The AIDS Dilemma: Public Health v. Criminal Law

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I. Introduction

> I visited Teddy today at St. Vincent's. It's very depressing . . . . He's lying there in bed, out of it. . . .
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> Jimmy died, as you must have heard. I went out to San Francisco to be with him the last few weeks. You must have heard that, too. He was in a coma for a month. . . .
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> Harry has K.S.,[1] and Matt has the swollen glands. He went in for tests today. . . I haven't slept well for weeks. Every morning I examine my body for swellings, marks. I'm terrified of every pimple, every rash. . . . I feel the disease closing in on me. All my activities are life and death. Keep up my Blue Cross. Up my reps. Eat my vegetables.
>
> Sometimes I'm so scared I go back on my resolutions: I drink too much, and I smoke a joint, and I find myself at the bars and clubs, where I stand around and watch. They remind me of accounts of Europe during the Black Plague: coupling in the dark, dancing till you drop. The New Wave is the corpse look. I'm very frightened. . . .[2]

A new "horror"[3] has invaded our civilized society. Dubbed AIDS, Acquired Immune Deficiency Syndrome has killed thousands[4] and infected hundreds of thousands, perhaps even mil-

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1. Kaposi's Sarcoma: a rare malignant tumor that usually manifests itself with purple lesions on the skin. Victor Gong, Understanding AIDS 193 (1985).

2. William Hoffman, As Is 7-8 (1985) (quote from the character Saul).

3. In Zaire, the people have adopted "Horror" as the name for AIDS. Ann Giudici Fettner & William Check, The Truth about AIDS: Evolution of an Epidemic 171 (rev. ed. 1985).

4. Through the end of 1986, 29,003 cases of AIDS have been reported to the Center for Disease Control (CDC). Of that number, 16,301 have died. Minneapolis Star & Tribune, Jan. 18, 1987, at 1F, col. 5. For a weekly compilation of statistics, see, e.g., Center for Disease Control [hereinafter CDC], U.S. Dep't of Health & Human Servs., *Table I. Summary—Cases Specified Notifiable Diseases, United States*, 35 Morbidity & Mortality Weekly Rep. [hereinafter MMWR] 614 (1986). A compilation of data through 1985 can be found in CDC, *Update: Acquired Immunodeficiency Syndrome—United States*, 35 MMWR 17 (1986) [hereinafter *Update*]. Experts project that by the year 1991, the number of AIDS cases will have increased to 270,000 and the cumulative number of deaths will have reached 179,000. *Coolfont Report: A PHS Plan for Prevention and Control of AIDS and the AIDS*

lions.[5] With minimal resources and little government support, a cure continues to elude researchers. Since homosexual and bisexual men presently constitute almost 73% of the reported cases,[6] this deadly condition affects not only its victims and their loved ones, but particularly threatens the gay community as a whole. Within the past fifteen years, great strides have been made in lesbian and gay rights. Homosexuals have gradually begun to "come out" by making their sexual orientation known to the public, gay rights organizations have formed across the nation,[7] state and local governments have passed equal rights legislation for homosexuals,[8] and litigation by homosexuals in the fields of child custody, adoption, federal taxes, employment discrimination, and immigration has increased in astounding numbers.[9] Of principal importance to the gay rights movement are the significant achievements in the decriminalization of private consensual sodomy.[10] Yet with

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Virus, 101 Pub. Health Reps. 341, 342 (1986) [hereinafter *Coolfont Report*]. The above projections may in fact be underestimated by at least 20%. *Id.*

5. Anywhere from 1 to 1.5 million people may already carry the virus. *Coolfont Report*, *supra* note 4, at 343. Persons affected by the AIDS virus can be divided into three groups: those meeting the CDC definition of AIDS, those showing symptoms of AIDS-related complex (ARC), and those testing seropositive for AIDS antibodies. *See infra* notes 128 & 179. The later group is by far the largest.

6. *Update*, *supra* note 4, at 18. This figure includes a number of people who are both homosexual/bisexual and intravenous (I.V.) drug users. Of the remaining cases, 17% are heterosexual I.V. drug users, 2% are blood transfusion recipients, 4% are heterosexual cases, 1% are hemophiliacs, and 3% are not classified in the above high risk groups. Minneapolis Star & Trib., Jan. 18, 1984, at 4F, col. 4.

The designation "high risk group" means that persons are at risk of getting the disease, not that they present a risk to others who do not have the disease. Fettner & Check, *supra* note 3, at 114. Nevertheless, it is actually certain *behaviors*, not specific *groups* of people, that promote transmission of the virus. Gays who practice safe sex, *see infra* note 160 and accompanying text, and I.V. drug users who do not share unsterilized needles are not practicing high risk behaviors, yet are continually categorized with those who do. Categorizing in this manner, while probably convenient for statistical purposes, tends to encourage "status" discrimination while doing nothing to advance prevention by curbing high risk behavior. Certain researchers have also concluded that the term "high-risk" groups should be abandoned. Minneapolis Star & Trib., Feb. 20, 1987, at 14A, col. 1.

7. *See* Thomas Stoddard, The Rights of Gay People app. E (rev. ed. 1983).

8. Wisconsin has the only state law which prohibits discrimination by both public and private entities on the basis of sexual orientation. Wis. Stat. Ann. §§ 111.31-.395 (West Supp. 1986). Numerous cities give protection to homosexuals in such areas as employment, housing, and education. *See* Hayden Curry & Denis Clifford, A Legal Guide for Lesbian and Gay Couples app. 1 (3d ed. 1985).

9. *See generally* Rhonda Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 Hastings L.J. 799 (1979) [hereinafter Rivera, *Our Straight-Laced Judges*]; Rhonda Rivera, *Recent Developments in Sexual Preference Law*, 30 Drake L. Rev. 311 (1980); Rhonda Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties; Part I*, 10 U. Dayton L. Rev. 459 (1985); Rhonda Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties; Part II*, 11 U. Dayton L. Rev. 275 (1986).

10. *See infra* note 24 and accompanying text. Since state statutes differ as to

the onslaught of AIDS, progress has come to a halt and possibly even taken a step backwards. AIDS hysteria, igniting ever-present homophobic attitudes, has sharply increased the instances of employment and housing discrimination against gays,[11] has conveniently provided the government with a mechanism to weed homosexuals out of the military,[12] and has prompted insurance companies to withdraw coverage for victims of AIDS and to refuse coverage for members of high risk groups.[13] Then, as if the disease were not burden enough, AIDS has been proposed as a justification for upholding or even reinstating legislation criminalizing sodomy, the primary form of sexual expression between

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the definition of sodomy and the persons to whom the statutes apply, this article uses the term sodomy to include both oral and anal sex whether practiced by homosexuals or heterosexuals. Heterosexual or homosexual sodomy will be specified when a distinction is necessary.

Numerous state statutes use the archaic term "crime against nature" to describe sodomy. *E.g.*, Ariz. Rev. Stat. Ann. § 131411 (West 1986); La. Rev. Stat. Ann. § 14.89 (West 1986). This term perpetuates Blackstone's prejudice that sodomy is both unnatural and immoral. "Deviate" sexual conduct or intercourse is another common term used in sodomy statutes. *E.g.*, Ala. Code § 13A-6-60 (1982); N.Y. Penal Law § 130.00(2) (McKinney 1975). Although deviate means a departure from the norm, it also connotes a sexual perversity which is judgmental and inappropriate. *See* David Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 Fordham L. Rev. 1281 (1977). This article will use the more neutral term of sodomy.

11. *See* Robert Burns, *AIDS: A Legal Epidemic?*, 17 Akron L. Rev. 719 (1984); Charles Eisnaugle, *New York State Division of Human Rights AIDS Based Discrimination: A Summary of Reported Instances, January 1984-October 1985*, in AIDS & Drug Abuse in the Workplace: Resolving the Thorny Legal-Medical Issues 286 (Charles Bakaly, Jr. & Saul Kramer eds. 1986); *see also* Arthur Leonard, *Employment Discrimination Against Persons With AIDS*, 10 U. Dayton L. Rev. 681 (1985); Arthur Leonard, *Aids and Employment Law Revisited*, 14 Hofstra L. Rev. 11 (1985).

Numerous California cities prohibit AIDS-based discrimination. *E.g.*, Los Angeles, Cal., Municipal Code, art. 5.8, §§ 45.80-.93 (1985); San Francisco, Cal., Municipal Code, pt. II, ch. VIII, art. 38, §§ 3801-3816 (1985). To date, no state has taken such initiative.

12. *See* John Parry, *AIDS as a Handicapping Condition*, 9 Mental & Physical Disability L. Rep. 402, 404 (1985). Presently, the Defense Department requires that all recruits and current military personnel be tested for AIDS. Recruits who test positively for AIDS-virus antibodies are rejected. Martin Schneiderman, *AIDS and Employment: Federal Employees, the Military, and the Washington Metropolitan Area (D.C.,VA.,MD.)*, in AIDS—Legal Aspects of a Medical Crisis 347, 353 (Eleanor Alter ed. 1986).

13. *See* Fettner & Check, *supra* note 3, at 214. Because of the high cost of AIDS claims, insurers are attempting to use the ELISA test, *see infra* notes 136-138 and accompanying text, and detailed questionaires about AIDS exposure to eliminate high risk individuals from insurance coverage. Howard Saks, *Impact of Aids on Life Insurance Industry*, 13 Est. Plan. 57 (1986). *But see* American Council of Life Ins. v. District of Columbia, 645 F. Supp. 84 (D.D.C. 1986) (statute prohibiting insurer from denying or cancelling coverage to persons testing positively for the AIDS virus upheld against insurance company challenge).

homosexuals.[14] The Supreme Court's rulings in *Bowers v. Hardwick*[15] and *Baker v. Wade*[16] will significantly affect the gay and lesbian rights movement.[17] The role AIDS played in its outcome is uncertain. The role AIDS should have played is the catalyst for this article.

Initially, this article summarizes the history of present attitudes toward homosexuality and sodomy. Next, it explores the significant challenges to state sodomy statutes and the grounds offered by states to defend these statutes. Finally, after presenting a factual summary of the AIDS epidemic, it analyzes both the criminal law and public health reaction to the AIDS crisis, concluding that the regulation of private consensual sodomy through the criminal law, even under the guise of a public health measure, is an inappropriate solution to the AIDS dilemma.

II. Historical Perspective

"If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them."[18] Through the centuries, these few words have elicited condemnation of homosexuality and, as a consequence, prohibition of sodomy.[19] Although initially the early church punished those practicing the "heresy" of homosexuality,[20] the British government eventually adopted the Judeo-Christian view of sodomy and proscribed by statute "the infamous *crime against nature*, committed either with man or

14. *See infra* notes 144-152 and accompanying text.

15. 760 F.2d 1202 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986).

16. 553 F. Supp. 1121 (N.D. Tex. 1982), *supplemented by* 106 F.R.D. 526 (N.D. Tex. 1985), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986).

17. Citing *Hardwick* as authority, the Missouri Supreme Court has ruled that the state's "deviate sexual intercourse" act violated neither the defendant's right to privacy nor equal protection under the law. State v. Walsh, 713 S.W.2d 508 (Mo. 1986).

18. Leviticus 20:13 (King James). *See also* Leviticus 18:22; Romans 1:26-27. The word sodomy apparently originated in reference to certain homosexual acts committed by the inhabitants of the city of Sodom. *See* Genesis 19:4-12; Deuteronomy 23:17.

19. Although the Bible makes no reference to sodomy between females, later proscriptions of sodomy have usually included lesbian sexual conduct. *See* John McNeill, The Church and the Homosexual 83-87 (1976), *cited in* Craig Pearson, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 U. Tol. L. Rev. 811, 815 (1984).

20. Kenneth Lasson, *Homosexual Rights: The Law in Flux and Conflict*, 9 U. Balt. L. Rev. 47, 51 (1979). The early Church viewed sodomy as a sin against God, since it was contrary to the Church's belief that the sole purpose of semen emission was procreation. Pearson, *supra* note 19, at 816 (citing Thomas Aquinas, On the Truth of the Catholic Faith: Summa Contra Gentiles, pt. 2, ch. 122(9), at 146 (V. Bourke trans. 1946)).

beast."[21] In the United States, every state, at one time or other, has criminalized sodomy.[22] Since the 1960's, however, a trend toward eliminating the statutory proscription of private consensual sodomy has been established.[23] Both the legislative and judicial branches of state government have contributed to the gradual decriminalization of sodomy.[24] Even now, concerned individuals

21. 4 William Blackstone, Commentaries *215 (emphasis in original).

22. Bennett Wolff, *Expanding the Right of Sexual Privacy*, 27 Loy. L. Rev. 1279, 1281 (1981). Initially only anal sex was prohibited. Gradually most states proscribed both anal and oral sex by heterosexuals and homosexuals.

23. In 1955, the American Law Institute recommended that criminal statutes regulating sexual conduct be recast in such a way as to remove legal penalties for acts performed in private among consenting adults. Model Penal Code § 207.5 comment (Tent. Draft No. 4, 1955), *adopted in* Model Penal Code § 213.2 revised comments (Off. Draft 1980). The British followed suit, releasing the Wolfendon Report, which urged that laws regulating private morality be repealed. Committee on Homosexual Offenses and Prostitution, Report, Cmd. No. 247, at 115 (1957) [hereinafter Wolfendon Report], *quoted in* Robert Harris, Jr., *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 UCLA L. Rev. 581, 583 (1967). In 1973, a section of the American Bar Association also recommended the repeal of all laws classifying non-commercial, private consensual sexual conduct between adults as criminal. *Recommendation and Report to the House of Delegates by the Section of Individual Rights and Responsibilities Concerning Consenting Adult Sexual Conduct*, 4 Hum. Rts. 67 (1974). Two years later, the American Medical Association supported an almost identical resolution. The American Psychiatric Association had previously removed homosexuality from its list of psychic disorders, stating that "homosexuality per se does not constitute any form of mental disease". Baker v. Wade, 553 F. Supp. 1121, 1130 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986).

24. Twenty-three states have legislatively decriminalized private consensual sodomy: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Vermont, Washington, West Virginia, Wisconsin, Wyoming. *See* Rivera, *Our Straight-Laced Judges supra* note 9, at 950-51.

Several state courts have declared that statutes prohibiting sodomy are unconstitutional or inapplicable to private consensual sodomy. *See* Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980) (improper exercise of police power and violation of equal protection); People v. Onofre, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980) (violation of right to privacy and equal protection, and invalid exercise of police power), *cert. denied*, 451 U.S. 987 (1981); Commonwealth v. Wasson, No. 86M859 (Ky. Dist. Ct. Oct. 13, 1986) (violation of Kentucky's constitutional right to privacy); State v. Gray, No. 3103327 (Minn. Dist. Ct. Dec. 1, 1986) (violation of Minnesota's constitutional right to privacy). *Cf.* Post v. State, 715 P.2d 1105 (Okla. Crim. App. 1986) ("crime against nature" does not include private consensual heterosexual sodomy; the issue as to the statutes' application to homosexual sodomy was not reached by the court), *cert. denied*, 107 S. Ct. 290 (1986); Commonwealth v. Balthazar, 366 Mass. 298, 318 N.E.2d 478 (1974) ("unnatural and lascivious act" does not apply to private consensual sexual conduct between adults). *But see* Bowers v. Hardwick, 106 S. Ct. 2841, 2843 (1986) (Constitution does not "confer a right of privacy that extends to homosexual sodomy."), *rev'd*, 760 F.2d 1202 (11th Cir. 1985); *Baker*, 769 F.2d 289 (sodomy statute did not violate right to privacy or equal protection under the law); Missouri v. Walsh, 713 S.W.2d 508 (Mo. 1986) (Missouri statute does not deprive homosexuals of a right to privacy or equal protection).

and organizations continue to challenge sodomy statutes.[25]

Given this progress, it is anomalous that sodomy statutes continue to remain in effect. In actuality, the majority of sodomy statutes are rarely enforced and, if enforced, involve either sodomy by force or in public[26]—acts generally prohibited under rape and public indecency or lewdness statutes. Although most statutes prohibit both heterosexual and homosexual sodomy, heterosexuals are seldom prosecuted; the primary target of law enforcement officials are gay men.[27] The law's mere existence labels homosexuals as criminals, causing anxiety and emotional distress.[28] In essence, sodomy laws criminalize the homosexual's primary means of sexual expression. While heterosexuals have the opportunity to "legitimize" their sexual relationships through marriage (if, in fact, fornication laws made those relationships illegal), homosexuals have no such option.[29] Considering the unequal treatment of homosexuals and heterosexuals, the intimacy of the acts involved, and the general nonenforcement of the statutes, it is no wonder that the constitutionality of statutes prohibiting sodomy in private between consenting adults, whether heterosexual or homosexual, has been questioned.

III. Challenges to Sodomy Statutes

As the lesbian/gay rights movement has grown, challenges to sodomy statutes have also increased.[30] Opponents of the statutes

25. The Lambda Legal Defense Fund has established an Ad Hoc Task Force Against Sodomy Laws to handle all challenges to sodomy statutes.

26. Ralph Slovenko, *Foreword: The Homosexual and Society: A Historical Perspective*, 10 U. Dayton L. Rev. 445, 447 (1985). Due to constitutional restraints on search and seizure, and the evidentiary requirement of corroborating testimony, most sodomy statutes are practically unenforceable. Randy Von Beitel, *The Criminalization of Private Homosexual Acts: A Jurisprudential Case Study of a Decision by the Texas Bar Penal Code Revision Committee*, 6 Hum. Rts. 23, 51-52 (1977).

27. Kathryn Humphrey, *The Right of Privacy: A Renewed Challenge to Laws Regulating Private Consensual Behavior*, 25 Wayne L. Rev. 1067, 1070 (1979). It should be noted that seven state statutes proscribe only homosexual sodomy: Ark. Stat. Ann. § 41-1813 (1977); Kan. Stat. Ann. § 21-3505 (Supp. 1985); Ky. Rev. Stat. Ann. § 510.100 (Baldwin 1985); Mo. Ann. Stat. § 566.090 (Vernon 1979); Mont. Code Ann. § 45-5-505 (1985); Nev. Rev. Stat. § 201.190 (1986); Tex. Penal Code Ann. § 21.06 (Vernon 1974).

28. Baker, 553 F. Supp. at 1130. *See also* Harris, *supra* note 23, at 581; Von Beitel, *supra* note 26, at 51.

29. *See* David Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 Hastings L.J. 957, 1006 (1979); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285, 1305 n.101 (1985).

30. *See supra* notes 24, 25.

have attacked them from many angles,[31] but a focus on the equal protection clause and the right to privacy had proved to be the most successful approach.[32] Although the right to privacy was originally limited to the context of marriage,[33] *Eisenstadt v. Baird*[34] broadened this right to protect "the right of the *individual*, married or single, to be free from unwarranted government intrusion. . . ."[35] While expressing "no opinion on the constitutionality of the Georgia statute as applied to [heterosexual] sodomy,"[36]

31. Sodomy statutes have been challenged as: (1) a violation of the eighth amendment restriction against cruel and unusual punishment. *See, e.g.*, Kenneth Lasson, *Civil Liberties for Homosexuals: The Law in Limbo*, 10 U. Dayton L. Rev. 645, 659 (1985); Pearson, *supra* note 19, at 863; (2) unconstitutional on vagueness grounds. *See, e.g.*, Debra Barnhart, *Commonwealth v. Bonadio: Voluntary Deviate Sexual Intercourse—A Comparative Analysis*, 43 U. Pitt. L. Rev. 253, 271 (1981); Pearson, *supra* note 19, at 860; (3) a violation of the establishment clause. *See, e.g.*, Baker v. Wade, 553 F. Supp. 1121, 1145 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986); Harris, *supra* note 23, at 600; Pearson, *supra* note 21, at 860; (4) an intrusion on first amendment freedom of speech and association. *See, e.g.*, Lasson, *supra*, at 660; Note, *supra* note 29, at 1293; and (5) as unconstitutionally overbroad. *See, e.g.*, Barnhart, *supra*, at 270; James Rizzo, *The Constitutionality of Sodomy Statutes*, 45 Fordham L. Rev. 553, 561 (1976). Generally, however, courts have summarily dismissed these challenges. *But see* Bowers v. Hardwick, 106 S. Ct. 2841, 2847 (1986) (Powell, J., concurring) (a long prison sentence for a single private, consensual act of sodomy "would create a serious Eighth Amendment issue"). For an extensive list of cases employing these and other grounds for attacking sodomy statutes, see Annotation, *Validity of Statute Making Sodomy a Criminal Offense*, 20 A.L.R.4th 1009 (1983).

32. A third line of inquiry involves the improper extension of the state's police power. Though courts have interpreted the constitution to give states the power to formulate regulations to promote the health, safety, welfare and morals of the people, the state must justify the imposition of its authority by showing that "the interests of the public generally, as distinguished from those of a particular class, [must] require such interference and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." Lawton v. Steele, 152 U.S. 133, 137 (1894), *quoted in* Commonwealth v. Bonadio, 490 Pa. 91, 95, 415 A.2d 47, 49 (1980).

33. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

34. 405 U.S. 438 (1972).

35. *Id.* at 453. For an in-depth analysis of the applicability of the right of privacy to relationships beyond the confines of marriage, see Kenneth Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 652 (1980) ("The logic of the freedom of intimate association . . . cannot be contained at the status boundaries of formal marriage. . . ."); Richards, *supra* note 29, at 1003 ("Sexuality . . . is not a spiritually empty experience that the state may compulsorily legitimize only in the form of rigid, marital, procreational sex. . . ."); Richard Saphire, *Gay Rights and the Constitution: An Essay on Constitutional Theory, Practice, and* Dronenburg v. Zech, 10 U. Dayton L. Rev. 767, 790 (1985) ("[T]he marriage relationship has been protected because it is a form of society through which individuals express and live out a conception of intimacy, loyalty, commitment and love. There is no reason . . . why these human capacities and aspirations cannot be developed and expressed in other forms of society than a traditional, heterosexual marriage.") *See also* Bowers v. Hardwick, 760 F.2d 1202, 1212 (11th Cir. 1985) (intimate association does not exist in marital relationships alone). 106 S. Ct. 2841 (1986).

36. *Hardwick*, 106 S.Ct. at 2842 n.2.

in *Bowers v. Hardwick* the Supreme Court concluded that since there is "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other," neither precedent nor traditional values permitted extending the right to privacy to consensual homosexual sodomy.[37]

The Court in *Hardwick* did not, however, address the equal protection question presented by the Georgia statute.[38] Since the rational basis test is generally equivalent to an automatic affirmance of a challenged statute's constitutionality, a statute will be struck down under an equal protection analysis[39] only if a court applies a strict scrutiny test. A court will apply the strict scrutiny standard only if it finds that sodomy statutes either discriminate against homosexuals as a suspect class or impinge upon homosexuals' fundamental rights. While no court has yet classified homosexuals as a suspect class, nor used the semisuspect classification applied in gender discrimination cases,[40] a strong argument can be made that homosexuals meet all of the essential criteria.[41]

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37. *Id.* at 2844.

38. Although the Georgia statute literally applies to both heterosexual and homosexual sodomy, *see* Ga. Code Ann. § 16-62(a) (1984), the Georgia Attorney General admitted the statute's unconstitutionality as applied to married couples and argued its validity only as to homosexuals. *See Hardwick*, 106 S. Ct. at 2858 n.10. *But see* Williams v. State, 494 So.2d 819 (Ala. Crim. App. 1986) (sodomy statute's marital exemption had no rational basis and violated the equal protection clause).

39. Initially, to invoke the equal protection clause, the court must find that the statute creates a classification. Statutes which distinguish between homosexual and heterosexual sodomy, *see supra* note 25, or married and unmarried people, *e.g.*, Kan. Stat. Ann. § 21-3505 (1981); 18 Pa. Cons. Stat. Ann. § 3124 (Purdon 1983), satisfy this requirement. If the language of the statute applies equally to all, it may be shown that the law is discriminatory as applied by proving a disparate enforcement against homosexuals. *See* Sandra Grove, *Constitutionality of Minnesota's Sodomy Law*, 2 Law & Inequality 521, 544 (1984); Pearson, *supra* note 19, at 846. *See also* Bowers v. Hardwick, 106 S. Ct. 2841, 2850 n.2 (1986) (Blackmun, J., dissenting) ("Georgia's exclusive stress before the Court on its interest in prosecuting homosexual activity despite the gender-neutral terms of the statute may raise serious questions of discriminatory enforcement. . . ."). *But see* Pearson, *supra* note 19, at 852; Annotation, *supra* note 31, at 1053, 1055.

40. *See* Baker v. Wade, 553 F. Supp. 1121, 1144 n.58 (N.D. Tex. 1982) (if asked to decide the issue, the court would have held that homosexuals are not a suspect class), *rev'd*, 769 F.2d 289, 292 (5th Cir. 1985) (the court declined to hold "that homosexuals constitute a suspect or quasi-suspect classification"), *cert. denied*, 106 S. Ct. 3337 (1986); State v. Walsh, 713 S.W.2d 508, 510-11 (Mo. 1986) (prohibition of homosexual activity is neither a suspect nor quasi-suspect classification).

41. For a class to be deemed suspect, members must satisfy four requirements: (1) Traits defining the class are immutable and beyond the member's control; (2) The class is the reflection of prejudice rather than rational judgment regarding the member's abilities; (3) The class is a politically powerless minority; and (4) The class has suffered from a history of purposeful discrimination. *See, e.g.*, Richard Delgado, *Fact, Norm and Standard of Review—The Case of Homosexuality*, 10 U. Dayton L. Rev. 575, 583 (1985); Harris Miller II, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexual-*

Since state courts have dealt with contests to sodomy statutes in various ways, thoroughly investigating their analyses will shed light on both future challenges to sodomy statutes and the possible effect of the Supreme Court's decision in *Bowers v. Hardwick*.[42]

A. Doe v. Commonwealth's Attorney

The first significant challenge to a state sodomy statute was *Doe v. Commonwealth's Attorney*.[43] In a declaratory judgment action brought by several adult males, a U.S. District Court found that Virginia's statute prohibiting "crimes against nature" was not unconstitutional. The majority, relying primarily on Justice Harlan's dissent in *Poe v. Ullman*,[44] concluded that the right of privacy was inapplicable to homosexual sodomy: "[W]e cannot say that the statute offends the Bill of Rights or any other of the Amendments and the wisdom or policy is a matter for the State's resolve."[45] The statute's longevity, along with the state's interest in promoting morality and decency, served to rationally support the Virginia statute. Judge Merhige, in his dissent, chastised the majority for narrowly interpretating the right of privacy. The right to select consenting adult sexual partners fell within the privacy rights protected by the Due Process Clause, said Judge Merhige, and absent a compelling state interest, the statute was unconstitutional.[46]

The U.S. Supreme Court summarily affirmed the district court's opinion, giving the judgment binding precedential effect.[47] Nevertheless, the decision has left other jurisdictions unsure as to

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ity, 57 S. Cal. L. Rev. 797, 812 (1984); Pearson, *supra* note 19, at 849. For a thorough discussion of the categorization of homosexuals as a suspect class, see Miller, *supra*, at 813-34; Note, *supra* note 29, at 1299-1305. *See also* Rowland v. Mad River Local School District, 105 S.Ct. 1373, 1377 (1985) (Brennan, J., dissenting) ("First, homosexuals constitute a significant and insular minority. . . . [M]embers of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and . . . discrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality.' (cite omitted) State action taken against members of such groups based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny. . . ."), *denying cert. to* 730 F.2d 444 (6th Cir. 1984).

42. 106 S.Ct. 2841 (1986).

43. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

44. 367 U.S. 497, 552 (1961) (Harlan, J., dissenting) ("Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced.")

45. *Doe*, 403 F. Supp. at 1200. The court did not, however, directly address the equal protection question.

46. *Id.* at 1204 (Merhige, J., dissenting).

47. 425 U.S. 901 (1976).

whether the Court's rationale supported the Virginia court's conclusion that private consensual sodomy fell outside the right of privacy or whether it based its decision on a lack of standing.[48] The significance of the *Doe* affirmance has become moot, however, since the Court in *Bowers v. Hardwick* decided the question on the merits of Hardwick's case "rather than rely on our earlier action in *Doe*."[49]

B. Commonwealth v. Bonadio

In *Commonwealth v. Bonadio*,[50] the Court overturned the convictions of two "exotic" dancers and held that Pennsylvania's Voluntary Deviate Sexual Intercourse Statute violated the right of equal protection and the state's police power. "[T]he police power should properly be exercised to protect each individual's right to be free from interferences in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct *does not harm others*."[51] Moreover, the court held that while the application of strict scrutiny was not necessary, a statute forbidding "deviate sexual intercourse" when performed by unmarried persons but not by married persons lacked even a rational basis under the equal protection clause.[52]

C. People v. Onofre

The court in *People v. Onofre*[53] concluded that the New York consensual sodomy statute violated the defendants' (one heterosexual and two homosexual couples) right to privacy and equal protection under the law and constituted an improper exercise of the state's police power.[54] The state failed to demonstrate a rational basis for excluding decisions "to seek sexual gratification from what . . . once was commonly regarded as 'deviant' conduct"

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48. *See* People v. Onofre, 51 N.Y.2d 476, 493, 434 N.Y.S.2d 947, 953-54, 415 N.E.2d 936, 943 (1980) (a contrary result is not compelled by *Doe*; affirmance may have been predicated on a lack of standing), *cert. denied*, 451 U.S. 987 (1981); Baker v. Wade, 553 F. Supp. 1121, 1137-38 (N.D. Tex. 1982) (little if any weight should be given to the summary affirmance), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986); Bowers v. Hardwick, 760 F.2d 1202, 1208 (11th Cir. 1985) (construe *Doe* as an affirmance based on the plaintiff's lack of standing), *rev'd*, 106 S. Ct. 2841 (1986). *But see Baker*, 769 F.2d 289, 292 (5th Cir. 1985) (decision of the Supreme Court in *Doe* was on the merits of the case).

49. 106 S.Ct. 2841, 2843 n.4 (1986).

50. 490 Pa. 91, 415 A.2d 47 (1980).

51. *Id.* at 96, 415 A.2d at 50.

52. *Id.* at 99, 415 A.2d at 51.

53. 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981).

54. *Id.*

from the right to privacy, as long as they were voluntary, non-commercial and in private.[55] In addition, the state had not demonstrated any legitimate justification which "rationally explain[ed] the different treatment accorded married and unmarried persons."[56] Finally, since the state had not offered a substantial showing of harm, its goal of preventing harm and preserving morality was an invalid exercise of police power.[57]

The dissent objected to extending the right of privacy, concluding that the Supreme Court decisions to date did not establish "an undifferentiated right to unfettered sexual expression."[58] The continuous and unbroken history of sodomy statutes, according to the dissent, was reason enough to uphold state regulation of private consensual sodomy.[59]

D. Baker v. Wade

Despite the state's offer of morality, health, and procreation as state interests, the trial court in *Baker v. Wade*[60] concluded that "the right of privacy . . . does extend to private sexual conduct between consenting adults (whether heterosexual or homosexual)"[61] and that the statute was neither justified by a compelling state interest nor rationally related to a legitimate state interest.[62] Likewise, "widespread public distaste" did not justify the overt discrimination between homosexuals and heterosexuals.[63]

In 1985, the court of appeals reversed the lower court.[64] The court stated that the *Doe* decision controlled the right of privacy question.[65] In addition, the state's claim that the public's strong objection to homosexual conduct served as a justification was not "totally unrelated to the pursuit of implementing morality, a permissible state goal" under an equal protection analysis.[66]

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55. *Id.* at 488, 434 N.Y.S.2d at 951, 415 N.E.2d at 940-41.

56. *Id.* at 491, 434 N.Y.S.2d at 953, 415 N.E.2d at 942 (quoting Eisenstadt v. Baird, 405 U.S. 438, 447 (1972)).

57. *Id.* at 492, 434 N.Y.S.2d at 953, 415 N.E.2d at 943.

58. *Id.* at 498, 434 N.Y.S.2d at 956-57, 415 N.E.2d at 946 (Gabrielli, J., dissenting).

59. *Id.* at 504, 434 N.Y.S.2d at 960, 415 N.E.2d at 949 (Grabrielli, J., dissenting).

60. 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986). Baker, a former Dallas school teacher, brought suit against the state seeking to have the Texas statute which prohibits homosexual sodomy declared unconstitutional.

61. *Id.* at 1140.

62. *Id.* at 1143.

63. *Id.* at 1145.

64. *Baker*, 769 F.2d at 289. The Supreme Court has since denied the plaintiff's petition for writ of certiorari. 106 S. Ct. 3337 (1986).

65. 769 F.2d at 292.

66. *Id.*

E. Bowers v. Hardwick

Clearly, the most influential challenge to a sodomy statute is *Bowers v. Hardwick*.[67] After concluding that Hardwick had standing to bring the action against the state, the court of appeals held that the Supreme Court's summary affirmance of *Doe* did not preclude a finding that Georgia's sodomy statute implicated the fundamental right of privacy.[68] In fact, Supreme Court actions since *Doe* had encouraged the reconsideration of this primary question.[69] The court of appeals remanded the case, giving the state an opportunity to prove that the statute promoted a compelling state interest.[70]

The Supreme Court's decision in *Hardwick* deviated sharply from the Court's prior analysis of the fundamental right to privacy. Not only did the Court decline to consider both the equal protection and eighth amendment questions, but it refused to extend or interpret its past decisions to include the right to engage in homosexual sodomy within the right to privacy.[71] In addition, the Court held that "majority sentiments about the morality of homosexuality" constituted a state interest sufficient to uphold Georgia's statute.[72]

IV. State Interests

In any constitutional analysis, whether it involves an equal protection violation, right to privacy claim, or a police power question, the focus of the court's review must be the sufficiency of the state's interest. The inadequacy of the justifications thus far advanced by the states regulating sodomy leads to the conclusion that absent a more compelling justification, statutes prohibiting private consensual sodomy must be abolished.[73]

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67. 760 F.2d 1202 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986).

68. *Id.* at 1212.

69. *Id.* at 1208-10 (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 694 n.17 (1977); People v. Uplinger, 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983), *cert. granted*, 464 U.S. 812 (1983), *cert. dismissed*, 467 U.S. 246 (1984)).

70. *Id.* at 1213.

71. 106 S. Ct. at 2844.

72. *Id.* at 2846.

73. Though states offer numerous justifications for sodomy statutes, in many cases the actual reason for the continuous prohibition of sodomy is the fear that the decriminalization of sodomy will be construed as state approval of a "deviate" sexual practice. People v. Onofre, 51 N.Y.2d 476, 489, 434 N.Y.S.2d 947, 951, 415 N.E.2d 936, 941 (1980), *cert. denied*, 451 U.S. 987 (1981). *See also* Baker v. Wade, 553 F. Supp. 1121, 1134 n.30 (N.D. Tex. 1981), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986); Harris, *supra* note 23, at 595; Von Beitel, *supra* note 26, at 49. A statute's longevity does not justify impeding the potential for the growth and reform of the criminal law.

A. Morality

The primary goal advanced by state governments to justify the criminalization of private consensual sodomy is the protection of morality. The Constitution has been interpreted to grant states the power "to prevent misuses of property or rights which impair the health, safety, or morals of others,"[74] and in turn, "maintain a decent society."[75] In his book *The Enforcement of Morals*,[76] Lord Patrick Devlin claims that the criminal law must protect the "recognized morality" of its citizenry.[77] If a particular behavior falls outside that recognized morality, Devlin insists that it be prohibited by law.

Expressing the opposing viewpoint, John Stuart Mill asserts that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[78] Mill goes on to say that any thought or behavior having no deleterious effect on others may not be regulated by the criminal law.[79] The harm must be probable rather than merely possible and must affect others or society as a whole. Harm to the individual actor is insufficient to justify government regulation. It is Mill's belief that an individual:

> cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier,

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74. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 375 (1926).

75. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59-60 (1973) (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964)). The state may legitimately prohibit *offensive* public displays of sexual behavior, any kind of forceful sexual contact, abuse and corruption of minors, and cruelty to animals—all under the guise of protecting morals. *See* Commonwealth v. Bonadio, 490 Pa. 91, 95, 415 A.2d 47, 49 (1980). *But see* Note, *supra* note 29, at 1308 (prohibition of incest and polygamy because of perceived immorality may be unjustified).

76. Patrick Devlin, The Enforcement of Morals (1965).

77. The "recognized morality" is ascertained by considering the depth of societal disgust for the behavior, the existence of a "real feeling of reprobation," the belief that the behavior is abominable, and the genuineness of that belief. *See* Steven Ludd, *The Aftermath of* Doe v. Commonwealth's Attorney*: In Search of the Right to be Let Alone*, 10 U. Dayton L. Rev. 705, 714 (1985).

78. John Stuart Mill, *On Liberty*, in Three Essays 15 (1975).

79.

> And it is foolish to say, that Government is concerned to meddle with the private Thoughts and Actions of Men, while they injure neither the Society, nor any of its Members. Every Man is, in Nature and Reason, the Judge and Disposer of his own domestic Affairs; and, according to the Rules of Religion and Equity, every Man must carry his own Conscience. . . . Government being intended to protect Men from the injuries of one another, and not to direct them in their own Affairs, in which no one is interested but themselves; it is plain, that their Thoughts and domestic Concerns are exempted intirely from its Jurisdiction.

The English Libertarian Heritage 127, 129 (D. Jacobsen ed. 1965), *quoted in* Ludd, *supra* note 77, at 707.

> because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, . . . but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else.[80]

The Wolfendon Report reiterates Mill's philosophy, stating that crime cannot be equated with sin and that the area of private morality is "not the law's business."[81]

Accepting, for the sake of argument, that the state should protect the morality of its people, it must first decide which set of moral values it should defend. Should the law prohibit what the "majority" regards as immoral?[82] Although most of the criminal law may reflect fundamental moral standards, it does not serve the law's purposes for a select percentage of the population to regulate private consensual behavior. Moreover, majority standards change. "Yesterday's perversion is today's experiment and perhaps tomorrow's matter of taste."[83] When the prevailing morality changes, the laws regulating those morals must also change.

Furthermore, using morality rather than injury to others as the basis for criminal law provides little proof of the law's effectiveness. There is little, if any, evidence that such legislation safeguards society's morals—or that it does not.[84] To legitimately regulate behavior reflecting a set of moral values, it must also be shown that the questionable behavior directly causes an identifiable harm either to others or to society as a whole. In applying this principle to sodomy statutes, the American Law Institute concluded that private consensual sodomy did not result in mental or physical danger to the health and safety of the participants or to the secular interests of the community and, therefore, should not be prohibited.[85] Moral proscription without conceivable harm can-

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80. Mill, *supra* note 78, at 15. Human liberty, according to Mill, consists of three aspects: first, liberty of conscience, of thought and feeling, of opinions and expression of those opinions; second, liberty of tastes and pursuits, "of framing the plan of our life to suit our own character; of doing as we like, . . . without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse or wrong"; and third, "freedom to unite, for any purpose not involving harm to others." *Id.* at 18.

81. Wolfendon Report, *supra* note 23, at 24.

82. Generally, the source of the majority view is Biblical and theological teachings. Laws enforcing these teachings often raise an establishment clause question. *See* Pearson, *supra* note 19, at 860.

83. Harris, *supra* note 23, at 595.

84. *See* Rizzo, *supra* note 31, at 584-85. *See generally* Richards, *supra* note 29, at 982-88.

85. *See* Model Penal Code, *supra* note 23.

not satisfy even the rational basis test.[86]

Courts have ruled on both sides of the harm requirement question. The court in *Doe v. Commonwealth's Attorney*[87] ignored the ALI's recommendation and held that, even absent proof that homosexuality led to moral delinquency, promoting morality and decency was a legitimate state interest.[88] The court conceded that it arrived at this conclusion simply because it would be impracticable to prove that harm took place.[89] Although the lower court in *Baker v. Wade* concluded that assertions of general platitudes of morality and decency were inadequate to justify the Texas sodomy statute,[90] the Fifth Circuit reversed, stating that the promotion of morality was a permissible state goal.[91] Also in agreement was the Missouri Supreme Court, holding in *State v. Walsh*[92] that implementing and promoting public morality is a permissible state goal.[93]

On the other hand, in *People v. Onofre*, the court stated that the penal law's function was not "to provide either a medium for the articulation or the apparatus for the intended enforcement of moral or theological values."[94] The court held that since the government made no showing that private consensual sodomy posed a threat, either to the participants or to the general public, the statute furthered no legitimate state interest.[95] The Pennsylvania court in *Commonwealth v. Bonadio* held that morality was not a sufficient state interest to justify the prohibition of sodomy without a showing of harm to others.[96] A "natural repugnance" toward "abnormal sexual acts" did not constitute a compelling state interest for the courts to justify Oklahoma's sodomy statute in *Post v. State*.[97]

The Supreme Court in *Hardwick* found that the majority of the population's view that "homosexual sodomy is immoral and

86. *See* Rizzo, *supra* note 31, at 581. *See also* Note, *supra* note 29, at 1308 (when combined with a fundamental right or suspect class, morality is an insufficient justification).

87. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

88. *Id.* at 1202.

89. *Id.*

90. 553 F. Supp. 1121, 1142 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986).

91. *Baker*, 769 F.2d at 292.

92. 713 S.W.2d 508 (Mo. 1986).

93. *Id.* at 512.

94. 51 N.Y.2d 476, 488 n.3, 434 N.Y.S.2d 947, 951 n.3, 415 N.E.2d 936, 940 n.3 (1980), *cert. denied*, 451 U.S. 987 (1981).

95. *Id.* at 489, 434 N.Y.S.2d at 951, 415 N.E.2d at 941.

96. 490 Pa. 91, 96, 415 A.2d 47, 50 (1986).

97. 715 P.2d 1105, 1109 (Okla. Crim. App. 1986), *cert. denied*, 107 S. Ct. 290 (1986).

unacceptable" provided a rational justification for Georgia's sodomy law.[98] The dissents, however, criticized the Court's meager treatment of the issue. The duration of a majority's belief should not mandate continued legislation. Rather, "we should be especially sensitive to the rights of those whose choices upset the majority."[99] In addition, the state must advance some secular justification beyond its assertion that homosexual conduct has traditionally been proscribed by Judeo-Christian values.[100]

B. Preservation of Marriage and Protection of Minors

The preservation of marriage has met with little success as a justification often proposed by states to uphold sodomy statutes. The government has argued that if sodomy were decriminalized, the wide acceptance of homosexuality and hence the increase in its incidence, would eventually lead to the disintegration of the institution of marriage and family.[101] The court in both *Onofre*[102] and *Bonadio*[103] rejected this reasoning. Likewise, when the Texas Penal Code revision committee discussed decriminalizing sodomy, they placed little significance on the suggestion that decriminalization would weaken the family structure.[104] There is no support for the reasoning that eliminating sodomy statutes will increase the incidence of homosexual relationships and consequently decrease the number of heterosexual marriages.[105] In fact, the nonenforcement of fornication and adultery statutes and the increasing prevalence of divorce and single parentage in American society does more to undermine the institution of marriage than does the nonenforcement of sodomy statutes.[106] Therefore, the state's interest in preserving the institution of marriage does not justify state regulation of sodomy.

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98. 106 S. Ct. 2841, 2846 (1986).

99. 106 S. Ct. at 2854 (Blackmun, J., dissenting). *See also id.* at 2857 (Stevens, J., dissenting).

100. *Id.* at 2854-55 (Blackmun, J., dissenting).

101. Note, *supra* note 29, at 1307.

102. 51 N.Y.2d 476, 490, 434 N.Y.S.2d 947, 952, 415 N.E.2d 936, 941 (1980) ("[The records] are devoid of any support for the statement that a prohibition against consensual sodomy will promote or protect the institution of marriage. . . ."), *cert. denied*, 451 U.S. 987 (1981).

103. 490 Pa. 91, 95, 415 A.2d 47, 49-50 (1980) ("[I]t is nugatory to suggest that [the statute] promotes a state interest in the institution of marriage.") *See also* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1205 (E.D. Va. 1975) (Merhige, J., dissenting) ("To suggest . . . that the prohibition of homosexual conduct will in some manner encourage new heterosexual marriages and prevent the dissolution of existing ones is unworthy of judicial response."), *aff'd mem.*, 425 U.S. 901 (1976).

104. Von Beitel, *supra* note 26, at 48.

105. *See Doe*, 403 F. Supp. at 1205; Pearson, *supra* note 19, at 857.

106. *See* Pearson, *supra* note 19, at 857. *Cf.* Note, *supra* note 29, at 1307.

Another reason offered to support sodomy statutes is the protection of minors.[107] Evidence suggests, however, that the large majority of sexual offenses against children are heterosexual in nature, not homosexual.[108] Child abuse statutes, and laws against statutory rape and the corruption of minors, are a more effective and narrowly drawn means of addressing the problem than are sodomy statutes.[109] Therefore, neither the preservation of marriage nor the protection of minors sufficiently justifies upholding sodomy statutes.

C. Health

A final reason advanced for the existence of sodomy statutes is to protect participants in certain sexual practices from physical injury or from the spread of venereal diseases. The state is empowered by the Constitution to enact health and quarantine laws to protect the health of its citizens.[110] Within this power falls the right to prevent the spread of contagious or infectious diseases.[111]

Arguments supporting sodomy statutes under a public health rationale are weak and seldom accepted by the courts. There is no proof that physical injury is a consequence of sodomy.[112] In addition, several factors tend to discredit sodomy statutes as a rational means of preventing sexually transmitted diseases. Sodomy statutes are both over and underinclusive. They prohibit lesbian sexual contact and monogamous gay relationships, neither of which promote venereal disease.[113] More importantly, they do not prohibit the primary means of communicating sexually transmitted diseases: promiscuous heterosexual contact. Even fornication statutes are not enforced for health purposes.[114] Furthermore, sodomy statutes may actually contribute to the spread of venereal disease rather than deter it; homosexuals are reluctant to seek treatment for fear of prosecution and less likely to give the names of others who may need treatment.[115]

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107. *See* Baker v. Wade, 553 F. Supp. 1121, 1130-31 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986); Von Beitel, *supra* note 26, at 43-44, 49.

108. Baker, 553 F. Supp. at 1130. *See also* Pearson, *supra* note 19, at 857.

109. *See* Pearson, *supra* note 19, at 857.

110. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 205 (1824).

111. Railroad Co. v. Husen, 95 U.S. 465, 471 (1877).

112. *See* People v. Onofre, 51 N.Y.2d 476, 489, 434 N.Y.S.2d 947, 951, 415 N.E.2d 936, 941 (1980), *cert. denied*, 451 U.S. 987 (1981) (no proof of physical injury had been offered).

113. *See* Richards, *supra* note 29, at 986 n.127; Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 Mich. L. Rev. 1613, 1632 (1974).

114. Pearson, *supra* note 19, at 856.

115. *See* Richards, *supra* note 29, at 986 n.127; Note, *supra* note 113, at 1632.

Since the state holds the power to enact public health laws separate from the criminal law, using the criminal law to prevent the spread of venereal diseases is superfluous. It only serves as punishment for individual behaviors rather than as an answer to a serious medical crisis. Therefore, although public health is a legitimate state interest, sodomy laws are not a rational means of alleviating the problem of sexually transmitted diseases.

As of 1981, a new element to the health concern has arisen: AIDS. Since a great majority of the victims of AIDS are gay men,[116] proponents of the criminalization of sodomy, under the pretext of preventing the spread of AIDS, have urged the continued enforcement, or reinstatement of sodomy statutes.[117] After exploring the mysteries surrounding the AIDS epidemic and the recent developments in AIDS research, the next section examines and rejects both criminal law and public health proposals as solutions to the AIDS problem and proposes a third, more effective, response: education.

V. Acquired Immune Deficiency Syndrome and Sodomy Statutes

A. AIDS—The Epidemic

In 1981, physicians in Los Angeles first noticed the appearance of a rare pneumonia, pneumocystis carinii pneumonia (PCP), in a striking number of young gay men.[118] At approximately the same time a rare cancer called Kaposi's sarcoma was diagnosed in a large number of male homosexuals in New York.[119] In-depth study and interviews resulted in the identification of AIDS. While research initially centered on homosexual men in the Los Angeles, San Francisco, and New York areas, physicians soon discovered that the disease was not limited to that group. A number of Haitians in Florida developed the same symptoms.[120] In addition, a significant number of intravenous drug users sharing unsterilized needles, hemophiliacs using Factor VIII concentrate to

116. *See supra* note 6 and accompanying text.

117. *See infra* notes 144-152 and accompanying text.

118. *See* CDC, *Pneumocystic Pneumonia—Los Angeles*, 30 MMWR 250 (1981). Five cases of PCP, all in young, gay men was an extremely unusual occurrence.

119. *See* CDC, *Kaposi's Sarcoma and Pneumocystic Pneumonia Among Homosexual Men*, 25 MMWR 305 (1981).

120. *See*, CDC, *Opportunistic Infections and Kaposi's Sarcoma Among Haitians in the United States*, 31 MMWR 353 (1982). As of May, 1985, the CDC removed Haitians from the list of high risk groups. Most of the Haitian cases have been traced to homosexual or heterosexual contact with AIDS carriers or an exposure to contaminated needles. Those cases which could not be classified due to lack of information were placed in the unknown group. *Update*, *supra* note 4, at 247-48. *Cf.* Fettner & Check, *supra* note 3, at 104-21.

control bleeding, and patients receiving blood transfusions within the last several years, all developed AIDS.[121] Other persons who have contracted AIDS in significant numbers include children of parents with AIDS and spouses or sexual partners of those with AIDS.[122]

While the origin of AIDS remains a mystery,[123] scientists finally discovered the cause of AIDS after years of diligent research. In 1983 in Paris, and in 1984 in the United States, scientists isolated a virus thought to be the cause of AIDS.[124] It is known as either lymphademopathy-associated virus (LAV), human T-cell lymphotropic virus type III (HTLV-III), or the most recent designation, human immunodeficiency virus (HIV).[125]

The AIDS virus weakens the body's built-in immune sys-

121. *See* CDC, *Update on Acquired Immune Deficiency Syndrome (AIDS) Patients with Hemophilia*, 31 MMWR 644 (1982); CDC, *Possible Transfusion-Associated Acquired Immune Deficiency Syndrome (AIDS)—California*, 31 MMWR 652 (1982).

122. *See* CDC, *Unexplained Immunodeficiency and Opportunistic Infections in Infants—New York, New Jersey, California*, 31 MMWR 665 (1982); CDC, *Immunodeficiency among Female Sexual Partners of Males with Acquired Immune Deficiency Sydrome (AIDS)—New York*, 31 MMWR 697 (1983). *See also* Fettner & Check, *supra* note 3, at 146-66. While the number of AIDS cases are rapidly increasing, they have generally increased proportionally within these high risk groups.

123. The theory most often proposed is that of the African/Haitian link. Kaposi's sarcoma and certain types of lymphoma are deadly in various parts of Africa, chiefly Zaire. Though the form of AIDS found in the United States has only recently appeared in Africa, it has been suggested that a strain of the AIDS virus has been dormant in Africa for a number of years or has been acquired from monkeys through unsanitary living conditions and cooking facilities. Fettner & Check, *supra* note 3, at 202-07. The discovery of an AIDS-related virus in humans similar to that found in African green monkeys seems to support this theory. Minneapolis Star & Trib., Mar. 27, 1986, at 6B, col. 1.

When Zaire became independent, many Haitians were hired to fill vacant employment positions. These Haitians later returned either to Haiti or instead to the United States. It is posssible that some homosexual men were exposed to AIDS while vacationing in Haiti and brought it back to the United States. This is only one explanation for the sudden emergence of AIDS in the United States. *See* Fettner & Check, *supra* note 3, at 122.

124. *See* F. Barré-Sinoussi, J.C. Chermann, F. Rey, M.T. Nugeyre, S. Chamaret, J. Gruest, C. Dauguet, C. Axler-Blin, F. Vezinet-Brun, C. Rouzioux, W. Rozenbaum & L. Montagnier, *Isolation of a T-Lymphotropic Retrovirus from a Patient at Risk for Acquired Immune Deficiency Syndrome (AIDS)*, 220 Science 868 (1983); Robert Gallo, Syed Salahuddin, Mikulas Popovic, Gene Shearer, Mark Kaplan, Barton Haynes, Thomas Palker, Robert Redfield, James Oleske, Bijan Safai, Gilbert White, Paul Foster & Phillip Markham, *Frequent Detection and Isolation of Cytopathic Retroviruses (HTLV-III) from Patients with AIDS and at Risk for AIDS*, 224 Science 500 (1984).

125. John Coffin, Ashley Haase, Jay Levy, Luc Montagnier, Steven Oroszlan, Natalie Teich, Howard Temin, Kumao Toyoshima, Harold Varmus, Peter Vogt & Robin Weiss, *Human Immunodeficiency Virus*, 232 Science 697 (1986).

tem[126] to such an extent that the body can no longer fight certain opportunistic infections[127] and rare cancers which it is normally able to resist.[128] Research indicates that the virus *cannot* be communicated through casual contact.[129] Although HTLV-III has been isolated in blood, semen, urine, breast milk, tears, and saliva,[130] transmission of the virus itself through saliva and tears has

126. Within our immune system are special white blood cells called lymphocytes, which are divided into two groups: B-cells and T-cells. The AIDS virus primarily affects the T-cells. In a person unaffected by AIDS, the T-cell ratio (the number of T-4 cells (helpers) to T-8 cells (suppressors)) is 2:1. In persons with AIDS, the ratio is reversed or in some cases the helper cells are completely gone. Fettner & Check, *supra* note 3, at 48-49. The AIDS virus invades the T-4 cells yet may remain dormant for years. When activated, the virus replicates itself and eventually destroys the T-4 cells. *Id.* Many healthy people at risk for AIDS already possess a weakened immune system in which the T-cell ratio is 1:1. For example, homosexual males have generally been subject to a high incidence of sexually transmitted diseases, particularly those men who exhibit a high degree of promiscuity. This repeated exposure tends to deplete the immune system. Also, narcotics have been known to cause immune defects in I.V. drug users. Hemophiliacs, organ transplant recipients, and cancer patients may also have depressed immune systems as a result of treatment for their conditions. *Cf.* Gong, *supra* note 1, at 78-79. A previously depressed immune system may be a possible factor in activating the AIDS virus. *Id.*

127. An "opportunistic infection" is "an infection caused by a microorganism that may be common in the environment but causes disease only in a host with a poorly functioning immune system." Gong, *supra* note 1, at 209.

128. AIDS victims are subject to a variety of infectious conditions, any of which can be fatal. Cytomegalovirus (CMV), Epstein-Barr Virus (EBV), several herpes simplex viruses, Pneumocystis carinii pneumonia (PCP), toxoplasmosis, various bacterial infections, candidiasis, cryptococcus, Kaposi's sarcoma, and lymphoma are a few of the typical conditions found in AIDS patients. *See* Gong, *supra* note 1, at 40-74. Early symptoms of AIDS-related complex (ARC), which may or may not lead to AIDS, are swollen glands, severe fatigue, persistent fevers or night sweats, persistent diarrhea, and weight loss. *Id.* at 30, 36-39. Persons who are seropositive—who react positively to tests for HTLV-III antibodies in the blood stream—may show no symptoms and may never develop ARC or AIDS. Earlier research on gay men indicated that each year 5-10% of healthy seropositive men will develop ARC and 5-10% of those with ARC will develop full-blown AIDS. Morton Hunt, *Teaming up Against AIDS*, N.Y. Times, Mar. 2, 1986, (Magazine), at 42, 78. More recently, however, the Public Health Service has predicted that 20-30% of persons infected with the AIDS virus will develop AIDS by 1991. *Coolfont Report*, *supra* note 4, at 343.

129. *See* Fettner & Check, *supra* note 3, at 158-59. *See also* Gerald Friedland, Brian Saltzman, Martha Rogers, Patricia Kahl, Martin Lesser, Marguerite Mayers & Robert Klein, *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) (risk of horizontal transmission of HTLV-III to nonsexual household contacts of patients with AIDS or ARC is minimal to nonexistent); Jonathan Mann, Thomas Quinn, Henry Francis, Nzila Nzilambi, Ngaly Bosenge, Kapita Bila, Joseph McCormick, Kalisa Ruti, Pangu Kaza Asila & James Curran, *Prevalence of HTLV-III/LAV in Household Contacts of Patients with Confirmed AIDS and Controls in Kinshasa, Zaire*, 256 J. A.M.A. 721 (1986) (transmission of HTLV-III/LAV between AIDS cases and household members, other than spouses, occurs rarely if at all); Merle Sande, *Transmission of AIDS: The Case Against Casual Contagion*, 314 New Eng. J. Med. 380 (1986).

130. CDC, *Summary: Recommendations for Preventing Transmission of Infec-*

not been documented.[131] The AIDS virus is transmitted chiefly through sexual contact, primarily, though certainly not exclusively, through receptive anal intercourse.[132] The virus is also communicated through exposure to blood or blood products, and from mother to child during the perinatal period.[133]

A critical advancement in AIDS research has been the development of a blood test known as ELISA[134] specifically for AIDS. This test indicates the level of HTLV-III antibody in the blood stream.[135] Though scientists developed this test primarily to assist in eliminating AIDS-contaminated blood from the nation's blood supply,[136] the test has been the sole basis of the military's refusal

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tion with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace, 34 MMWR 681, 682 (1985). *See also* Jerome Groopman, S. Zaki Salahuddin, M.G. Sarngadharan, Phillip Markham, Matthew Gonda, Ann Sliski & Robert Gallo, *HTLV-III in Saliva of People with AIDS-Related Complex and Healthy Homosexual Men at Risk for AIDS*, 226 Science 447 (1984); David Ho, Roy Byington, Robert Schooley, Theresa Flynn, Teresa Rota & Martin Hirsch, *Infrequency of Isolation of HTLV-III Virus from Saliva in AIDS*, 313 New Eng. J. Med. 1606 (1985).

131. CDC, *Education and Foster Care of Children Infected with Human T-Lymphotropic Virus Type III/Lymphadenopathy Associated Virus*, 34 MMWR 517, 518 (1985); David Lyman, Warren Winkelstein, Michael Ascher & Jay Levy, *Minimal Risk of Transmission of AIDS-Associated Retrovirus Infection by Oral Genital Contact*, 255 J. A.M.A 1703 (1986) (men who had no sexual partners or who only engaged in oral-genital contact showed significantly less risk of AIDS virus infection than men engaging in anal intercourse); Sande, *supra* note 129, at 381 (no evidence that disease is spread by kissing or oral intercourse). Transmission is possible through oral intercourse usually only if the mouth has been bleeding or contains sores. *See* Fettner & Check, *supra* note 3.

132. Anal intercourse and certain other sexual practices of male homosexuals tend to tear the lining of the rectum and allow the virus to pass from semen into the blood stream. Fettner & Check, *supra* note 3, at 90. Despite the numbers of AIDS cases stemming from such activities, reports of heterosexual transmission of the virus are also on the increase. AIDS victims who possess no high risk factors generally acquired AIDS through contact with either a prostitute, a spouse with AIDS, or an I.V. drug user. *See* CDC, *Heterosexual Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated-Virus*, 34 MMWR 561 (1985) [hereinafter *Heterosexual Transmission*]; Robert Redfield, Phillip Markham, Syed Zaki Salahuddin, D. Craig Wright, M.G. Sarngadharan & Robert Gallo, *Heterosexually Acquired HTLV-III/LAV Disease (AIDS-Related Complex and AIDS)*, 254 J. A.M.A. 2094 (1985) [hereinafter Redfield]. While HTLV-III has been isolated from semen, there have been no reports of the virus in vaginal secretions. Consequently, the actual mechanism for transmission of the virus from males-to-females and specifically from females-to-males is not known. It is evident, however, that receptive anal intercourse is not necessary for heterosexual transmission. *Id.* at 2096.

133. *Heterosexual Transmission*, *supra* note 132, at 561.

134. Enzyme-linked immunosorbent assay.

135. Fettner & Check, *supra* note 3, at 173.

136. *Id.* at 173. Since the ELISA test was developed to eliminate potentially infectious units of blood from the nation's blood supply and was not intended to be diagnostic, the test is likely to engender the smallest number of false negative results as possible. Michael Osterholm, Robert Bowman, Michael Chopek, J. Jeffrey

to accept recruits and to assign isolation and medical disability to present personnel solely on the basis of antibody testing.[137] Employers and insurance companies have also sought to use the test to evaluate applicants and to assess liability for future medical costs of employees and insureds afflicted with AIDS.[138]

At the present time, there is no cure for AIDS. Research currently focuses on two areas: developing a vaccine to prevent AIDS infection and testing therapeutic agents in an attempt to inhibit deterioration and allow regeneration of the immune system. Scientists have taken significant steps in developing a vaccine. They have not only identified the genome structure of the AIDS

McCullough, Jack Korlath & Herbert Polesky, *Sounding Board: Screening Donated Blood and Plasma for HTLV-III Antibody*, 312 New Eng. J. Med. 1185, 1186 (1985) [hereinafter Osterholm]. *See also* George Lundberg, *The Age of AIDS: A Great Time for Defensive Living*, 253 J. A.M.A. 3440 (1985). Although both the specificity and sensitivity of the test range from 93 to 99%, the possibility of false positive results from only one ELISA testing is phenomenal. *See* Osterholm, *supra*, at 1186. Given a geographic region where the prevalance of the virus is very low, e.g. 0.01%, it is possible that 98% of the tests will result in false positives. Lundberg, *supra*, at 3440. Even with repeated ELISA testing, the chances are very great that a false positive outcome will result. When the Red Cross retested 2,552 repeatedly ELISA positive blood samples with the more effective Western blot test, only 587 samples remained positive. Charles Marwick, *Blood Banks Give HTLV-III Test Positive Appraisal at Five Months*, 254 J. A.M.A. 1681 (1985). While the Red Cross generally requires a Western blot test following a repeatedly positive ELISA test, at other testing facilities, availability of an alternative test is limited. Marwick, *supra*; Osterholm, *supra*, at 1186. *See also* Donald Burke & Robert Redfield, *False-Positive Western Blot Tests for Antibodies to HTLV-III*, 256 J. A.M.A. 347 (1986) (quality of Western blot testing "varies from substandard to excellent"). The necessity of using an additional test, such as the Western blot, to reduce the number of false positives is evident. Therefore, although the ELISA test may free the blood supply from blood containing AIDS antibodies, the ELISA test is an unreliable indicator of those individuals who have been infected with the AIDS virus.

137. *See* Schneiderman, *supra* note 12, at 347. Since courts have held that the military may reject or discharge individuals on the basis of their sexual orientation, *see, e.g.*, Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, Miller v. Weinberger, 454 U.S. 855 (1981), *cert. denied*, Beller v. Lehman, 452 U.S. 905 (1981), the ELISA test essentially serves as a more "reliable" method of removing gays from the armed services.

A group from the El Paso County Health Department reported that a combination of positive tests for certain infectious conditions, including AIDS, could be used as indicator of sexual orientation in men. John Potterat, John Muth & Gary Markewich, *Serological Markers as Indicators of Sexual Orientation in AIDS Virus-Infected Men*, 256 J. A.M.A. 712 (1986). Although the purpose of their "actuarial method" was to identify risk factors in persons belonging to the unknown group, the possible repercussions of the approach are obvious.

138. *See* Mervyn Silverman & Deborah Silverman, *AIDS and the Threat to Public Health*, 15 Hastings Center Rep. 19 (Supp. Aug. 1985). California, Florida, Wisconsin, Maine, and the District of Columbia in some manner prohibit serological testing as a method of screening employees and/or insurance applicants. *See* Cal. Health & Safety Code § 199.21(c) (West 1985); D.C. Code Ann. § 6-2805 (Supp. 1986); Fla. Stat. § 381.616(5) (1985); Me. Rev. Stat. Ann. tit. 5, §§ 17001-17006 (Supp. 1986); Wis. Stat. Ann. § 146.025 (West 1985).

virus, specifically genes which are essential for HTLV-III replication,[139] but have also experimented with recombinant vaccinia viruses resulting in the generation of T-cells and the production of antibodies against the AIDS virus.[140] Nevertheless, a vaccine will help only those not yet infected with the AIDS virus. For the thousands with AIDS, and the countless numbers infected with the virus, antiviral drugs, including azidothymidine (AZT), have proved promising in repressing the virus and its accompanying opportunistic infections.[141] Long range projections set the year 2000 as the goal for eliminating transmission of the virus.[142] In the meantime, it is evident that something must be done to stop the spread of this deadly virus.

B. AIDS—The Criminal Law

Since the earliest days of English common law, the criminal law has played a significant role in the regulation of private sexual conduct. Through increased public awareness and an expanded interpretation of constitutional liberties, however, legislatures have begun to acknowledge the inappropriateness of regulating private sexual conduct through the criminal law. Although much of modern society has matured into a somewhat grudging tolerance of homosexuality, homophobia remains the prime motivating factor in discrimination based upon participation in private consensual homosexual sodomy. Consequently, certain legislatures have attempted to prevent the criminal law from reinforcing homophobic stereotypes by decriminalizing sodomy and restoring to homosexuals constitutional rights that long went unrecognized.[143]

Nevertheless, the AIDS crisis has given opponents of gay rights new ground on which to stand. Claiming that AIDS is "just what *they* deserve," the criminalization of sodomy is justified as necessary to prevent AIDS from spreading to the heterosexual population. In several recent cases, AIDS has been offered as a justification for sodomy statutes. Although the state declined to

139. *See* Amanda Fisher, Mark Feinberg, Steven Josephs, Mary Harper, Lisa Marselle, Gregory Reyes, Matthew Gonda, Anna Aldovini, Christine Debouk, Robert Gallo & Flossie Wong-Staal, *The Trans-Activator Gene of HTLV-III is Essential for Virus Replication*, 320 Nature 376 (1986).

140. *See* Joyce Zarling, William Morton, Patricia Moran, Jan McClure, Steven Kosowski & Shiu-Lok Hu, *T-cell Responses to Human AIDS Virus in Macaques Immunized with Recombinant Vaccinia Viruses*, 323 Nature 344 (1986).

141. *See* Walter Dowdle, *The Search for an AIDS Vaccine*, 101 Pub. Health Reps. 232, 232-33 (1986); Karen Wright, *First Tentative Signs of Therapeutic Promise*, 323 Nature 283 (1986).

142. *Coolfont Report*, *supra* note 4, at 341.

143. *See supra* notes 8, 24 and accompanying text.

file an appeal from the lower court's decision to strike down Texas' sodomy statute,[144] a group known as Dallas Doctors Against AIDS attempted to reopen the case to introduce proof that " 'the public health and safety of all citizens of Texas will be harmed if the spread of AIDS is not stopped'. . .and that [the sodomy statute] is desperately needed to combat the AIDS menace."[145] Though the lower court rejected this argument, found that the state's evidence was not newly discovered, and indicated that the legislature had not considered the AIDS problem when passing the Texas sodomy statute,[146] it is distinctly possible that the circuit court contemplated the AIDS question when reversing the lower court's decision.

In the *Hardwick* case, both the state's brief filed in support of Georgia's sodomy statute and an amicus brief filed by Professor David Robinson, Jr. of George Washington Law School suggested to the Supreme Court that the AIDS epidemic would be a compelling justification for retaining sodomy statutes.[147] In particular, Robinson's brief argued that states should be allowed "to reassert traditional values" and proscribe "potentially lethal behavior."[148] Nevertheless, the Court did not directly address the AIDS question,[149] but rather accepted the state's morality justification in upholding the statute.[150] In *State v. Walsh*, however, the Missouri Supreme Court based its decision not only on *Hardwick*'s affirmation of morality as a permissible state goal, but on the state's interest in inhibiting the spread of AIDS.[151] Clearly, the possibility exists for further exploitation of the AIDS epidemic as an excuse to reinstate sodomy statutes in states which have long since promoted decriminalization.[152]

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144. Tex. Penal Code Ann. § 21.06 (Vernon 1974).

145. Baker v. Wade, 106 F.R.D. 526, 529 (N.D. Tex. 1985), *supplementing* 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986).

146. *Id.* at 534. *But see* State v. Walsh, 713 S.W.2d 508, 512 (Mo. 1986) ("That AIDS was not discovered until after the enactment of [the Missouri sodomy statute] does not affect its present validity.")

147. *See* Brief for Petitioner at 37 & Brief for David Robinson, Jr. as Amicus Curiae at 23-28, Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (No. 85-140).

148. Brief for David Robinson, Jr. at 5.

149. The only subtle reference to AIDS was relegated to a footnote in the dissent discussing the disputable connection between sodomy and harms alleged in the briefs presented to the Court. *Hardwick*, 106 S. Ct. 2841, 2853 n.3 (1986) (Blackmun, J., dissenting).

150. *Hardwick*, 106 S. Ct. at 2846.

151. *Walsh*, 173 S.W.2d 508, 512 (Mo. 1986).

152. Two legislators from New Mexico proposed the introduction of a bill to recriminalize sodomy, claiming that the statute was necessary to prevent the spread of AIDS. Arthur Leonard, *Other Miscellaneous Gay/Lesbian Law Notes*, 1986 Lesbian/Gay L. Notes 5. In addition, a promising gay rights bill was defeated in Massa-

Government regulation of private consensual sodomy, whatever the reason, is a remnant of the past. Both legislatures and courts have begun to support homosexuals' right to engage in private sexual activity.[153] With gender now designated as a quasi-suspect class,[154] the next logical step is to award that same preference to classifications based on sexual orientation.[155] Laws abridging those rights or regulating that class, including sodomy laws, must be necessary for, or at least substantially related to, an important state interest to uphold the regulation.

Granted, the state's interest in stopping the transmission of AIDS is a compelling one. Nevertheless, sodomy statutes are not tailored to serve that purpose. First and foremost, sodomy statutes simply do not deter sodomy. They have not in the past, and are not likely to do so in the future. Educating the population to avoid unsafe sexual practices,[156] in combination with the fear of contracting AIDS, is a more powerful deterrent to the spread of AIDS. In California, where sodomy has been decriminalized, many gays have radically changed their sexual behavior as a result of the strong educational movement which has emerged since the AIDS crisis began. A considerable drop in the rate of rectal gonorrhea evidences the promising trend.[157] Self-imposed behavioral changes have done much more to limit the spread of AIDS than the sodomy statutes could ever accomplish.

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chusetts partially as a result of the AIDS crisis. Arthur Leonard, *Massachusetts and Providence, RI, Reject Gay Rights Protection*, 1985 Lesbian/Gay L. Notes 42. Since the Massachusetts Supreme Court had declared the bill constitutional, its promoters were fairly confident of passage. The link between the gay community and AIDS evidently aroused the homophobia of gay rights opponents, defeating the bill.

153. *See supra* note 24.

154. *See* Craig v. Boren, 429 U.S. 190 (1976).

155. *See supra* notes 36-37 and accompanying text.

156. Unsafe sexual practices include both receptive and insertive anal intercourse without a condom, manual-anal intercourse preceded or followed by an exchange of semen, fellatio, oral-anal contact, and vaginal intercourse without a condom. Scientific Affairs Committee of the Bay Area Physicians for Human Rights, Guidelines for AIDS Risk Reduction (1984) [hereinafter Guidelines].

157. The rate of rectal gonorrhea has fallen more than 75%. *AIDS: What is to be Done?*, Harper's, Oct. 1985, at 39, 45. *See also Office of Technology Assessment's Findings on the Public Health Services Response to AIDS: Joint Hearing Before a Subcomm. of the House Comm. on Government Operations and the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 70-71 (1985). Several studies have indicated a decline in the number of sexual partners and the frequency of unsafe sexual behavior in a significant number of gay males. *See* CDC, *Self-Reported Behavioral Changes Among Gay and Bisexual Men—San Francisco*, 34 MMWR 613 (1985); Leon McKusick, William Horstman & Thomas Coates, *AIDS and Sexual Behavior Reported by Gay Men in San Francisco*, 75 Am. J. Pub. Health 493 (1985); Donald Riesenberg, *AIDS-Prompted Behavior Changes Reported*, 255 J. A.M.A. 171 (1986).

Using sodomy statutes to prevent AIDS, like the prevention of venereal disease, is overinclusive. The language of sodomy statutes generally prohibits sodomy by those who have not been infected with the AIDS virus and those who do not engage in high risk behaviors. For example, most statutes apply to lesbian and monogamous gay male couples who practice sodomy, neither of which are a high risk for contracting or transmitting AIDS. Safe sexual practices between both homosexual and heterosexual couples are also prohibited by sodomy statutes.[158] These behaviors also present a limited risk in the spread of AIDS.

Sodomy statutes as a method of preventing the transmission of AIDS are also underinclusive. While at the present time the primary method of communicating the virus is through receptive anal intercourse,[159] in a growing number of AIDS cases the virus has been transmitted through penile-vaginal intercourse, sexual conduct obviously not prohibited by sodomy statutes.[160] Sodomy statutes also do not prevent the spread of AIDS through the second most frequent means of transmission: the sharing of unsterilized needles. Though the state may take corrective measures one step at a time, the broad use of sodomy statutes raises further questions on how far the state can go in inhibiting individual liberty.[161]

Another problem, also raised in the context of other sexually transmitted diseases, is that sodomy statutes may in fact be counterproductive to a solution to the AIDS epidemic.[162] The illegality of homosexual sexual relationships may compel many gays

158. Safe sexual practices include anal intercourse with a condom and cunnilingus. *See* Guidelines, *supra* note 156. One study has proven that the AIDS virus cannot pass through condoms. Marcus Conant, Denise Hardy, Judith Sernatinger, D. Spicer & J.A. Levy, *Condoms Prevent Transmission of AIDS-Associated Retrovirus*, 255 J. A.M.A. 1706 (1986). The efficacy of condoms, however, depends in part on their proper use, including their application at the appropriate time and with proper care, and the additional use of lubricant and spermicide. Keith Henry & Kent Crossley, *Condoms and the Prevention of AIDS*, 256 J. A.M.A. 1442 (1986).

159. *See supra* note 132 and accompanying text.

160. *Id.*

161. The lower court in Baker v. Wade raised some of these problematic questions:

> [I]f prohibiting private, consensual homosexual conduct will effectively combat AIDS, should the State of Texas also ban private, consensual heterosexual acts by Haitians, hemophiliacs and drug addicts? . . . [I]f any criminal statute is "justified," shouldn't it be "narrowly drawn" to prohibit those persons who know that they have AIDS (whether homosexuals, Haitians, hemophiliacs, or drug addicts) from either having sexual contacts or donating blood?

106 F.R.D. 526, 535 (N.D. Tex. 1985), *supplementing* 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986).

162. *See supra* note 115 and accompanying text.

to seek multiple, anonymous sexual encounters with little protection against the spread of disease. It is precisely this type of behavior, in either homosexuals or heterosexuals, which fosters the spread of AIDS. In addition, sodomy's illegality may inhibit accurate reporting of AIDS cases and hinder cooperation with health authorities for research and treatment.[163] Moreover, sodomy statutes tend to reinforce the mistaken belief that homosexuals are responsible for the AIDS epidemic and consequently encourages the incidence of discrimination against gays.[164]

Therefore, sodomy statutes as a means of preventing the transmission of AIDS are ineffective, overinclusive, and only serve to punish an unpopular behavior, rather than control a deadly epidemic. The criminal law, in the form of sodomy statutes, acts only to perpetutate homophobia and cannot replace adequate public health measures to prevent the spread of AIDS.

C. AIDS—Public Health Measures

Apart from invoking sodomy statutes, state governments can use their police power to utilize several public health measures to attempt to stop the spread of the AIDS virus. In judging whether such regulation is legitimate, courts have developed several considerations to use when analyzing public health statutes:

(1) Does the state have a duty to protect the public health?
(2) Is that duty a legitimate legislative subject?
(3) Does the health statute under consideration bear a rational and direct relationship to the objective?
(4) Is the statute arbitrary or capricious?
(5) If legislative classification results, is that classification rationally related to a legitimate state interest?
(6) Does the sweep of the statute go beyond what is required to achieve the objective?
(7) Is either a suspect classification or a fundamental right involved?[165]

In the past, courts have upheld regulations ranging from reporting requirements to involuntary physical examinations.[166]

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163. Studies have shown that societies which impose severe penalties for sodomy have a poorer record of reporting and treatment of sexually transmitted diseases. David G. Ostrow & Norman Altman, *Sexually Transmitted Diseases and Homosexuality*, 10 Sexually Transmitted Diseases 208, 212 (1983). Moreover, unless a guarantee of complete confidentiality is given, accurate AIDS research will be impossible or ineffective. *See* Lawrence Brouse, *HTLV-III Transmission*, 254 J. A.M.A. 2130, 2131 (1985).

164. *See supra* note 11 and accompanying text.

165. Catherine Damme, *Controlling Genetic Disease Through the Law*, 15 U.C. Davis L. Rev. 801, 805 (1982).

166. *See id.* at 806-13. Courts have permitted mandatory immunization for small pox whether or not there is evidence of an epidemic. *See* Jacobson v. Massachu-

One of the state's drastic means of limiting the transmission of AIDS, and that most akin to sodomy statutes, is the compulsory closing of gay bathhouses. Public health officials claim that bathhouse patrons engage in the type and frequency of sexual activity which spreads the AIDS virus.[167] Though some owners have voluntarily closed their bathhouses, the New York legislature enacted a regulation which requires closing establishments that allow anal intercourse and fellatio on the premises.[168] In *City of New York v. New Saint Mark's Baths*,[169] the New York Supreme Court upheld the closing of a gay bathhouse in spite of arguments that bathhouses provide a "valuable communication link between public health authorities and the homosexual community."[170]

Although a high incidence of unsafe sexual practices take place in gay bathhouses, bathhouses constitute an excellent forum for educating those gay men most likely to be at risk of contracting AIDS. Closing bathhouses only forces the patrons to seek alternative sites for their sexual activity rather than to take a positive step toward changing attitudes and behavior necessary to halt the transmission of AIDS. New York's focus on the gay community in its effort to stop communication of the virus manifests the same attitude which is apparent from the advocates of sodomy statutes: control the unpopular behavior rather than the cause of the illness. In this way, the regulations go beyond the objectives they are trying to achieve—that of suppressing the AIDS virus—and impinge on individual fundamental rights of privacy and associa-

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setts, 197 U.S. 11 (1905); Hartman v. May, 168 Miss. 477, 151 So. 737 (1934). Courts also allow quarantine of the diseased, carriers of the disease, and even those not yet affected within an area if there is danger presented by the disease and a reasonable suspicion that the area is infected. *See In re* Johnson, 40 Cal. App. 242, 180 P. 644 (2d Dist. 1919); People *ex rel.* Barmore v. Robertson, 302 Ill. 422, 134 N.E. 815 (1922). *But see In re* Shepard, 51 Cal. App. 49, 195 P. 1077 (2d Dist. 1921) ("mere suspicion" is not sufficient); and isolation of leprosy and tuberculosis victims. *See, e.g.*, 42 U.S.C. § 247e (1980).

167. The Center for Disease Control recommends state regulation or closing of establishments which "facilitate high risk behaviors . . . (e.g., bathhouses, houses of prostitution, 'shooting galleries' [place where I.V. drug use occurs in abundance])." CDC, *Additional Recommendations to Reduce Sexual and Drug Abuse-Related Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus*, 35 MMWR 152, 154 (1986) [hereinafter *Additional Recommendations*].

168. N.Y. Comp. Codes R. & Regs. tit. 10, § 24-2.1 to -2.3 (1985). San Francisco also prohibits unsafe sexual contacts in its gay bathhouses. Silverman & Silverman, *supra* note 138, at 22.

169. 130 Misc. 2d 911, 497 N.Y.S.2d 979 (N.Y. Sup. Ct. 1986).

170. *Id.* at 917, 497 N.Y.S.2d at 983. *See also* Broadway Books, Inc. v. Roberts, 642 F. Supp. 486, 491 (E.D. Tenn. 1986) (AIDS provided a rationale for a Chattanooga city ordinance licensing adult-oriented bookstores); State *ex rel.* Slaton v. Fleck & Assocs., 622 F. Supp. 256 (N.D. Ga. 1985) (state action to close bathhouse cannot be removed to federal court).

tion. Ultimately, closing bathhouses will be as ineffective as sodomy statutes in the fight against AIDS.[171]

Another proposed health measure concerns the quarantine, isolation, and/or involuntary hospitalization of AIDS carriers to prevent communication of the virus. In *Cordero v. Coughlin*,[172] the district court upheld the segregation of prisoners affected by AIDS.[173] Within those restricted circumstances, the court found that prison officials had broad discretion to act, while prisoners retained only "a narrow range of protected liberty interests."[174] While several states have proposed plans to quarantine AIDS patients outside the prison system,[175] the United States Conference of Local Health Officers has advised against such an action.[176] The quarantine of AIDS victims, or even virus carriers, does not serve to treat or control the virus. Since AIDS is not communicable through casual contact, isolating victims or carriers from persons uninfected with the virus is unnecessary. Furthermore, the inability of researchers to pinpoint the time at which AIDS virus carriers become infectious and the near impossibility of terminally ill AIDS patients transmitting the virus make narrowly drawn quarantine regulations difficult, if not impossible, to draft and enforce.[177] Indefinite quarantine, most likely enduring for the life of the victim, would undoubtedly implicate an unconstitutional deprivation of liberty. Consequently, a general quarantine of all virus carriers would be arbitrary and capricious, and the isolation of individual victims would serve no purpose other than harassment.

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171. For a detailed constitutional analysis of this topic, see Stephen Collier, *Preventing the Spread of AIDS by Restricting Sexual Conduct in Gay Bathhouses: A Constitutional Analysis*, 15 Golden Gate U.L. Rev. 301 (1985); Judith Rabin, *The AIDS Epidemic and Gay Bathhouses: A Constitutional Analysis*, 10 J. Health Pol. Pol'y & L. 729 (1986).

172. 607 F. Supp. 9 (S.D.N.Y. 1984).

173. *Id. Cf.* LaRocca v. Dalsheim, 120 Misc. 2d 697, 467 N.Y.S.2d 302 (1985).

174. 607 F. Supp. at 10 (citing Hewitt v. Helms, 459 U.S. 460, 469 (1982)).

175. *See* Chris Nichols, *AIDS—A New Reason to Regulate Homosexuality?*, 11 J. Contemp. L. 315, 340 (1984); Note, *The Constitutional Rights of AIDS Carriers*, 99 Harv. L. Rev. 1275, 1281 (1986). A group known as PANIC (Prevent AIDS Now Initiative Committee) placed Proposition 64 on California's November ballot. Proposition 64 was an initiative which extended "existing public health codes for communicable diseases to AIDS and AIDS virus carriers." The proposition would have made state quarantine and isolation statutes available to combat AIDS. Joseph Palca, *Proposition Causes PANIC*, 323 Nature 384 (1986). Fortunately, however, the initiative was soundly defeated. N.Y. Times, Nov. 6, 1986, at 19, col. 4.

176. Minneapolis Star & Trib., Jan. 22, 1986, at 10A, col. 1. The Public Health Service recommends temporary involuntary isolation of those AIDS carriers who refuse to discontinue high risk behaviors "only in rare circumstances and after due process." *Coolfont Report*, *supra* note 4, at 347.

177. *See* Rosanne Pagano, *Quarantine Considered for AIDS Victims*, 4 Cal. Law. 17 (1984).

Finally, typical public health measures include mandatory blood testing, case reporting, and contact tracing. The Public Health Service presently encourages persons engaging in high risk activity to voluntarily submit themselves for serological testing.[178] While such testing may serve the function of making individuals aware of the hazards of high risk behavior to themselves and their contacts, mandatory testing by employers or insurance companies can only serve as a tool for discriminatory purposes; it will not prevent the transmission of the AIDS virus. Compulsory testing encourages the substitution of an assumed behavior for a positive test result and consequently, discrimination on the basis of that behavior.

While most states require physicians and blood banks to report only CDC-defined AIDS cases to the Public Health Service,[179] Idaho and Colorado require reporting the names, along with other pertinent data, of persons with seropositive test results and authorize tracing the sexual contacts of virus carriers.[180] Moreover, blood banks keep records of seropositive blood donors. Questions of confidentiality arise when these names are placed on lists possibly accessible to insurance companies, employers, and the military. California, Florida, Maine, Wisconsin, and the District of Columbia expressly protect the confidentiality of blood test results against use by employers and insurance companies.[181] A Florida court in *South Florida Blood Service v. Rasmussen*[182] protected blood donors' interests in confidentiality in an action by a transfusion recipient who died from AIDS as a result of a virus-infected transfusion. The donors' privacy interests in combination with the public's interest in the free access to donated blood outweighed the

178. *Coolfont Report*, *supra* note 4, at 347; *Additional Recommendations*, *supra* note 167, at 153.

179. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 10, § 241.1 (1985). The CDC specifies certain conditions patients must manifest before being diagnosed as an AIDS case. *See* CDC, *Update on Acquired Immune Deficiency Syndrome (AIDS)—United States*, 31 MMWR 507 (1982); CDC, *Revision of the Case Definition of Acquired Immunodeficiency Syndrome for National Reporting—United States*, 34 MMWR 373 (1985).

The reporting form used by the CDC asks not only for the name, address, and other necessary information, but for a history of sexual orientation and relationships, prison record, and drug use. Joni Gray & Gary Melton, *The Law and Ethics of Psychosocial Research on AIDS*, 64 Neb. L. Rev. 637, 654 n.113 (1985). The availability of such information heightens the need for confidentiality.

180. Idaho Code § 39-601 to -602 (1985 & Supp. 1986); 17 Colo. Regs. § 1004 (1985). California's Proposition 64 would have authorized seropositive case reporting. *See supra* note 175.

181. *See* statutes cited *supra* note 138. The military, however, has never been prohibited from using blood tests for exclusionary purposes. *See supra* note 129 and accompanying text.

182. 467 So.2d 798 (Fla. Dist. Ct. App. 1985).

other party's interest in discovering the donors' names and addresses.[183] While this case may protect the names of blood donors in a similar situation, there is no guarantee that anonymity will be preserved for all test results. If employers and insurance companies are allowed access to lists, or are permitted to conduct mass screenings of employees or policy holders, AIDS becomes not only a health problem, but also a basis for discrimination. Accumulating the names of AIDS virus carriers is wholly unrelated to the effort to limit the communication of the virus. Although certain vital statistics may be essential to researchers, the inclusion of names only increases the possibility of their discriminatory misuse. One solution to this problem is to establish alternative, anonymous test sites. In this way, persons engaging in high risk behavior may be tested for exposure to the virus without the loss of confidentiality and fear of recrimination.[184]

Though primarily suggesting self-referral of an AIDS-infected person's sexual and drug abuse contacts, the Public Health Service has indicated that in some situations, notification and counseling of contacts by health agencies may be appropriate.[185] Regardless of this recommendation, contact tracing is best left to virus carriers on a voluntary basis or delegated to a private organization which would subsequently destroy the contacts' names. Unlike contact tracing used to notify those possibly exposed to venereal diseases, the possible harm engendered by the suggestion of AIDS infection is more extreme. Granted, it is crucial for everyone to be made aware of their potential infection. Nevertheless, the inherent bias against gays and the present association of AIDS with gay men demand that seropositive test results be kept confidential.

The most effective and least restrictive response to the AIDS crisis is education. To eliminate transmission of the AIDS virus, the heterosexual and homosexual communities must change both their attitudes and behaviors. A conscious effort by all persons whose behaviors place them at risk for AIDS to alter their behaviors in conformity with safe sex guidelines and recommendations for the use of sterilized needles will help curb the spread of the disease. In order for this to take place, accurate information must be disseminated to the public.

Thus far, funding for education has been primarily directed toward the professional: the researcher, the physician, and the

183. *Id.* at 804.
184. Silverman & Silverman, *supra* note 138, at 20.
185. *Coolfont Report*, *supra* note 4, at 347.

health care worker. Comprehensive brochures and lectures on safe sex procedures, and free distribution of condoms and sterilized needles are essential elements to an effective fight against AIDS. In San Francisco, an active and explicit education campaign has elicited positive behavioral changes.[186] More concentrated efforts must be initiated across the country to insure that *everyone* is aware of current research developments and behavioral guidelines upon which they should model their behavior. Recent Public Health Service recommendations advocate national information and education campaigns utilizing radio, television, and newspaper and magazine ads to inform the public about AIDS and its transmission.[187] Even the Surgeon General has urged parents and schools to introduce AIDS sex education "at the lowest grade possible."[188] Education is the only public health measure precisely ministering to the AIDS problem, while maintaining the constitutionally protected rights, not only of gays, but of all persons afflicted with AIDS. In 1820, Thomas Jefferson wrote: "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education."[189] Jefferson's words are equally applicable today.

VI. Conclusion

It is alarming that AIDS should strike so suddenly and so devastatingly. It is unfortunate that AIDS is primarily concentrated in a group already suffering from hardship and prejudice. But it is shocking that those who oppose homosexuality should use the AIDS crisis as a means of furthering their predilections. The court in *Baker v. Wade* raised the following question: "[I]f AIDS can be wiped out by statutes such as [the Texas sodomy statute], would the State consider passing laws against other diseases?"[190] Using the criminal law to punish those who may already suffer from the guilt of having infected those they care for and who will

186. *See supra* note 157 and accompanying text.

187. *Coolfont Report*, *supra* note 4, at 346. The Public Health Service and the Red Cross have developed television public service announcements regarding AIDS and the use of condoms. *See* CDC, *Availability of Informational Material on AIDS*, 35 MMWR 819 (1987).

188. *See* U.S. Dep't of Health & Human Servs., Surgeon General's Report on Acquired Immune Deficiency Syndrome 5, 31 (1986).

189. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in Letters of Thomas Jefferson 216, 218 (Frank Irwin ed. 1975).

190. 106 F.R.D. 526, 535 (N.D. Tex. 1985), *supplementing* 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986).

more than likely die is ludicrous. Clarence Darrow aptly summarized the irony and unproductivity of this type of thinking when he quoted from a story by Samuel Butler entitled "Erehwon."[191] It takes place in a village high in the mountains of New Zealand.

> If a bank president had embezzled the funds of a bank, or if some one else committed something that civilized people call crime, such persons were not sent to jail or prison, but to a "straightener," who treated the unfortunate one daily for a suitable time, each day friends and relatives inquiring solicitously how the patient was getting along, displaying deep interest in his progress, and showing great pleasure and gratification when any one was cured. But if some one had a disease he was at once sent to a criminal court. Mr. Jones, we will say, is led into court charged with tuberculosis. The judge asks him what he has to say for himself, and he replies that he was born with a weak constitution, that he is poor and has been forced to work in inclement weather and unventilated surrounding, and so developed tuberculosis. Thereupon the judge, with the judge's zeal for justice, turns over the pages of his docket and says, "Mr. Jones, weren't you in this court a year ago for pneumonia?" The poor fellow replies "Yes-" he had been working in the rain and cold, and had not known that it would cause pneumonia. The judge promptly replied that ignorance was no excuse for crime. On further examination it was disclosed that he was once in court afflicted with a severe cold; it was therefore clear that he was an habitual criminal, and thereupon he was sent to prison for life.[192]

Punishing AIDS carriers, by means of sodomy statutes and other public health measures modeled on the same premise, will only criminalize its victims. It will not stop the AIDS epidemic. Only diligent research, intensive education, and time can do that.

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191. Nowhere spelled backwards.

192. Clarence Darrow, The Story of my Life 357-58 (1932), *quoted in* Baker v. Wade, 106 F.R.D. at 535 n.27.