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THE AIDS EPIDEMIC: A CONSTITUTIONAL CONUNDRUM*

Leonard Orland** and Sue L. Wise***

I. INTRODUCTION: FAILED IMMUNITY AND CONSTITUTIONAL SYSTEMS

The great French historian Fernand Braudel reminds us that for several centuries, plague, "[l]eader of the dance of Death, . . . was a fixture, a permanent structure in men's lives."1 Plague was "only one disease among many others"2 — smallpox, influenza, typhus, diphtheria, typhoid, tuberculosis and syphilis. While reactions to disease vary, nevertheless these pestilences "present the same drama, list the same more or less effective measures (quarantines, surveillance, . . . disinfection, roadblocks, close confinement . . . ), the same panic-stricken suspicions and the same social pattern."3 In the midst of epidemic, the masses die, the "plague making us cruel, as doggs, one to another," as Samuel Pepys noted in August, 1665.4

As for the rule of law, Braudel observes that "[M]unicipal mag-
istrates, officers and prelates forgot their responsibilities; in France whole parlements emigrated . . . ; [w]hen plague broke out in London in 1664 the Court left the town for Oxford . . . ; [t]here was no litigation in the capital[.]

In this present post-penicillin era, we may be witnessing the beginning of such an epidemic. In less than a decade, life has become nasty, brutish and short for tens of thousands of American citizens whose biological immune systems have failed. This biological collapse is the consequence of AIDS, "an entirely new, transmissible, always fatal and, thus far medically uncontrollable pathological condition."

For most of these citizens, gay men afflicted with AIDS, the horrors of life multiply logarithmically. Not only do they watch helplessly as their own bodies and those of their intimates rapidly deteriorate toward inevitable death, but they also find themselves cut off from much of what American citizens have come to expect — reasonable employment, housing, medical care, social interaction in a free environment, life and medical insurance, and, in the end, the hope of death with dignity.

Gay men, already accustomed to a legacy of social and legal persecution, discover that the failure of their own immune systems mirrors the failure of the legal and constitutional system expected to protect them in time of crisis. The sad reality, explored briefly in this essay, is that the Constitution and the Bill of Rights offer as little protection to these citizens as their lost physical immunity.

The inadequate constitutional responses to the threat of AIDS find their roots in the historic oppression of homosexuals and in the uncertainty of current medical knowledge about AIDS.

5. Id. at 85-86.
11. See infra text accompanying notes 85-133.
12. Id.
A CONSTITUTIONAL CONUNDRUM

II. A LEGACY OF LEGAL OPPRESSION

The current medical literature identifies gay men and drug addicts as high risk AIDS carriers. The association of the disease with gay men and the concomittant perception of AIDS as a gay disease are new and powerful forces in the stigmatization of homosexuals. Indeed, long before the AIDS epidemic, homosexuals had been adjudged morally and socially loathsome and traditional targets for criminal prosecution.

Criminal prosecution of men for private, nonassaultive, consensual homosexual conduct is of ancient origin; for centuries, hatred of homosexuals has been translated into criminal statutes which condemn "the abominable and detestable crime against nature," which was "‘ felony by the ancient common law, and punished, according to some authors, with burning; according to others . . . with burying alive.'

In the fourth century Christian Roman Empire, anal sex was


15. See Landsman, Ginsburg & Weiss, supra note 7.

16. 2 ENCYCLOPEDIA OF CRIME & JUST. HOMOSEXUALITY AND CRIME 866-71 (1983). Addicts experienced a similar fate, culminating with the Harrison Act of 1914, Ch. 1, 38 Stat. 785. By the end of the nineteenth century, addicts had been identified with foreign groups and internal minorities who were already actively feared and the objects of elaborate and massive social and legal restraints. Two repressed groups which were associated with the use of certain drugs were the Chinese and the Negroes . . . At first [after 1870], the Chinese represented only one more group brought in to help build the railroads, but particularly after economic depression made them a labor surplus and a threat to American citizens, many forms of antagonism arose to drive them out or at least to isolate them. Along with this prejudice came a fear of opium smoking as one of the ways in which the Chinese were supposed to undermine American society.

Cocaine was especially feared in the South by 1900 because of its euphoric and stimulating properties. The South feared that Negro cocaine users might become oblivious to their prescribed bounds and attack white society . . . . When opiates began to be feared for their addictive properties, morphine was more closely attached to the 'lower classes' or the 'underworld,' but without greater specificity.

D. Musto, The American Disease 5-6 (1973) (footnotes omitted).

17. 2 ENCYCLOPEDIA OF CRIME & JUST., supra note 16, at 866.


all non-heterosexual behavior was considered contra naturam ('against nature'). Under the Church's influence in the thirteenth century more anti-homosexual laws were enacted. St. Thomas Aquinas argued that homosexuality is 'against nature', a view that, in conjunction with translations of Scripture that emphasize anti-homosexual bias, still underpins religious and legal sanctions against homosexuality.

To this day, these historic prejudices provide support for religious and legal sanctions against homosexual behavior. For the past several hundred years, criminal prosecution of homosexuals has continued, notwithstanding the relatively recent conclusions of eminent law reform groups in the United Kingdom and the United States that consensual homosexual conduct should not be criminal.

Although the Supreme Court has recognized a constitutional right to sexual privacy, that privacy has been and continues to be the exclusive right of heterosexuals, and constitutional attacks on "crime against nature" statutes have consistently failed in the Supreme Court.

In 1973, the Supreme Court, in a brief per curiam opinion, reversed the Fifth Circuit, which had found the Florida "crime against nature" statute unconstitutionally vague. The Court concluded that

21. Id.
    Thus, far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the middle ages undermines his suggestion that [the Georgia sodomy statute] represents a legitimate use of secular coercive power. A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus.
28. Wainwright v. Stone, 414 U.S. 21 (1973). While the Supreme Court tersely noted that "Stone was convicted for copulation per os and per anum, [and] Huffman for copulation per anum," id. at 22, a careful review of the reported decisions fails to disclose the specific
“copulation per os and per anum” had “long been held” by the Florida courts to come within the statutory prohibition against the “abominable and detestable crime against nature” and hence “afforded appellees ample notice that their conduct was prohibited by law.”29 Two years later, in 1975, in upholding a conviction involving heterosexual sexual assault (forcible cunnilingus), the Supreme Court rejected a void for vagueness challenge to Tennessee’s “crime against nature” statute.30 The Court declared that “[t]he phrase has been in use among English speaking people for many centuries, . . . and a substantial number of jurisdictions in this country continue to utilize it.”31 The following year, the Supreme Court, without opinion, affirmed a three judge court’s decision upholding Virginia’s “crime against nature” statute as applied to private consensual homosexual relations.32

The refusal of the Supreme Court to extend constitutional protection — the fundamental right of sexual privacy — to homosexuals, while at the same time upholding a state prohibition on acts of private consensual sodomy, all too clearly demonstrates the continued Supreme Court antipathy toward homosexual conduct. Continuing an unbroken line of cases rejecting constitutional claims tendered by homosexuals, the Supreme Court, in its 1986 decision in *Bowers v. Hardwick*,33 upheld the constitutionality of a Georgia statute which made sodomy, defined as “any sexual act involving the sex organs of one person and the mouth or anus of another,” a criminal act.34 The respondent, a male homosexual, was initially charged with violating the statute by conduct with another male performed in the privacy of respondent’s home. After the state declined prosecution, respondent sought to declare the statute unconstitutional. The district court dismissed the complaint, and the Eleventh Circuit re-

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29. *Id.* at 22-23.
31. *Id.* at 50.
34. *Id.* at 2842 n.1.
versed on the ground that the statute interfered with respondent’s constitutionally protected right of sexual privacy. 35

The Supreme Court, in a 5-4 decision authored by Justice White, reversed. Treating the case as presenting solely an issue of due process, Justice White, speaking for Chief Justice Burger and Justices Powell, Rhenquist, and O’Connor, proclaimed that the Supreme Court was “quite unwilling” to announce “a fundamental right to engage in homosexual sodomy.” 36 To the majority, the Court’s prior decisions protecting married and unmarried sexual privacy should be limited to the specific conduct previously accorded constitutional protection, viz, child rearing and education, family relationships, marriage, contraception, and abortion. “None of the rights announced in those cases,” the majority concluded, “bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . . .”37

Chief Justice Burger’s concurrence underscored a similar but somewhat stronger view — that “in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy.”38 Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, dissented and criticized the majority’s “almost obsessive focus on homosexual activity”39 and its “willful blindness” to the “fact that sexual intimacy is a ‘sensitive key relationship of human existence . . . .’”40

Chief Justice Burger’s blunt, narrow, homophobic view stands in marked contrast to the tolerance so movingly expressed by Justice Blackmun’s anguished dissent:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many ‘right’ ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.41

The traditional American unwillingness to perceive male homosexuals as entitled to constitutional protection has not been confined

36. 106 S. Ct. at 2843.
37. Id. at 2843-44.
38. Id. at 2847.
39. Id. at 2849.
40. Id. at 2851 (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)).
41. Id. (emphasis in the original).
to the Supreme Court; indeed, it has been expressed by groups which view their function as the protection of constitutional rights. While the American Civil Liberties Union (ACLU) is currently active in efforts to protect gay AIDS victims, as recently as 1957, the National Board of the American Civil Liberties Union refused to respond to the "occasional demands" made upon the Union to "defend the civil liberties of homosexuals." Ironically, the past reasoning of the Civil Liberties Union reflects the current reasoning of the Supreme Court: it is "not the function of the ACLU to evaluate the social validity of laws aimed at the suppression or elimination of homosexuals, and that overt acts of homosexuality constitute a common law felony." Since then, the ACLU, in the most recent Supreme Court case, has sought unsuccessfully to protect the constitutional rights of homosexuals. The major health problem posed by AIDS, however, threatens to undermine attempts to protect the civil rights of gays, particularly in light of the uncertain etiology of the disease.

III. AIDS AS A DISEASE: A WORKING SUMMARY OF CONTEMPORARY MEDICAL KNOWLEDGE

A. Epidemiology

In June of 1981, the Centers for Disease Control (CDC) issued their first AIDS report, which described exceedingly rare opportunistic infections striking primarily in homosexual men in the Los Angeles area. By September of 1982, the CDC recognized Acquired Immune Deficiency Syndrome (AIDS) as a new and distinct illness.
and by 1983, identified additional high-risk groups: intravenous drug users, Haitians, hemophiliacs, infants born to infected mothers and recipients of transfused blood. By late 1985, the New York State Department of Health concluded that sexually active homosexual and bisexual men with multiple partners (73%) and present or past abusers of intravenous drugs (17%) constituted the overwhelming majority of AIDS victims.

A daily average of eleven new AIDS cases is reported in the United States, and the total number of cases is expected to reach 40,000 by the end of 1986. AIDS is a deadly disease. Although the mortality rate (the proportion of deaths to the total number of reported cases) among AIDS patients to date is forty-seven percent, the case fatality rate (the chance that a specific patient will die of AIDS) is one hundred percent. At present, no treatment exists which is effective in either suppressing the multiplication of the AIDS virus within an infected individual, or in reconstituting the immune system once it has undergone breakdown. No vaccine has


51. N.Y. STATE DEP'T. OF HEALTH, ACQUIRED IMMUNE DEFICIENCY SYNDROME: 100 QUESTIONS & ANSWERS 1 (1985). Scattered cases involved persons with hemophilia and others who had received transfusions of contaminated blood or blood products (3%), non-at-risk persons who had had heterosexual contact with persons with AIDS or at risk for AIDS (1%), and children who had apparently acquired AIDS prior to or during birth from infected mothers (1%). Other victims, not falling into any identified risk groups, accounted for the remaining 5% of cases. *Id.* at 1-2.


53. Krim, *supra* note 7, at 3. By September, 1985, 21 countries had reported 1,573 AIDS cases to the World Health Organization European Collaborating Centre on AIDS. *Update: Acquired Immunodeficiency Syndrome—Europe, 35 MORBIDITY & MORTALITY WEEKLY REP. 35 (Jan. 24, 1986).* The World Health Organization, in more recent estimates, has suggested that 50,000 Africans may have contracted AIDS since 1980, and that one million to two million people may be symptomless carriers of the AIDS virus. *U.N. Agency Says There May Be 50,000 Cases of AIDS in Africa,* N.Y. Times, June 6, 1986, at A18, col. 6. The head of the AIDS branch of the CDC has characterized AIDS as "a massive problem, one with national and international implications," Altman, *New Fear on Drug Use and AIDS,* N.Y. Times, April 6, 1986, at A1, col. 2, while medical researchers caution that government statistics on reported cases may conservatively understate the number of cases. *See Hunt, Teaming Up Against AIDS* N.Y. Times, March 2, 1986, § 6 (Magazine), at 42. A factor in the underreporting of AIDS is the cooperation of health care workers, sympathetic to ill and dying patients, in not labeling a patient with the ignominy of AIDS, with its attendant adverse consequences. *See King, Doctors Cite Stigma of AIDS In Declining to Report Cases,* N.Y. Times, May 27, 1986, at A1, col. 1.


55. *Id.*
been developed to protect those not yet exposed to the AIDS virus.\textsuperscript{56}

\section*{B. Symptomology}

The AIDS virus causes reduced cellular immunity; the virus affects one specific white blood cell type (T-lymphocyte) which normally attacks viruses, fungi, parasitic infections, and cancer.\textsuperscript{57} As a result of the breakdown in T-lymphocytes, the AIDS patient first becomes unusually vulnerable to opportunistic infections which present a variety of symptoms identified as AIDS-related complex (ARC).\textsuperscript{58} later, as the disease progresses, the patient becomes debilitated by viral and fungal illnesses common in the general population,\textsuperscript{59} but deadly to the AIDS patient. Stricken patients usually die within three years of diagnosis; there is no known cure.\textsuperscript{60}

\section*{C. Transmissibility}

All evidence indicates that the virus associated with AIDS is transmitted through direct blood-to-blood or semen-to-blood contact — specifically sexual contact, needle sharing, or transfusion of blood or blood products.\textsuperscript{61} Homosexual and bisexual men are at risk because of the prevalence in this group of anal and oral intercourse which may result in semen-to-blood or blood-to-blood contact.\textsuperscript{62} Any direct contact with the semen of an infected person, including oral/genital sex, increases the risk of AIDS transmission.\textsuperscript{63} Communal needle use among intravenous drug users obviously increases the risk that blood from an infected person will be injected directly into the bloodstream through the shared contaminated needle.\textsuperscript{64} Similarly, hemophiliacs and others who receive blood transfusions may come into direct contact with blood and blood products from infected persons. Researchers Say Laboratory Tests May Produce a Vaccine for AIDS, N.Y. Times, Mar. 1, 1986, at 32, col. 1.

\footnotesize
57. Bartlett, Refusal to Treat and Hospital Liability Issues, in AIDS: Legal Aspects of a Medical Crisis 3 (1985).
58. See J. Slaff & J. Brubaker, supra note 9, at 271 (average life expectancy of the AIDS patient is 18 months). ARC symptoms consist of chronic generalized enlargement of the lymph nodes, recurrent fevers, weight loss, minor alterations in the immune system, and minor infections. Id.
60. J. Slaff & J. Brubaker, supra note 9, at 7.
61. N.Y. State Dep't. of Health, supra note 51, at 2.
62. Id.
63. Id. at 3.
64. Id. at 2.
One major uncertainty surrounding AIDS is whether or not the virus can be transmitted through the day to day contact that occurs in work, household, or school environments. Most scientists maintain that such "casual" contact presents no risk of transmission of the AIDS virus. Medical authorities who assert that AIDS cannot be casually transmitted note that the AIDS virus does not survive long outside the human body and is not transmitted through the air, food, or water, nor is it transmitted by touching any object handled, touched, or breathed on by an AIDS victim. Moreover, family studies indicate that adults do not transmit the infection to children, except when infected mothers transmit AIDS to their unborn children. The available evidence also indicates that AIDS is not transmitted by eating and drinking from common dishes or utensils, or other activities which are common to a household setting.

Even the CDC apparently has only speculative answers to critical questions about the cause, incubation period, and transmissibility of AIDS. The possibility exists that body fluids other than blood, blood products (such as plasma), and semen can carry the infectious agent. The virus has been cultured from saliva and tears, and some researchers have hypothesized that sweat may act as a transmission agent. Obviously, this uncertainty on the part of the foremost medical experts contributes to the belief held by roughly half of all Americans that the disease is communicable through casual contact.

65. J. Slaff & J. Brubaker, supra note 9, at 147. But new infection among hemophiliacs and others who receive blood transfusions has been substantially eliminated through screening of all blood donations since April 1985. Id.


67. N.Y. STATE DEP'T. OF HEALTH, supra note 51, at 4; Summary: Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/ Lymphadenopathy — Associated Virus in the Workplace, 34 MORBIDITY & MORTALITY WEEKLY REP. 681, 681 (Nov. 15, 1985) (CDC does not recommend blood screening in the workplace because "AIDS is a bloodborne, sexually transmitted disease that is not spread by casual contact." CDC recommends that "food service workers known to be infected with AIDS should not be restricted from work.") This issue is still the subject of exploration in the medical community. A recent study indicates that the AIDS virus can remain active outside the body for up to 15 days. Tests Show AIDS Virus Can Live Up to 15 Days Outside the Body, N.Y. Times, Apr. 9, 1986, at A15, col. 5.

68. Grieco, supra note 59, at 12. One researcher has suggested that the "virus present in the birth canal could be delivered to newborns during delivery." Altman, AIDS Study May Show How Women Infect Men, N.Y. Times, March 7, 1986, at A16, col. 1.


70. Grieco, supra note 59, at 11.

A similar mystery surrounds questions of the communicability period attendant to the AIDS virus. CDC-defined AIDS occurs when the number of T-lymphocytes is reduced to a level where certain opportunistic infections associated with the disease occur. It is altogether possible, however, that a carrier might transmit the AIDS virus at a number of different disease stages. The CDC recognized that two to twenty-four months may elapse between exposure to the AIDS virus and the appearance of recognizable symptoms, and that transmissibility may precede recognizable illness.

One observer has suggested four categories of infected AIDS individuals: (1) those exposed to the virus (or who test positively for the presence of the AIDS antibody in their blood) who display no physical symptoms; (2) those exposed persons with symptoms characteristic of the onset of AIDS; (3) those suffering from an opportunistic infection who do not require hospitalization and are able to carry on their normal activities; and (4) those hospitalized as a result of multiple infections or so weakened by their condition that they are relatively incapacitated.

The shroud of uncertainty surrounding AIDS transmission and communicability during all disease stages has dark and depressing social and legal implications. This is particularly true because the CDC has recognized that persons who exhibit no symptoms or who are not, and do not become, ill with CDC-defined AIDS, may nevertheless be carriers of the infection. There is the additional possibility that individuals who exhibit warning signs associated with AIDS, including swollen lymph nodes, weight loss, abnormal fatigue, night sweats, and a decrease in T-lymphocytes in the blood, may transmit

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73. See supra text accompanying notes 57-59. See also Sicklick and Rubinstein, A Medical Review of AIDS, 14 Hofstra L. Rev. 5, 6 (1985) (discussing case definition of AIDS).
76. See, e.g., Leonard, supra note 71, at 687 (discussing discrimination in the workplace experienced by members of each category).
the infectious agent. However, these symptoms can be attributable to medical conditions other than AIDS; the presence of ARC symptoms does not mean that the infected individual will himself develop AIDS. Furthermore, a positive AIDS antibody test neither accurately predicts development of AIDS, nor does it predict the risk of transmission. At present, the CDC concludes that the transmission of AIDS by casual contact or airborne spread is a minimal risk of the disease.

IV. AIDS AS A PROBLEM OF CONSTITUTIONAL LAW

AIDS, if not presently epidemic in scope, may well take on epidemic proportions if no public health measures reduce its occurrence and spread. Responsible authorities estimate that presently there may be hundreds of thousands of AIDS cases; these estimates push toward one million at the high end of the spectrum. All authorities agree that the reported AIDS case rate is rising dramatically each year. The Acting Assistant Secretary of Health and Human Services has spoken of an “escalating AIDS epidemic” of “staggering and devastating” proportions, while the Public Health Service has predicted 270,000 AIDS cases and 179,000 AIDS deaths by 1991. Undoubtedly, this threat of mass death will weaken the resolve of even the most vigorous defenders of individual rights, including defenders of the rights of the largest group affected by AIDS — gay men.

Opponents of homosexual rights have used the AIDS issue as a “lightning rod” to inflame preexisting prejudice against gay men.

78. Leonard, supra note 71, at 685.
79. Id.
81. AIDS Update 1983, supra note 13, at 311 (no evidence suggests transmission of AIDS by airborne spread; casual contact offers little or no risk).
83. Address of Dr. Mathilde Krim, Yale Law School AIDS Conference (Feb. 1, 1986) (on file at Hofstra Law Review). See also supra note 53. (World Health Organization reports AIDS cases in 21 European countries); AIDS Update 1986, supra note 13, at 17 (the number of AIDS cases in the U.S. continues to increase, although not exponentially); Simons, Brazil Surveys Carnival Visitors About AIDS, N.Y. Times, Feb. 9, 1986, at 9, col. 1 (Brazilian health authorities report 574 AIDS cases, more than half of which resulted in deaths).
84. Pear, Tenfold Increase in AIDS Death Toll is Expected by '91, N.Y. Times, June 13, 1986, at A1, col. 3.
85. D. ALTMAN, supra note 10, at 69-70.
This prejudice, combined with genuine concern over the proportions of the threat involved, has led to the firing of homosexuals from their jobs, outright physical assaults upon gays, and pressure on state officials to reopen a former leper colony to confine AIDS carriers.\(^6\) Many supporters of repressive measures presumably share the view of Ronald Goodwin of the Moral Majority, who sees any attempt to cure or prevent AIDS as "a commitment to spend our tax dollars on research to allow these diseased homosexuals to go back to their perverted practices without any standards of accountability."\(^7\)

Even reactions free of antihomosexual bias may not rest on a rational basis. Public school boards, for example, have been reluctant to admit children suffering from AIDS into classrooms;\(^8\) obviously, these child victims are not objects of prejudice apart from their diseased state. While these responses may be efforts to balance the rights of AIDS-infected students to an education against the right of the other students to be free from a public health risk, such responses also represent a hysterical social reaction, unrelated to the reality of the underlying risk.

These kinds of responses present the core question of where, given the current state of medical knowledge, the balance should be struck between the rights of AIDS victims and the threat to public safety. This process generates the further question of whether or not, if AIDS were found to be transmissible through casual contact or airborne exposure, there are any limits on the measures which could be taken to protect the public from contagion.

The uncertain state of medical and scientific knowledge concerning the transmissibility of AIDS complicates constitutional analysis of a situation in which an AIDS victim, either actual or suspected, makes contact with other members of the public. The risk of death associated with AIDS is serious. If that risk threatens a large enough segment of the population, and if there is certainty about the threat of death, then, arguably, there are few limits on State activities undertaken to minimize that risk.\(^9\)

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86. Id. at 60-65.
87. Id. at 25 (quoting Ronald Goodwin). Similar views have been expressed by high officials in the Reagan Administration. Patrick Buchanan, White House Director of Communications, has declared that homosexuals "have declared war upon Nature, and now Nature is exacting an awful retribution." Bayer, *AIDS and the Gay Community: Between the Specter and the Promise of Medicine*, 52 SOC. RESEARCH 581, 589 (1985) (quoting Buchanan as reported in N.Y. Post, May 24, 1983).
88. Silas, *supra* note 72, at 18.
Nevertheless, constitutional limits on state action do not simply evaporate in the midst of crisis, no matter how serious the threatened risk. While the control of disease is an area traditionally within the state's police power, there are, nonetheless, constitutional limits on the state's ability to use criminal law to control disease. The state cannot, for example, make illness a crime, although it can make public acts committed by an ill person criminal. It appears unlikely that the state can constitutionally impose criminal sanctions on a person having the status of an AIDS carrier, even though the state may constitutionally punish public and perhaps even private acts by AIDS carriers if those acts carry high risks to the public.

Forty years ago, in Korematsu v. United States, the United States Supreme Court, in one of its unhappier moments, upheld on national security grounds the confinement of citizens of Japanese ancestry in internment centers. If an exclusion order against citizens based on race or national origin can be sustained on national security grounds, the confinement of citizens of Japanese ancestry in internment centers is similarly justifiable.
grounds (characterized by the Korematsu Court as an example of "pressing public necessity"),
can we say with any certainty that the
Supreme Court would strike down the long-term confinement of, for example, all black males, if, contrary to current known fact, black males were, with reasonable certainty, identified as high-risk carriers
of AIDS? Would the result be any different if the risk group were aliens, such as Haitians? What if the risk group were Jews and the proposed governmental response was to intern all American Jews who test positive, in Korematsu-style "assembly and relocation centers," until they are no longer infectious (which may mean when they are dead)?

Yale Law School Dean Guido Calabresi has suggested that, in
an ideal society, if the object of state action is a group which has
already been the subject of discrimination, then even the objective of
preventing death may not constitute sufficient justification for class
based discriminatory actions. Several factors dampen the likeli-
hood that the rational and humane Calabresi position will benefit
those grappling to protect the constitutional rights of AIDS victims.

In America's real and far from ideal society, the legacy of op-
pression against gay men is one historically grounded in law and,
even today, based on law. Moreover, gay men, under current equal
protection doctrine, have not been recognized as a suspect class
(which would require that class-effecting legislation survive the test
of strict constitutional scrutiny). As of this writing, it is highly un-
likely that either discriminating against gay men or imposing crimi-
nal sanctions on gay men for homosexual conduct is unconstitu-
tional. In Bowers v. Hardwick, the Supreme Court upheld the

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98. Id. at 216.
100. See G. CALABRESI, supra note 89, at 102-09.
101. See Bowers, 106 S. Ct. 2841 (1986) (upholding constitutionality of sodomy statute as applied to private homosexual conduct in the privacy of the home). Cf. D. BELL, RACE AND AMERICAN LAW (1973) (tracing America's historical constitutional and legal legacy of oppres-
sion of blacks).
102. DeSantis v. Pacific Tel. and Tel. Co., 608 F.2d 327, 333 (9th Cir. 1979) (homosexuals have not been designated a "suspect" or "quasi-suspect" class requiring stricter scrutiny of classifications on the basis of homosexuality). See also Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd, 425 U.S. 901 (1976) (right of privacy does not include private homosexual conduct).
103. The D.C. Circuit and the Eleventh Circuit reached opposite conclusions regarding the test to be applied in appraising constitutional rights of gay men and the deference to be accorded the Supreme Court per curiam affirmance order in Doe v. Commonwealth's Atto-
authority of the state to impose criminal sanctions for acts of oral and anal intercourse committed in the privacy of the home; the majority rested its decision on the validity of the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable," rather than on the issue of a public health justification for the legislation. While the public health issue had been tendered by Georgia in the district court, the Supreme Court majority, in holding that private acts of homosexual conduct were not constitutionally protected, did not find it necessary to consider this argument.

The majority opinion in Bowers characterized the case as presenting only a due process challenge to a criminal statute. Accordingly, the majority did not consider claims under the eighth and ninth amendments or the equal protection clause of the fourteenth amendment. The dissenters, however, criticized the Court's "cramped reading of the issue before it" and viewed the case as fairly presenting broader constitutional claims. The hostility of the majority to gay male constitutional claims, hostility which the dis-


On June 30, 1986, the Supreme Court resolved the issue of the precedential significance of the prior decisions in Bowers v. Hardwick, 106 S. Ct. 2841 (1986). The Court reversed the Eleventh Circuit and stated, somewhat enigmatically, "we prefer to give plenary consideration to the merits of this case rather than rely on our earlier decision in Doe." Id. at 2843 n.4.


105. Id. at 2846.

106. Id. at 2853. Justice Blackmun, in his dissent, noted the failure of the majority to deal with the public/private distinction: "But the mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places." Id. at 2855.

107. Id. at 2850.
senters characterized as an “almost obsessive focus on homosexual activity,” and which cast prior sexual privacy cases in an exceedingly narrow light, makes it unlikely that the present Court would, in future cases, find constitutional protection for gay men based on any constitutional amendment or any theory of unconstitutionality other than cruel and unusual punishment.110

The Supreme Court has already concluded that the constitutional right to privacy does not preclude imposition of criminal sanctions on consensual homosexual conduct in the privacy of the home.111 That ruling substantially enhances the power of the state to control deadly sexually transmitted disease in the midst of a public health crisis, particularly in a federalist framework which historically has accorded great deference to state and local health measures.112 Thus, the AIDS problem tests the constitutional outer limits of state control of life-threatening disease.

The need to strike a balance between the rights of gay men afflicted with AIDS and the state’s interest in protecting the public from the spread of AIDS presents complex constitutional issues illustrated by the following problems:

Can those who claim that gay men are the subjects of discrimination in violation of equal protection overcome the case law suggesting that being male or gay is neither a suspect classification, nor a quasi-suspect classification;113 the further justification that the restriction was aimed at disease carriers, not persons with a particular sexual preference;114 and the Supreme Court decision in Bowers

108. Id. at 2849.
109. See id. at 2850-51.
110. The eighth amendment issue was seen as an open one by the four dissenters as well as Justice Powell. Justice Powell’s concurring opinion specifically reserved judgment on the eighth amendment question: “The Georgia statute at issue in this case . . . authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct — certainly a sentence of long duration — would create a serious Eighth Amendment issue.” Id. at 2847.
111. 106 S. Ct. 2841 (1986).
113. DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 333 (9th Cir. 1979).
115. A major obstacle to a challenge by homosexuals of AIDS-related regulations on equal protection grounds is the fact that, even if homosexuals were found to constitute a suspect or quasi-suspect class, most of these regulations would be aimed at the larger class of disease carriers, rather than at the smaller class of persons with a particular sexual preference. Although the impact of such a regulation would clearly fall most heavily upon homosexuals and bisexuals, discriminatory impact, standing alone, may be insufficient to establish a viola-
sustaining the constitutionality of a sodomy statute applied to male homosexual conduct in the privacy of the home?\footnote{116}

Does the claim that gay men have a right to freedom of association,\footnote{117} even if recognized, evaporate in light of a reasonable legislative finding that gay bathhouses are a public health menace because they increase the probability of transmission of a deadly disease?\footnote{118}

Does anything remain of the claim that restrictive AIDS legislation conflicts with the right of sexual privacy,\footnote{119} given the explicit refusal of the Supreme Court in Bowers to extend the married or unmarried sexual privacy doctrine from the heterosexual relationship to the homosexual one?\footnote{120}

Can states, as a preventive measure, routinely inspect hotels where unsafe sexual activity linked to AIDS is said to take place?\footnote{121} If specific hotels are linked to sexual encounters by gay men, can the hotel rooms be searched without violating the fourth amendment?\footnote{122}

tion of equal protection, absent discriminatory intent. See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (zoning ordinance upheld against challenge that its effect was racially disproportionate, absent a showing of discriminatory intent); Washington v. Davis, 426 U.S. 229 (1976) (upholding written objective test as criterion for government employment against challenge that a disproportionate number of blacks failed the test).

117. Cf. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (due process right of freedom of association violated by requiring an organization to give membership lists to the state).
118. In People v. Uplinger, 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983), cert. dismissed sub nom. New York v. Uplinger, 104 S. Ct. 2332 (1984), the New York Court of Appeals invalidated, on federal constitutional grounds, a state statute prohibiting persons from loitering "in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature." Id. at 937, 447 N.E.2d at 62, 460 N.Y.S.2d at 515. After initially granting certiorari, New York v. Uplinger, 464 U.S. 812 (1983), the Supreme Court dismissed the writ as "improvidently granted," 104 S. Ct. 2332, 2333 (1984). The per curiam order stated, enigmatically, that the case presented an "inappropriate vehicle for resolving the important constitutional issues raised by the parties." Id. at 2334. Justice White, joined by Chief Justice Burger and Justices Rehnquist and O'Connor, dissented on the ground that the "New York statute was invalidated on federal constitutional grounds, and the merits of that decision are properly before us and should be addressed." Id. at 2335. Justice Stevens, concurring, declared: "If a majority is convinced after studying the case that its posture . . . makes it an unwise vehicle for exercising the 'gravest and most delicate' function that this Court is called upon to perform, the Rule of Four should not reach so far as to compel the majority to decide the case." Id.
120. 106 S. Ct. at 2846.
121. Axelrod Says Hotels Are Subject To Curbs on Sex Linked to AIDS, N.Y. Times, Nov. 18, 1985, at B4, col. 4.

http://scholarlycommons.law.hofstra.edu/hlr/vol14/iss1/7
Can the state close a gay bar by calling it “an establishment where sexual practices that can transmit AIDS [are] believed to take place,” given the deference accorded state action over liquor establishments under the twenty-first amendment?

Apart from statutory rights dealing with the right of a patient to hospital or medical treatment, does the refusal of public hospitals to accept an AIDS patient for treatment generate constitutional problems under the equal protection clause of the fourteenth amendment?

Can a health or life insurer lawfully refuse to insure a person who tests positive on a blood test or who refuses to be tested, when the reliability of the antibody test is still questionable?

Is employment discrimination against gay men, or those who test positive, an unconstitutional response to the fear, hysteria, and prejudice that surround the AIDS issue, and does such employ-

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127. In Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974), the Court invalidated a statutory requirement of a year’s residency in a county as a condition to an indigent’s receiving free nonemergency hospitalization or medical care. In invalidating the statutory requirement, the Court relied upon Shapiro v. Thompson, 394 U.S. 618 (1969). Both Memorial Hospital and Shapiro involved the constitutionally fundamental right to travel, and considered the deprivation of important benefits as penalties upon the right to travel, rather than holding the benefits fundamental in and of themselves.
128. See generally Scherzer, AIDS and Insurance — Problems and Approaches Under N.Y. Law, in AIDS: LEGAL ASPECTS OF A MEDICAL CRISIS 126, 128 (1985) (some states have statutorily or administratively prohibited the use of antibody tests for insurance purposes).
129. See generally Eckholm, Screening of Blood for AIDS Raises Civil Liberties Issues, N.Y. Times, Sept. 30, 1985, at A1, col. 2. The simplest testing procedure often registers positive when no disease-indicating antibody is present. Hence, for diagnostic purposes, two simple tests, followed by a more complex test, are usually administered. Id. at B8, col. 4.
130. The Supreme Court has refused to allow classification on the basis of public prejudice. For example, in Palmore v. Sidoti, 104 S. Ct. 1879 (1984), which involved a child custody case in which a divorced white mother had remarried a black man, the lower courts transferred custody of the daughter to the natural father, who was white, on the grounds that if the child remained with her mother and stepfather, she would be “vulnerable to peer pres-
ment discrimination violate equal protection or Title VII? Can the discrimination nonetheless be justified as a response to identifiable public health concerns and the need to provide a safe work environment for other workers?

Does discrimination against AIDS victims in jobs, services or benefits by federal agencies, or recipients of federal funds, constitute discrimination against the handicapped under the Federal Rehabilitation Act of 1973?

This essay can do little more than identify constitutional problems raised by the threat of AIDS and suggest constitutional approaches, necessarily limited, for resolution of issues. Perhaps additional insight may be gained by examination of responses to AIDS in a microcosm of society, the prison.

sures [and] suffer from the social stigmatization that is sure to come." Id. at 1881. The Supreme Court, finding that the lower court's order could not survive strict scrutiny, unanimously reversed. The Court acknowledged that the private prejudices on which the state court had relied were probably real ones, but held that the law may not, directly or indirectly, tolerate such private prejudices. Id. at 1882.

131. In DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 333 (1979), homosexuals were not considered to be a "class" within the meaning of the Civil Rights Act, 42 U.S.C. § 1985(3). The Ninth Circuit concluded that "[h]omosexuals do not comprise a group which federal statutory or constitutional law deems in need of protection from group harassment, hence, [they] do not constitute a protected class for purposes of § 1985." Id. at 334 n.1. The court also held that the ban against employment discrimination contained in Title VII, 42 U.S.C. § 2000e does not protect homosexuals from employment discrimination, because Title VII's prohibition of "sex" discrimination applies only to discrimination on the basis of gender, rather than on the basis of sexual preference. Id. at 329-30. Accord Powell v. Read's, Inc., 436 F. Supp. 369 (D. Md. 1977) and Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977) (both holding that Title VII does not reach discrimination against transsexuals).

132. See supra note 111 and accompanying text. But see G. Calabresi, supra note 89, at 106-09.

133. Lawyers of the Civil Rights Division of the Justice Department, in a confidential staff legal opinion, answered this question affirmatively:

Because of public hysteria connected with the disease, persons with AIDS frequently become societal pariahs, irrationally ostracized by their communities because of medically baseless fears of contagion, and people's historical fear of both disease and the sick . . . . This treatment of persons with AIDS, grounded in irrational public prejudices, is precisely one of the kinds of behaviors that led to the enactment of the Rehabilitation Act.

Pear, AIDS Victims Gain In Fight On Rights, N.Y. Times, June 8, 1986, at A1, col. 5. This position was ultimately rejected by the Justice Department. For an in-depth analysis of the memorandum written by Assistant Attorney General Cooper, see Leonard, AIDS and Employment Law Revisited, 14 Hofstra Law Review 11, 29-34 (1985). A majority of states, however, have rejected the Justice Department position and have declared that AIDS is a handicap under state laws. See Pear, States' AIDS Discrimination Laws Reject Justice Department's Stand, N.Y. Times, Sept. 17, 1986, at A20, col. 1.
V. PRISONERS, JAIL INMATES, AND AIDS

Toward the end of 1985, the National Institute of Justice and the American Correctional Association attempted to ascertain the number of confirmed AIDS cases in America's prisons and jails.\(^\text{134}\) The survey disclosed 455 confirmed AIDS cases in twenty-five state and federal correctional systems and 310 cases in nineteen city or county jail systems.\(^\text{135}\) Undoubtedly the number of actual cases of AIDS in the prison and jail population is now significantly higher.\(^\text{136}\) The competing demands facing a correctional administrator seeking to deal rationally with AIDS are substantial and reflect the demands placed on other public officials.\(^\text{137}\) Consider the following hypothetical problems:

Some incoming inmates demand, as a constitutional right, to be blood tested for AIDS antibodies; other incoming inmates assert, as a matter of privacy, the right not to be tested.

Some inmates either tested positive for AIDS antibodies or diagnosed as having active ARC or AIDS demand transfer to a hospital, while other inmates, similarly situated, assert a right not to be transferred. Alternatively, some infected inmates ask for isolation and treatment in the prison hospital, while others demand not to be transferred to the prison hospital and demand expensive or experimental life-saving treatment.

Some inmates who test positive for AIDS antibodies assert the right not to be removed from the general prison population, while others have no objection to being placed in administrative segregation.\(^\text{138}\) Other inmates, not tested positive, demand that the correc-

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\(^{135}\) Id.

\(^{136}\) See generally Altman, New Fear on Drug Use and AIDS, N.Y. Times, Apr. 6, 1986, at A1, col. 2 (noting that AIDS is the leading cause of death in New York prisons, and probably elsewhere, principally because of intravenous drug use before incarceration and suggesting that such use will cause a rapid increase in AIDS cases in prisons).

\(^{137}\) One of the coauthors of this essay has served as Correctional Practices Consultant to the Connecticut Commissioner of Corrections for more than a decade. See generally L. Orland, Prisons: Houses of Darkness 81-108 (1975) (discussing conflicting rights of prisoners under the law). The other coauthor has been counsel in a number of constitutional attacks on practices of the Connecticut Commissioner of Corrections. See, e.g., Bell v. Manson, 590 F.2d 1224 (2d Cir. 1978). This analysis is not intended to reflect actual current problems or policies in the Connecticut correctional system, but draws upon the authors' collective experience to explore general correctional issues. For a discussion of AIDS in Connecticut prisons, see Gordon, Prisons Alter AIDS-Complex Policy, Hartford Courant, March 5, 1986, at A1, col. 1.

\(^{138}\) Hewitt v. Helms, 459 U.S. 460, 463 n.1 (1983) (distinguishing between discipli-
tional system protect their health by removal of those inmates who test positive to administrative segregation, the prison hospital, or a separate hospital.

Some AIDS-positive tested inmates demand the right to continue in their current sentence-reducing job assignments, including food handling, while other inmates, as well as many correctional officers and their union representatives, demand that positively tested inmates not handle food. Many correctional officers and their union representatives demand that inmates who test positive be removed from the population, placed in administrative segregation, placed in a prison hospital, or removed altogether from the correctional system so that correctional officers will not risk contagion.

It is fairly clear that a rational correctional commissioner cannot accommodate all of these demands, and that the Bill of Rights will not provide the necessary guidance. Two immediate constitutional concerns are implicated. The initial constitutional problem is the eighth amendment ban on cruel and unusual punishment as it applies to a refusal to treat AIDS-infected inmates. The Supreme Court made clear in Estelle v. Gamble that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ ... proscribed by the Eighth Amendment.” Applying Estelle, the Second Circuit, in Lareau v. Manson, held that failure to screen newly arrived inmates for communicable disease adequately was “sufficiently harmful to evidence deliberate indifference to serious medical needs.” While subsequent cases make clear that the Constitution does not protect inmates from the mere negligent infliction of injury, it seems safe to conclude that, as to sentenced inmates, the state has a constitutional duty to screen for AIDS and to provide medical treatment for known victims. Whether the same conclusion applies to pretrial de-
tainees is less clear in light of the Supreme Court’s reluctance to apply eighth amendment protection to jail inmates.\textsuperscript{146}

A second cluster of problems concerns transfer and isolation of incarcerated AIDS victims. The Supreme Court has made clear that due process does not require that inmates receive a hearing before being transferred within a correctional system.\textsuperscript{147} Nor has the Court required a hearing before a correctional institution places an inmate in administrative segregation.\textsuperscript{148} On the other hand, in \textit{Vitek v. Jones},\textsuperscript{149} the Court required a due process hearing before an inmate was transferred from a correctional institution to a mental hospital.\textsuperscript{150} Arguably, under \textit{Vitek}, a due process hearing would be required before transfer of an inmate to a separate AIDS hospital, even though such a hearing would not be required for administrative transfer of AIDS victims in administrative segregation within the confines of a correctional institution.\textsuperscript{151}

VI. CONCLUSION: THE LIMITS OF CONSTITUTIONAL LAW IN CONTROLLING STATE RESPONSES TO AIDS

Americans, with justifiable pride, can point to the constitutional protections of the Bill of Rights which have been used by the Supreme Court, frequently over popular opposition, to protect the despised and the disadvantaged, including the poor,\textsuperscript{152} the mentally

\begin{footnotes}
\item[146] See \textit{Bell v. Wolfish}, 441 U.S. 520, 536 n.16 (1979) (rejecting claim that double celling and strip searches violate eighth amendment).
\item[149] 445 U.S. 480 (1980).
\item[150] \textit{Id.}
\item[151] Proposed guidelines for treatment of inmates, circulated for comment by the Centers for Disease Control in January 1986, do not recommend routine testing of inmates’ blood unless the correctional system is prepared to provide “totally separate” facilities for asymptomatic inmates who test positive. CDC notes that “relatively few prisons” are currently able to provide such facilities. Pear, \textit{supra} note 134.
\end{footnotes}
ill, the prisoner, the alien, those accused of crime, the illegitimate and racial minorities. Unfortunately, this process has, on occasion, led to unrealistic expectations and concomitant disillusion when the Supreme Court has refused to extend constitutional protection or to recognize the rights of a given group, including, most particularly, male homosexuals. Prisoners have certainly discovered the limits of civil rights protection. Similar limits may be found in Supreme Court consideration of the constitutional rights of other disadvantaged groups. The stark truth is that the protections of the Bill of Rights cannot solve all, or even most, problems of pov-

153. See, e.g., Ake v. Oklahoma, 105 S. Ct. 1087 (1985) (indigent defendant must be provided with psychiatric access if sanity will be a significant factor at trial); Vitek v. Jones, 445 U.S. 480 (1980) (a convicted felon is entitled to appropriate procedures before being involuntarily subjected to institutional care in a mental hospital).

154. See generally L. Orland, supra note 137, at 81-108 (describing cases in which the Supreme Court has upheld the constitutional rights of prisoners).


Gay men are conspicuously absent from the list of disadvantaged who have received protection from the Supreme Court.

159. See, e.g., Maher v. Roe, 432 U.S. 464 (1977) (sustaining use of Medicaid funds for childbirth but not for nontherapeutic abortions); Ross v. Moffit, 417 U.S. 600 (1974) (holding that states do not have to provide counsel to indigent defendants for the appeal process); Kahn v. Shevin, 416 U.S. 351 (1974) (upholding property tax exemption for widows, but not widowers); Lindsey v. Normet, 405 U.S. 56 (1972) (rejecting contention that the need for decent shelter is a fundamental interest and upholding a statute which permits a landlord to bring an expedited action for possession under certain circumstances).


161. See supra note 159.
property, prejudice, or injustice.

That lesson emerges with painful clarity as the Bill of Rights fails as a primary safeguard against draconian state responses to AIDS victims. State responses ostensibly based on quite rational public health concerns are also the result of deeply rooted prejudice against gay men. The probability of substantial constitutional protection for this group is slim, given the seriousness of the public health risks, the traditional deference accorded state action in the area of police power and public health, and the frequency with which the Supreme Court has rejected constitutional attacks on criminal statutes directly aimed at gay men.

In the last analysis, the primary protections, given present judicial attitudes, derive not from law but from medicine, not from constitutional command, but from enlightened legislative and governmental self-interest, not from judicial leadership, but from the tolerance of citizens. Indeed, the response of the medical profession to the acute needs of AIDS-infected gay males stands in marked contrast to the callous indifference thus far displayed by the judiciary. While the medical and scientific communities withhold moral judgments and strain to search for cause, treatment, and cure, the judiciary, giving full sway to the moral tyranny of the majority, permits state legislatures to impose criminal sanctions on those who are stripped of constitutional protection merely because they differently "define themselves through their intimate sexual relationships

162. See supra notes 13-16 and accompanying text.
163. See Jacobson v. Massachusetts, 197 U.S. 11 (1905). "According to settled principles, the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." Id. at 25.
164. See supra notes 27-32 and accompanying text.
165. See Hunt, supra note 53, at 42.
166. See J.S. Mill, On Liberty 89-90 (1951):
The will of . . . the majority . . . may desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power. The limitation, therefore, of the power of government over individuals loses none of its importance when the holders of power are regularly accountable to the community, that is, to the strongest part therein. This view of things . . . has had no difficulty in establishing itself; and in political speculations "the tyranny of the majority" is now generally included among the evils against which society requires to be on its guard . . . . Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them

...
with others." 167 In Justice Blackmun's haunting words, "[D]epriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do." 168 Ultimately, depriving AIDS victims of legal and constitutional protection may prove far more destructive to our national conscience than any physical danger the AIDS epidemic presents to the nation's citizens.

167. See Bowers, 106 S. Ct. at 2851 (Blackmun, J., dissenting).
168. Id. at 2856.