useful indicator of seropositivity for only a short period of time. *Id.* at 1772. Further, "the rejection of seropositive recruits cannot be justified on such grounds if seropositive active duty personnel are not also being discharged." *Id.* Bayer also doubts the plausibility of screening as a method of identifying those with a weakened immune system, who might have adverse reactions to the live viruses that are given to military recruits: "[E]ven this paternalistic justification is weak. The HIV tests are not the only way to identify these individuals." *Id.* Instead, Bayer discusses other hidden motivations at the core of the issue:

[O]ther factors may be concealed under the guise of public health: the mili-

Infection among military recruits has been interpreted as indicative of heterosexual transmission of AIDS,²²¹ based on notions that drug users, homosexual and bisexual men would not join the military and, further, that military men are known to visit prostitutes often both at home and abroad.²²² This interpretation fits the historical pattern of concern regarding the high incidence of venereal disease and its toll on the military in World War II.²²³ Yet, today it is a fact that many young recruits are introduced to other high risk activities after they join the Army—especially drug use and homosexuality.²²⁴

In a study conducted by the New York City Department of Health, physicians interviewed twenty-three HIV-positive military recruits who utilized the city's AIDS hotline information and counselling services.²²⁵ The interviews revealed that ten of the recruits had a history of IV drug use, seven were bisexual, one was a homosexual, and the only woman in the group had heterosexual contact with a drug user.²²⁶ These findings suggest that the risk factors most often found in military recruits are drug use and homosexual experiences.²²⁷ Only three of the recruits mentioned any contacts with

tary's policies against homosexuals and drug use, relations with foreign governments concerned about the exportation of AIDS by American servicemen, and the desire to avoid the economic burden of AIDS. Here, too, we urge direct discussion of these concerns, not masking them as purported public health issues.

Id.

221. Stoneburner, *Risk Factors In Military Recruits Positive for HIV Antibody*, 315 NEW ENG. J. MED. 1355 (1986) [hereinafter Stoneburner].

222. *Human T-lymphotrophic Virus Type III/Lymphadenopathy-Associated Virus Antibody Prevalence in U.S. Military Recruit Applicants* 35 MORBIDITY & MORTALITY WEEKLY REP. 421-24 (1986); Barnes, *Military Statistics on AIDS in the U.S.*, 233 SCIENCE 283 (1986); Burke, *Prevalence of HTLV-III Infections Among Prospective U.S. Military Recruits*, International Conference on Acquired Immunodeficiency Syndrome (AIDS), Paris (1986); Altman, *Rise in AIDS Virus Infection Among Recruits is Detected*, N.Y. Times, June 26, 1986.

223. BRANDT, *supra* note 56. Before the discovery of penicillin, syphilis was a serious problem on military bases everywhere. *Id.*

224. Leishman, *Heterosexuals and AIDS*, ATLANTIC MONTHLY (Feb. 1987) [hereinafter Leishman]. At one large base in Fort Bragg, North Carolina, one recruit told Leishman that:

[A]bout an eighth of the men are on hard drugs, and a lot more have tried it . . . The problem is that everybody gets so bored. And there are no women. The message is, 'Get married or forget it.' You have to have some female company sometime. The situation creates a lot of homosexual behavior, which is the one subject nobody wants to talk about around here. They'll tell you about clap or prostitution, but nobody wants to talk about the gay stuff. What do they expect? Put four guys together sleeping in a tiny room, the very same guys you work with all day. It is too much for some people.

Id. at 63.

225. Stoneburner, *supra* note 221, at 1355. All but one of the applicants were men.

226. *Id.*

227. *Id.*

prostitutes and the physicians expressed reservation as to these findings due to the brevity of the interviews.²²⁸

The bias of these investigators against the role of prostitutes in the transmission of AIDS might be due to the fact that sixty-three percent of patients with AIDS who originally attributed their sole risk factor to contacts with prostitutes later admitted to homosexual or bisexual behavior, or to IV drug use.²²⁹ In truth, the army lifestyle—with close quarters and little contact with women—tends to lead to increased homosexual activity and problems with drug abuse.²³⁰ Yet, the only socially acceptable explanation for the high incidence of AIDS at army bases is heterosexual transmission and prostitution. As this article has already discussed, these results may be encouraged by an inherently pliable methodology of descriptive epidemiologic data gathering—a system inexorably bound by human responses to social pressures.

In terms of legal and moralistic responsibility for spreading AIDS, this bias distorts the reality of a relationship between a prostitute and her customer (referred to as a "john"). Sex is a consensual act, whether between lovers or a prostitute and john. Because prostitution is a voluntary undertaking between consenting adults, the responsibility for disease control should be equally apportioned, and the john should bear some responsibility for safe sex practices.

Viewed from this diametric perspective, one might argue that the prostitute is the victim and the john is the infector.²³¹ After all, it is medically more likely that the john will infect the female prostitute than *vice versa*. Also, a higher percentage of prostitutes consistently use condoms, and did so long before the AIDS epidemic. Venereal disease has always been an occupational hazard for prostitutes.²³² If a john refuses to allow the prostitute to use a condom to protect herself from sexually transmitted diseases, or the prostitute who is also a drug addict forgoes the condom to obtain a higher fee to support her habit, it is the prostitute who is at higher risk.²³³ These hypothetical situations reflect the stark reality of many prostitutes who are trapped in the vocation due to their

228. *Id.*

229. Lekatsas, *Identification of Risk in Persons with AIDS in New York City: When is "No Risk" Without Risk*, presented at the Second International Conference on AIDS, Paris 1986. See also *supra* notes 31-34 and accompanying text for a discussion of non-identifiable risk groups.

230. Leishman, *supra* note 224, at 53.

231. See *supra* notes 21-28 and accompanying text for a discussion of how it is medically more likely for the john to infect the prostitute than *vice versa*.

232. See Darrow, *supra* note 217.

233. Statistics show, however, that prostitutes are increasingly successful in convincing clients to use condoms. *Aided by AIDS*, Newsweek, Aug. 31, 1987, at 6.

poverty.²³⁴

These examples are real, yet they appear less believable because they cut against cultural and historical bias. Prostitution is at best a voluntary, consensual act, and at worst is a forced occupation with medical occupational hazards. In either case, requiring only the prostitute to be tested is inequitable and ineffective in terms of public health recourses and goals. Truly involuntary acts of exposure, such as rape or when a seropositive man sitting on a bus injects a stranger next to him, probably justify state intrusion into individual rights. These instances, however, can be easily distinguished from prostitution.

Currently, the wisest public health solution to controlling both the incidence of AIDS and STDs generally attributable to prostitution may lie in the state of Nevada, where prostitutes working at legal brothels are tested for syphilis, hepatitis and other diseases along with AIDS on a monthly basis.²³⁵ Madams generally manage houses of prostitution and one of their major responsibilities is to "keep their girls clean."²³⁶ "One of the first lessons a novice learns from a madam is how to spot signs of STD and to turn down anyone who looks suspicious . . . throughout their careers, house prostitutes are reminded of the importance of prophylaxis."²³⁷ While it is virtually impossible for the prostitute to discern a customer who looks as though he may carry the HIV virus, persistent efforts at screening and prevention for AIDS and STD's in legalized brothels currently represents the best effort to prevent the transmission of disease by prostitutes in the United States.

However, beyond the requisite monthly HIV testing and weekly STD testing, the Nevada policy heavily restricts freedom and lifestyle decisions of the prostitute. The favorable but narrow perspective of the legalized brothel in Nevada²³⁸ does not look beyond the effect of the AIDS epidemic on business, and as such never addressed the larger issue of the impact of a very regimented lifestyle on the prostitute.²³⁹

234. Leishman, *supra* note 224, at 47.

235. *Id.* Leishman writes that Nevada brothels are actually experiencing a "boon" due to the AIDS epidemic. *Id.*; see also Darrow, *supra* note 217 at 112. At brothels, female prostitutes are taught how "to inspect a man for signs of STD, how to 'freshen up' a client with mild soap and warm water, and how to 'flush away' microbes that may be deposited in the mouth or vagina during sexual intercourse." *Id.* Darrow finds these procedures have value in the prevention of disease transmission. *Id.* Darrow states that "conditions are most propitious for effective prophylaxis in houses where madams monitor activities, customers are compliant, and running water and medical supplies are close at hand." *Id.*

236. Darrow, *supra* note 217, at 115.

237. *Id.*

238. Leishman, *supra* note 224, at 47.

239. Sex Work 189-91 (Delacoste & Alexander, eds. 1987) [hereinafter Sex

Moreover, in the health setting, the mandatory weekly examinations are oriented to benefit the customer, as there is no counterpart, no equal requirement that the customer be tested so as to protect the prostitute. All brothel house policies should require mandatory condom use,²⁴⁰ and unless both the prostitute and the customer are mandatorily tested, testing for the prostitute should be voluntary, easily available, and completely anonymous. Where the seropositivity appears to be linked to drug use, those who test positive should have access to drug programs.²⁴¹

H. *An Alternative Idea: Decriminalizing Prostitution*

The importance of developing methods of controlling AIDS and STD's among prostitutes stems in part from the fact that the institution of prostitution historically endures, slowing down during venereal disease epidemics, but inevitably resurfacing due to nationwide demand.²⁴² Americans experimented with ways to get rid of the "social evil," but prostitution is clearly a thriving business in the United States and abroad.²⁴³

Decriminalization could mean the end of all criminal codes regarding voluntary prostitution, including relationships that are mutually voluntary between prostitutes and either agents or managers. Prostitution then would be subject to the existing professional and civil codes regarding business. As such, codes could supply rights regarding disability, health insurance, and vacation.²⁴⁴

Finally, if our society is to advocate a system of decriminaliza-

WORK]. The current systems of regulation require the prostitute to work and live in special districts, deny her the right to pursue relationships, and require her to register with the local sheriff's department. The prostitute in the brothel system also generally has no right to refuse a customer, and, while Leishman is correct that some brothels now require the use of condoms, the majority still do not allow their women to protect themselves by using condoms. *Id.*

240. Frequently, brothel houses have undocumented two-tier systems, as compared to an all-condom policy, whereby the prostitute is paid a higher rate to forego use of a condom. Interview with P. Alexander, Co-Director of COYOTE (Call Off Your Old Tired Ethics) (Feb. 1988) [hereinafter Alexander Interview].

241. Alexander Interview, *supra* note 240. Alexander also stressed that any prostitute who tests positive should have immediate entry into job retraining programs. *Id.*

242. See BULLOUGH, *WOMAN AND PROSTITUTION* (1985).

243. Indeed, the numbers of arrests for prostitution nationally has not decreased. New York Criminologist Bernard Cohen noted that men may turn to prostitution more frequently as "other women" grow more cautious due to the AIDS virus. See "Aided by AIDS," *Newsweek*, August 31, 1987, at 6.

244. Alexander views this as the greatest opportunity for prostitutes to gain control over their working environment. *SEX WORK*, *supra* note 239, at 210. Under this decriminalized system, voluntary, non-abusive relationships would enjoy non-regulation, and the practice of prostitution, according to Alexander, could become less dangerous. Prostitutes ideally could join unions and bargain over their working conditions and develop a code of ethics to improve problems in this area. *Id.*

tion, a critical result in terms of confronting the AIDS epidemic will be the removing of the "underground phenomena" from prostitution.²⁴⁵ In defining this term, it is useful to analogize the current "underground" nature of prostitution with the growth of the homosexual community in the last fifteen years. The steady decriminalization of sodomy in twenty-five states was a significant enabling factor in the evolution of the gay rights movement.²⁴⁶ The strength of this movement was revealed by the ability of the gay community to respond almost singlehandedly to the AIDS epidemic, in terms of both outreach and education.²⁴⁷

Prostitutes have not enjoyed the same social and political advances as homosexuals, and their risk of arrest and the ancillary stigmatization, going back to red light abatement laws in the late 1800s, prevails today. The continuing illegality and stigmatization of prostitutes means insurmountable barriers in the goals of organizing and educating the underground prostitute market,²⁴⁸ barriers which the gay community have largely broken through.

Most Northern European countries are in accord with a 1949 United Nations convention paper calling for the decriminalization of prostitution, including the enforcement of laws against those who exploit women and children in prostitution.²⁴⁹ In 1973, the National NOW Conference passed a similar resolution, calling for the decriminalization of prostitution.²⁵⁰ Some of the benefits of a comprehensive decriminalization scheme, according to NOW, include the possibility of unionization of prostitutes "to help them improve their working conditions."²⁵¹ Currently, in the United States, ten to fifteen percent of prostitution involves street solicitation, the majority of which involves drug users.²⁵² Eighty-five to ninety percent of all prostitutes who are arrested are street workers, and while only forty percent of street prostitutes are women of color, eighty-five percent of all prostitutes who are sentenced to jail are women of

245. *Id.*

246. Alexander Interview, *supra* note 240.

247. *Id.*

248. Alexander pointed to several current examples of this shame and stigmatization: prostitutes who lie to physicians about their occupation, fearing they will be treated badly, police confiscating prostitute's condoms as evidence of prostitution. In her work with an affiliated prostitute outreach and education group, Alexander finds it almost impossible to network and educate the prostitute community; massage parlors answer the phones and deny having anything to do with sex. Alexander Interview, *supra* note 240.

249. UNITED NATIONS CONVENTION FOR THE SUPPRESSION OF THE TRAFFIC IN PERSONS AND OF THE EXPLOITATION OF THE PROSTITUTION OF OTHERS, Art. 6 (1949).

250. Women and the Law: Prostitution Workshop, National Organization of Women Conference (1973).

251. Alexander, Working on Prostitution, News Release, NOW 14 (June 1986).

252. *Id.* at 7.

color.²⁵³ Decriminalization would end this discriminatory enforcement of current prostitute laws, improve working conditions and decrease drug problems.²⁵⁴ NOW views decriminalization as a more viable alternative than the present de facto legalization of prostitution by third parties in the United States.²⁵⁵

Quarantining and forced testing of prostitutes is a harsh response, especially for the carrier who never develops AIDS.²⁵⁶ Such a policy completely misses the heart of the health issue: the number of AIDS carriers is continually increasing. Energy and money would be better spent on those at greater risk: teenagers, minorities, and the heterosexual adult population. Given the current knowledge, focusing on prostitutes is a token measure. It is an idea that failed to control venereal disease before. Playing on past prejudices is not the answer; rather it distracts attention from the important issues: education and prevention.

I. *The Only Less Restrictive Alternative: Education and Prevention*

Broad-based education and individual counseling efforts, rather than policies promoting physical restriction and isolation, are the best approach to controlling the AIDS epidemic. The fundamental flaw of compulsory testing and quarantining is their capacity to mask the fact that prevention of AIDS involves individual responsibility and education about safe sex.

Recent proposals by the C.D.C. for compulsory testing of various segments of the population, including hospital admitees, those applying for marriage licenses, all pregnant women, and all patients at family planning clinics and STD clinics met with broad opposi-

253. *Id.*

254. *Id.* at 15.

255. *Id.* at 4. While prostitution is illegal in the United States except for the state of Nevada, a "quasi-legalized brothel system" has developed in several cities. Alexander cites San Francisco as an example:

In the early 70's, the San Francisco Board of Supervisors passed legislation regulating massage parlors, and requiring that both the owners of the massage parlors and the massage workers they employed obtain licenses from the Police Department's Permit Bureau. A conviction on a prostitution-related offense, in the previous three years, is grounds for denial of the license. Similarly, a conviction subsequent to the issuing of the license is grounds for revocation. In 1981, the Board of Supervisors passed similar legislation regulating escort services.

Id. Alexander found this legislation to merely regulate and control prostitution, not prevent it. *Id.* at 5.

256. A Florida prostitute with AIDS was recently confined to her home and ordered to wear an electronic monitor that signaled police if she strayed more than 200 feet from her telephone. *Hooker with AIDS Confined*, N.Y. Daily News, Sept. 28, 1985.

tion.²⁵⁷ Instead, voluntary testing programs, combined with sound counseling and assurance of anonymity are favored by both the medical and legal communities.²⁵⁸ The other critical requirement to control the AIDS epidemic outside of voluntary testing is an extensive educational outreach network.²⁵⁹ With our current knowledge about AIDS, all future transmission could, at least theoretically, be prevented.²⁶⁰ Three tools are needed to implement this theory and actually modify individual behavior: information, motivation and skills.²⁶¹ Getting the information to each individual is clearly the first problem. The second goal involves behavior modification.

Conveying the information to the public requires a sound, rapid intervention plan. The message, at least, is simple: (1) any sexual intercourse, outside of a mutually monogamous or HIV antibody-negative relationship, must be protected by a condom; (2) do not share unsterile needles or syringes; and (3) all women who may have been exposed should seek HIV antibody testing before becoming pregnant, and if positive, avoid pregnancy.²⁶²

The difficulty in communicating this message is two-fold: first, a distorted perception exists that the American public is offended by accurate, nonjudgmental information about human sexual behavior.²⁶³ Surgeon General Everett Koop stated that "many people, especially our youth, are not receiving information that is vital to their future health and well-being because of our reticence in dealing with subjects of sex, sex practices and homosexuality This silence must end."²⁶⁴

However, both the White House and Secretary of Education William Bennett have placed the issue of sex education in a moral context, arguing that schools should stress abstinence and should teach about sex only as a part of marriage.²⁶⁵ In a memorandum for the Domestic Policy Council on the subject of AIDS education,

257. Altman, *Mandatory Tests for AIDS Opposed at Health Parley*, N.Y. Times, Feb. 25, 1987, at 1; Altman, *U.S. is Considering Much Wider Tests for AIDS Infection*, N.Y. Times, Feb. 4, 1987, at 1; *Wider Use of AIDS Test Considered*, S.F. Chronicle, Feb. 3, 1987, at 1.

258. Health and Public Policy Committee, American College of Physicians; and the Infectious Diseases Society of America, *Position Paper, Acquired Immunodeficiency Syndrome*, 104 ANN. INT. MED. 575; See Francis, *The Prevention of Acquired Immunodeficiency Syndrome in the United States*, 257 J. AM. MED. A. 1357 (1987) [hereinafter Francis].

259. Francis, *supra* note 258.

260. *Id.*

261. *Id.*

262. *Id.*

263. Hunter, *AIDS Prevention and Civil Liberties: The False Promise of Proposals for Mandatory Testing*, 23 C.D.C. Conference on AIDS Mandatory Testing, (Feb. 24-25, 1987).

264. *Id.*

265. NEWSWEEK, Feb. 16, 1987, at 64.

dated February 11, 1987, Attorney General Edwin Meese wrote: "Any health information developed by the Federal Government that will be used for education should encourage responsible sexual behavior—based on fidelity, commitment, and maturity, placing sexuality within the context of marriage."²⁶⁶ Nonetheless, with Koop's support, the AIDS epidemic is calling for a new openness in sex education—a critical first step in educating the public.²⁶⁷

The second difficulty in effectively dispersing information is how to reach the minority and drug-using population. As the statistics below demonstrate, drug use, not prostitution, would be a well-placed focus of attention.²⁶⁸ Seventeen percent of AIDS patients are intravenous drug users, yet, compared with prostitution, the courts and legislatures have virtually ignored the issue.²⁶⁹ With widespread national attention focused on the use of drugs in our society, it is difficult to believe that the association of AIDS and IV drugs has gone relatively unnoticed. Moreover, epidemiologists have found that the majority of "street" prostitutes are drug users, a connection which amplifies the need to reach out and educate the drug-using community.

Already there is a disproportionate number and continuing rise in AIDS cases among blacks and people of hispanic descent: twelve percent of the population is black, yet blacks comprise twenty-five percent of all AIDS cases; hispanics, who make up six percent of the population, account for fourteen percent of those afflicted.²⁷⁰ It is widely believed that these statistics reflect the high proportion of blacks and hispanics in the drug-using community, especially in major cities.²⁷¹

Gaining access to the drug-using community is the most difficult task in the near future. In Canada, clean syringes and needles

266. Meese, Memorandum for the Domestic Policy Council, Subject: AIDS Education, (Feb. 11, 1987).

267. Werner, *Surgeon General Urges Ads on TV for Condoms on Combating AIDS*, S.F. Examiner, Feb. 11, 1987, at 1, col. 1; *Two Stations and Newsweek OK Condom Ads*, S.F. Chronicle, Feb. 22, 1987, at 2, col. 1; *Kids and Contraceptives*, NEWSWEEK, Feb. 16, 1987, at 54. This openness has sparked controversy that increased education regarding sex practices and protection, and at a younger age, will encourage children to have sex. *Id.* at 68. Secretary of Education William Bennett is a proponent in this controversy, billing sex education programs as either not constructive or detrimental in their failings to teach strong moral character and sexual restraint. DARTMOUTH REVIEW, 8 (Mar. 11, 1987).

268. A very high percentage of drug users are black and hispanic. C.D.C., SURVEILLANCE REPORT, (December 21, 1987).

269. *Women and AIDS: Assessing The Risks*, N.Y. Times Style Section, Oct. 28, 1985, at 15; *Women and AIDS*, NEWSWEEK, July 14, 1986; *Letters: HTLV-III Antibodies in Drug-Addicted Prostitutes Used by U.S. Soldiers in Italy*, 256 J. A.M.A. 711.

270. *AIDS Cases May Sour Among Minorities*, S.F. Examiner, Jan. 28, 1987.

271. *Id.*

are openly dispersed in major cities, but there has been great controversy in the United States over openly dispensing needles.²⁷² In Amsterdam, burgundy buses park near the canals, carrying machines to dispense condoms, trays filled with plastic vials of Methadone for drug addiction therapy for heroin addicts, and numerous syringes "intended for those who have not overcome the habit. The bus is designed in part to distribute Methadone, but also to enable heroin addicts who refuse to give up the drug to exchange their used syringes for new ones in order to avoid being infected by AIDS."²⁷³

Currently, coalitions are being formed in the United States to reach out to the black and latino populations at high risk in the larger cities. In San Francisco, these coalitions are critical of the San Francisco Health Department for "not doing enough to avert an AIDS epidemic among minority residents."²⁷⁴ Disapprobation is not centered only on San Francisco, as critics cite the disproportionate concern for funding research at both the local and federal levels, leaving a large deficit of resources for education and prevention.²⁷⁵ With no safe and effective treatment, and no vaccine in the near future, these allegations deserve careful consideration.

In Los Angeles alone, three people die each day from AIDS. Each victim costs the city between \$100,000 and \$150,000 in medical expenses.²⁷⁶ Therefore, the annual cost for caring for AIDS patients in Los Angeles is well over 100 million dollars.²⁷⁷ Yet, the budget of the City of Los Angeles for AIDS education is less than one percent of this sum.²⁷⁸ The budget of the AIDS Minority Project, a group devoted to the education of the lower class, teenage community—the adolescents most involved in IV drug use and entering a period of sexual promiscuity—has a yearly budget of only \$40,000.²⁷⁹

If information about preventive sexual practice can be universally dispersed, there will still exist a highly unpredictable variable: human behavior. This factor consistently confounds physicians, nurses and social workers in attempts to improve individual health. Nonetheless, studies of the homosexual population in San Francisco

272. *Some Nations Giving Addicts Clean Needles*, N.Y. Times, Mar. 9, 1987, at 4, col. 1.

273. *Id.*

274. S.F. Examiner, Jan. 25, 1987.

275. L.A. Times Magazine, Aug. 10, 1986, at 13.

276. N.Y. Times, June 13, 1986, at 1, col. 1.

277. *Id.*

278. *AIDS Symposium* (Sept. 15, 1986).

279. Interview with Rev. Carl Bean, Director of the L.A. AIDS Minority Project (Sept. 15, 1986). Among those who have contracted AIDS to date, 32% of the blacks and 78% of the whites are homosexual, 13% of the blacks and 11% of the whites are bisexual, and 43% of the blacks and 14% of the whites were users of intravenous needles. *AIDS Risk-Group Profiles in Whites and Members of Minority Groups*, 315 NEW ENG. J. MED. 191 (1986).

reveal that gay men have changed their sexual habits, reflected by the constant decline in the practice of almost all unsafe behavior in the gay population.²⁸⁰

However, designing an effective risk reduction program for the heterosexual community is more difficult, largely due to the phenomenon of "intellectualized fear."²⁸¹ Studies found that the heterosexuals are less likely to feel personally threatened by AIDS, and therefore are less prone to adapt sexual behavior patterns or lifestyles to avoid exposure to the virus.²⁸² Denial of AIDS is also prevalent in the minority population,²⁸³ and arguably stems from the early labelling of the disease as an affliction of the homosexual, hemophilic, drug-using, Haitian and prostitute population.

It will take time to reverse these outdated stereotypes, but massive education is still the only viable solution.²⁸⁴ Television commercials should be shown several times daily, defining safe sex, stating the importance of using condoms, and informing the heterosexual community that it is not who you are, but what you do: "the problem lies with *healthy* people who refuse to limit their sexual activities to those that are considered safe."²⁸⁵ With cases of prostitutes being tested and quarantined for AIDS, and rumors in Los Angeles about shutting down massage parlors, why not close the singles' bars?

J. The Courts: A Bleak Future

With regard to the rights of AIDS carriers and patients, the current disposition of the Court seems singularly unfavorable. There are several reasons for this ominous prediction, not the least of which includes the Supreme Court's apparently ever-decreasing interest in privacy rights arguments outside the setting of family and procreation since the earlier days of the Burger Court. While it appeared for a time after *Griswold v. Connecticut*²⁸⁶ and *Roe v.*

280. *Designing an Effective AIDS Prevention Campaign Strategy for San Francisco: Results from the Third Probability Sample of an Urban Gay Male Community*, The San Francisco AIDS Foundation, (June 30, 1986).

281. Leishman, *Heterosexuals and AIDS*, *The Atlantic Monthly*, Feb. 1987, at 44.

282. The San Francisco AIDS Foundation, *Designing an Effective AIDS Risk Reduction Program for San Francisco: Results from the First Probability Sample of Multiple/High-Risk Partner Heterosexual Adults*, (June 30, 1986).

283. Hardy, *The Real Threat to Minorities: "A Lot of Denial" and Scorn*, S.F. Examiner, Jan. 25, 1987.

284. *The Only Weapon Against AIDS*, N.Y. Times, Aug. 18, 1986.

285. Correspondence, from Ben Shatz, Esq., Director of National Gay Rights Advocates, to Dr. Charles Alexander, Chief, Texas Department of Health, regarding the state's recently proposed rule to make AIDS a quarantinable disease in Texas.

286. 381 U.S. 479 (1965).

*Wade*²⁸⁷ that the Court was moving toward a more modern and rational approach to individual liberties, every major decision since then, with few exceptions,²⁸⁸ can only be classified as fitting a trend that brings legal thinking back to a moralistic, traditional viewpoint.²⁸⁹ This direction has been recently reinforced by the Court's decision in *Bowers v. Hardwick*.²⁹⁰ The Court, and Burger in particular, relied heavily on tradition and history in denying the right of homosexuals to legally enjoy sexual intimacy in the privacy of a home.²⁹¹

CONCLUSION

If sexual conduct can be prohibited by the state, as has been shown by the Court's refusal to protect the intimate lives of homosexuals during the thick of the AIDS crisis, then the state will be able to easily defend an assortment of restrictions created to restrict sexual behavior, even if the restrictions fail to narrowly target only unsafe sex practices.

Hopefully, the quarantining and testing ordinances, like sodomy statutes,²⁹² will remain vestigial, examples of symbolic legislation. Historically, it has been impossible to regulate or forbid personal choice in sexual behavior, yet society consistently attempts to create illusions of "normalcy." When such illusions interfere with the pre-

287. 410 U.S. 113 (1973).

288. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

289. See Grey, *supra* note 126, at 86-87.

290. 478 U.S. 186 (1986). See Brest, *Supreme Court Proscribes a View of Privacy*, L.A. Times Editorial, July 13, 1986.

291. In his active reluctance to extend constitutional protection to homosexuals, Burger cited an author who relied on the dated definition of homosexuality from the English Reformation, when the definition of sodomy included sexual interactions of men with men, and of men with "beasts." *Id.* at 196-97 (Burger, C.J., concurring), citing D. BAILEY, *HOMOSEXUALITY IN THE WESTERN CHRISTIAN TRADITION* 70-81 (1975). Burger's clear reliance on traditional if not biblical strictures can be compared with the Court's treatment of tradition earlier in the arena of sex discrimination, where, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court found tradition to be the evil responsible for sex discrimination, stating that our ancient attitude of "romantic paternalism . . . put women . . . in a cage Indeed, this paternalistic attitude became so firmly rooted in our national consciousness . . ." *Id.* at 684. Brennan continued by writing that "our statute books gradually became leaden with gross, stereotypical distinctions between the sexes . . ." He also mentioned that sex is an "immutable characteristic determined solely by the accident of birth . . ." *Id.* at 685. Burger could have adopted these arguments to grant at least intermediate scrutiny to homosexuals in *Hardwick*, but he chose not to do so. Like moralists years before, Burger and four other justices looked only deep enough at the issues to confront the obstacle of the symbolism of sexually different behavior, and voted in favor of upholding historical norms in the area of sexually-sanctified behavior.

292. Gay men face at least the threat of criminal prosecution daily in twenty-five states where homosexual acts are still crimes. See *RIGHTS OF GAY PEOPLE: THE REVISED EDITION OF THE BASIC ACLU GUIDE TO A GAY PERSON'S RIGHTS* 131 (1986).

vention of a deadly disease, however, they should be subject to the highest scrutiny.