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Introduction

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LAW, SOCIAL POLICY, AND CONTAGIOUS DISEASE: A SYMPOSIUM ON ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS)

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By Jacob D. Fuchsberg*

Until recently, few of us had heard of acquired immune deficiency syndrome. Even its acronym, AIDS, sounds more like an advertising catchword than the shirtsleeve name of a dreaded disease. Yet, in what seems but a twinkling of time, it has become a term connoting not only a major public health problem, but one that confronts the legal system with unprecedentedly difficult civil rights issues. The timely articles collected in this symposium do much to put the subject in focus.

The medical facts, of course, are frightening. AIDS is a disease for which we are told that, as of now, no cure is imminent. This though the overwhelming percentage of the cases end in death. And, to add to the alarm, as diagnostic knowledge has grown, almost 20,000 cases already have surfaced in the United States alone, according to federal health statistics,1 while the number continues to

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The article in this issue entitled *A Medical Review of AIDS*, by Drs. Marc J. Sicklick and Arye Rubinstein, presents a helpful summary of the nature of the illness.

No wonder reaction to the AIDS crisis, fueled by the widespread publicity it has received in this era of easy communication, at times borders on the hysterical. Many fear that AIDS can be spread through casual contact, as in workplaces, classrooms or other places where people gather. (The medical consensus on this point is to the contrary, but not unanimous.) Regrettably, reactive political and legal measures, some all too hasty and indiscriminate responses to public clamor, at times have jeopardized the civil rights of victims, suspected victims and potential victims.

A special factor distorting society's response to AIDS is that, unlike in Africa, where most of the victims of this disease are heterosexual, in the United States the largest single group of AIDS victims has been homosexual men. Historic hostility to individuals with such a sexual orientation has been heightened by those ready to think of AIDS as a "gay plague." Indeed, the public policy debate has been distorted by some who go so far as to insist that AIDS represents no less than divine retribution. It also provides a forum for those who would enlarge the power of government to intrude on intimate sexual conduct, obviously an area most sensitive to privacy concerns.

This is not to say that the legal system has not responded in conventional and constructive ways. For instance, although there is generally no law prohibiting employment discrimination against AIDS victims *per se*, claims have been pressed under statutes protecting the disabled. Along this line, Professor Arthur S. Leonard, in his article *AIDS and Employment Law Revisited*, focuses on the availability of statutorily-rooted and administratively-enforceable remedies. It may be apt too to add Professor Leonard's observation, quoted recently in the *New York Times*, that "even the most hard-line management lawyers are now advising their clients that AIDS is a disability, and workers may not be dismissed because of a disability."

Another possible application of existing laws is discussed in *AIDS and Quarantine: The Revival of an Archaic Doctrine*, by Wendy E. Parmet. After chronicling the history of quarantine laws, she thoroughly and thoughtfully analyzes the pragmatic and constitutional barriers to the imposition of isolation on some or all AIDS victims.

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victims. While there were many cases treating such questions yester-
year, one cannot help but wonder how they would have been decided
in light of the expansion of due process in ensuing decades.

This brings us to new legal tools developed specifically in re-
sponse to the AIDS crisis. For example, it is feared that insurance
companies will discriminate against AIDS victims in order to avoid
liability for hospital and medical care that could reach into billions
of dollars. In response, several states already have prohibited resort
to a blood test for AIDS antibodies as a means of denying coverage
to AIDS victims. More states and the federal government are being
urged to follow suit.

Other legislative proposals are designed to protect the public
from the spread of AIDS. Among these is one that would go so far
as to impose criminal sanctions on those who defy voluntary quaran-
tine measures. This concept is presented and discussed by Professor
David Robinson, Jr. in AIDS and the Criminal Law: Traditional
Approaches and a New Statutory Proposal. It seems to me, how-
ever, that, because behavior which exposes others to risk is generally
private, the practical effectiveness of a criminal prohibition would be
an open question. For example, intravenous drug use, though already
illegal, remains an important and troublesome vector of AIDS
transmission.

Needless to say, many of these issues raise the central question
of balancing the rights of the individual against the power of govern-
ment. Thus, while Professor Robinson's proposal would, among other
things, outlaw most forms of sexual intimacy by AIDS victims, libertar-
ians point out that New York's long-established anti-sodomy law
(which, of course, was not limited to AIDS victims) was declared
unconstitutional by a divided Court of Appeals in 1980, a position
the United States Supreme Court more recently refused to impose
nationwide. In so deciding, the Supreme Court, relying heavily on
"ancient" proscriptions against sodomy, ignored the burgeoning
AIDS problem. Thus, since AIDS can be transmitted through heter-
osexual intercourse, panic over its spread presents more than the pos-
sibility that states may further extend governmental intrusion on
privacy.

This and other civil liberties issues are considered in The AIDS
Epidemic: A Constitutional Conundrum, by Leonard Orland and

Sue L. Wise. They conclude that, especially in light of the gravity of the AIDS threat to public health, courts are unlikely to afford significant constitutional protection against relatively free-wheeling exercise of the police power. Yet, other countries, where individual rights are not protected by a written constitution, have in some respects been quicker to use the police power than has the United States. On this score, a revealing international perspective is provided by Marlene C. McGuirl and Robert N. Gee in *AIDS: An Overview of the British, Australian and American Responses*.

Consideration of such questions suggests that courts, increasingly, will be called upon to make difficult decisions. An immediate example is to be found in the recent New York case in which parents sued to overturn an order of the Board of Education allowing an infected child to attend public school. A fascinating insiders' analysis of this decision is presented in *AIDS in the Classroom*, by New York City's Corporation Counsel, Frederick A. O. Schwarz, Jr., and his associate, Frederick P. Schaffer, who spoke for the City and its agencies in that litigation.

Needless to say, such conflicts are not unrelated to the reality that prejudice is usually bred by ignorance. In times of crisis, people who cannot or will not learn the facts have been quick to blame minorities, especially those they already disliked. To mention but one example from our own recent history, it is now generally recognized that it was wrong to send thousands of Japanese-Americans to concentration camps during World War II. Similarly telling instances of scapegoating unpopular minorities for epidemics are presented by Janet L. Dolgin in *AIDS: Social Meanings and Legal Ramifications*.

Finally, in a society where free speech is so highly encouraged, we should not be surprised at the quantity of discussion of AIDS that has appeared in the popular press. But, since such debate does not always take the high road, it is especially heartening that well-considered differences of opinion can be expressed and explored in this scholarly journal, to the end that reasoned discussion on a qualitative level may contribute to the formulation of a principled public policy on the issues at hand. The editors are to be congratulated for performing this invaluable public service.