AIDS and Discrimination in the United States: Reflections on the Nature of Prejudice in a Virus

Mary C. Dunlap
AIDS AND DISCRIMINATION IN THE UNITED STATES:
REFLECTIONS ON THE NATURE OF PREJUDICE
IN A VIRUS

MARY C. DUNLAP†

I. INTRODUCTION

IT WOULD be nearly impossible to pay the slightest attention
to the “demographics” of acquired immunodeficiency syn-
drome (AIDS) or AIDS related complex (ARC) without noticing
that this is a disease that discriminates. The human immu-
nodeficiency virus (HIV) has taken its highest numerical tolls1 (in
diagnoses of AIDS) among gay2 and bisexual men and intrave-
nous (IV) drug users. While Black and Hispanic persons consti-
utely twenty percent of the United States’ population,

† B.A., 1968, J.D., 1971, University of California, Berkeley. Ms. Dunlap is a
cofounder of Equal Rights Advocates, Inc., a feminist law firm in San Francisco,
California; since 1980, Ms. Dunlap has been engaged primarily in solo civil
rights law practice and in teaching, inter alia, about gay/lesbian rights. She
wishes to express her particular appreciation for the contributions of her
gay/lesbian rights law students at Golden Gate University and Stanford Univer-
sity Law Schools for their insights about fear as a fact of the AIDS pandemic, and
to her law clerk, Em Herzstein, for her rapid and effective research
and the legis-

1. According to the Centers for Disease Control (CDC), of people with
AIDS: 74% are gay/bisexual men; 17% are heterosexual drug users who share
needles; 4% are heterosexuals who have had sexual intercourse with people who
are seropositive or who are in one or more high-risk groups; 2% are persons
(other than hemophiliacs) who have received HIV-exposed blood transfusions;
1% are hemophiliacs who have received HIV-exposed blood products; 1% are
newborn infants of seropositive mothers; and less than 1% are not identified in
the above categories. Centers for Disease Control, Update: Acquired Immune-
nodeficiency Syndrome: United States, 35 MORBIDITY & MORTALITY WEEKLY REP. 757,
758 (1986). Of course, there are difficulties with available statistics about the
rates of AIDS in at least some of these groups. Among the most obvious
problems with these statistics are the fact that the prejudice accompanying self-
identification as an intravenous (IV) drug user or as a gay or bisexual man will
inhibit some with AIDS diagnoses from being so identified, and that there is a
percentage of cases where AIDS is present, but not diagnosed. Even so, the
CDC statistics place over 90% of people with AIDS in these two groups. Id.

2. The term “gay” is used in this article, for the most part, in lieu of the
term “homosexual” because of the history of oppression that accompanies the
term “homosexual,” because of the author’s belief in a degree of analytic cleans-
ing power of new terminology and, most persuasively, because the term “gay”
appears generally to be preferred among the group to which the author is
referring.
Black and Hispanic persons constitute forty percent of persons diagnosed with AIDS. The inclination to perceive AIDS, ARC and the virus that causes them in terms of “high-risk groups” adversely affects treatment of the pandemic by perpetuating responses such as homophobia (irrational fear of gay persons), abled-bodiedism (bias against disabled persons), racism, class elitism and prejudice.

Fear of AIDS repeatedly has been translated and reduced to fear of people with AIDS. This fear must be treated as a fact that is at least as vital to the story of AIDS in the United States as the scientific fact of discovery of the HIV virus or the political facts underlying various theories of HIV transmission in the United States.


4. For a discussion of the prejudice and discrimination that AIDS promotes, see infra notes 14-19 and accompanying text.

5. For an account of the discovery of the HIV virus in 1983 as provided by its discoverers, Robert C. Gallo of the National Center Institute in the United States and Luc Montagnier of the Pasteur Institute in France, see Gallo & Montagnier, AIDS in 1988, Sci. Am., Oct. 1988, at 41.


7. “Fear can be useful when it helps people avoid behavior that puts them at risk for AIDS. On the other hand, unreasonable fear can be as crippling as the disease itself.” Surgeon General’s Report on Acquired Immune Deficiency Syndrome, U.S. Dept. of Health and Human Services 3 (1987) [hereinafter Surgeon General’s Report].
mechanisms of remediation and prevention as to AIDS and to under- 
dermine the credibility of legal, medical and educational institu- 
tions charged with the responsibility of responding to the AIDS 
pandemic. This article will pay particular attention to this role of 
fear as expressed in prejudices toward gay and lesbian persons, 
toward people of color and toward disabled persons by those 
charged with law-making and policy-making responsibilities.

A second key premise of this article is that the AIDS crisis 
operates as a magnifying glass through which the strengths and 
weaknesses of major institutions in this nation and society can be 
viewed. As Harvey V. Fineberg, Dean of the School of Public 
Health of Harvard University, recently noted:

AIDS throws new light on traditional questions of value, 
compels a fresh look at the performance of the institu- 
tions we depend on and brings society to a crossroads 
for collective action that may, with the passage of years, 
mark a key measure of our time.8

This article will use AIDS as just such a magnifier of one im-
portant part of the institutional matrix surrounding AIDS, apply-
ing the powers of this international health crisis9 to illuminate 
and make possible a closer examination of the operation of law in 
relation to it. We may thus discover ways to keep the irrational 
fear of people with AIDS from perpetuating legal and political 
injustices against affected persons. More optimistically, we may 
find new and constructive means for addressing, confining and 
remedying those group prejudices—homophobia, racism, class 
elitism and able-bodiedism—that AIDS exposes in the behavior of 
the American legal system.

8. Fineberg, supra note 3, at 128.

9. That the AIDS pandemic constitutes a crisis of international scope is be-
yond dispute. The World Health Organization of the United States has been 
informed that at least 5,000,000 people worldwide are infected by the AIDS vi-
rus and that 1,000,000 new cases can be anticipated in the next five years. 
1988, at 82.

Between 1979 and March 21, 1988, 42 countries in the Americas had re-
ported a total of 61,602 AIDS cases to the World Health Organization (WHO). 
Centers for Disease Control, Update: Acquired Immunodeficiency Syndrome (AIDS)— 
54,233, more than 60% of the world total, were reported by the United States. 
Id. at 287. Twenty-eight countries in Europe have reported 13% of the 84,256 
AIDS cases reported worldwide. Id. Thirty-eight countries in Africa also re-
ported 13% of the world total, while only 231 cases of AIDS were reported in all 
of Asia. Id.
II. AIDS Discriminates: The Reaction to AIDS Can Compound or Diminish the Virus' Discriminatory Disposition

In the United States, the discriminatory disposition of the HIV virus and of the AIDS diagnoses that follow seropositive test results is obvious: gay and bisexual men and Black and Hispanic persons, both male and female, constitute the overwhelming majority of those who have died of or are living with AIDS. While women amounted to only seven percent of those diagnosed with AIDS in the first five years of the pandemic, that percentage increased to twenty percent in 1986. As of mid-1987, AIDS also became the leading cause of death for females aged twenty-five to thirty-four, eighty-four percent of whom were women of color.

Indisputably, HIV seropositivity and AIDS are most prevalent in minority populations in the United States, which has tended to isolate them in terms of wider societal reaction. As gay political scientist Dennis Altman has observed:

Of the Vietnam War it was said that only the recognition of American casualties really fired the peace movement and gave it mass support. In the case of AIDS the high concentration of cases among certain groups and localities—namely, gay men, drug users, Haitians and hemophiliacs in a few urban areas—means that a few people have felt a disproportionate amount of personal loss. For most people it has been fear of contagion rather than experience of loss that has made the disease


11. For further statistical discussion of the AIDS crisis, see supra notes 1-3, 9 and accompanying text. In tests conducted on 1,525,869 recruit applicants by the Department of Defense between October 1985 and March 1988, 753 White males (out of a total of 978,519) tested HIV seropositive, while 1,168 Black and Hispanic males (out of a total of only 291,630) tested HIV seropositive. Centers for Disease Control, Trends in Human Immunodeficiency Virus Infection Among Civilian Applicants for Military Service—United States October 1985-March 1988, 37 MORBIDITY & MORTALITY WEEKLY REP. 677, 677-78 (1988).

Fear of people with AIDS has materialized in every public forum and institution in this society, in virtually every context imaginable. Efforts have been made to prevent HIV-positive children and children with AIDS from attending school and to prevent teachers diagnosed with AIDS from continuing to teach. Wide-spread discrimination in employment and housing, not only against people with AIDS and ARC and HIV-positive individuals but against people perceived to be within high-risk groups for HIV, has been reported. Refusals by medical professionals to

15. See, e.g., Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988). Vincent Chalk, a certified teacher of hearing-impaired students in public school, was removed from the classroom when he was diagnosed with AIDS. Id. Chalk claimed discrimination based on disability, under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982 & Supp. V 1987), which prohibits disability discrimination by federally funded programs in, inter alia, employment. Chalk, 840 F.2d at 703. The court of appeals, ordering the school district to return Chalk to the classroom, held that the established modes of transmission of HIV precluded the lower court from rejecting “the overwhelming consensus of medical opinion” and “improperly rel[y]ing . . . on speculation [as to Chalk’s hazardousness in teaching] for which there was no credible support in the record.” Id. at 708. The trial court, in denying the injunction, had relied upon “the fear that [Chalk’s] presence in the classroom was likely to produce.” Id. at 711. In a factually similar case, which lent support to the Chalk decision, the Supreme Court in 1987 ruled that a schoolteacher suffering from a contagious disease (tuberculosis) was a handicapped person within the protection of § 504 of the Rehabilitation Act. See School Bd. v. Arline, 480 U.S. 273 (1987).

care for people due to fear of AIDS likewise have been documented, as has the pervasive reluctance of funeral homes and cemeteries to handle the remains of those who have died of AIDS. Actions by the insurance industry to avoid insuring and paying benefits to HIV-seropositive people have received considerable attention.

Fear of gay and lesbian people has fueled a "wave of homophobic violence [that] appears to be sweeping the country." Despite repeated assurances by scientific and medical leaders that the HIV virus is transmitted only by unsafe sexual

17. See generally Banks, The Right to Medical Treatment, in YALE AIDS GUIDE, supra note 10, at 176 (Los Angeles paramedics were sued for allegedly not providing proper medical assistance to heart attack victim because they believed he had AIDS; also, prominent heart surgeon refused to operate on anyone infected with HIV). Banks notes that "many funeral homes are reluctant to handle the remains of AIDS patients." Id. at 183. See also Fox, The Politics of Physicians' Responsibility in Epipemics: A Note on History, in AIDS: THE BURDENS OF HISTORY 86 (E. Fee & D. Fox, ed. 1988) (viewing physicians' ethical responsibility to treat AIDS patients in context of historical behavior toward patients with contagious diseases).

18. See Scherzer, Insurance, in YALE AIDS GUIDE, supra note 10, at 189; see also Scherzer, Insurance and AIDS-related Issues, in AIDS PRACTICE MANUAL, supra note 10, at VIII-1 (Gay men are perceived as poor insurance risks and are sometimes denied insurance benefits to which they are entitled, which threatens the well-being of all gay men, regardless of whether they are at risk for AIDS).


20. Perhaps the best known of these monolithic educational programs is the effort of former United States Surgeon General C. Everett Koop to communicate current medical knowledge about HIV transmission through a nationwide mailing that identified the known means of HIV transmission with increased specificity. Compare Surgeon General's Report, supra note 7 ("[I]f proper precautions are not used with sexual contacts and/or intravenous drug use . . . infected individuals can spread the virus to others."), with U.S. Public Health Service, Understanding AIDS, at 3 (1988) (containing list of "risky behavior," including "[s]haring drug needles and syringes; [a]nal sex, with or without a condom; [v]aginal or oral sex with someone who shoots drugs or engages in anal sex; [u]nprotected sex (without a condom) with an infected person"). Other sources of information about HIV transmission have emerged, especially in areas where AIDS has taken its highest tolls, which provide highly specific and explicit information about HIV transmission. For example, the San Francisco AIDS Foundation has published an array of educational literature on HIV transmission, using explicit language and graphics to convey known information on the subject. See San Francisco AIDS Foundation, An Important Message for Gay & Bisexual Men (1987) (pamphlet/poster) [hereinafter An Important Message]. The poster explains that "unsafe sex is when certain body fluids (cum, vaginal fluids, blood, shit, and piss) get from one person into the body of another person. This happens by fucking without a condom, having
contact, sharing of IV drug needles, perinatally and, very rarely, by blood transfusions and accidental clinical exposure, fearful reactions continue to abound.

HIV-positive persons were found to "face . . . outright hostility from a substantial number of Americans," in a recent study by Harvard University researchers.21 This authoritative analysis of fifty opinion surveys determined that twenty-nine percent of people surveyed favored tattooing HIV-positive persons, seventeen percent supported banishing people with AIDS to islands to live in colonies like lepers and thirty percent believed people with AIDS should be isolated at work and school. Twenty percent believed that people with AIDS were "getting their rightful due."22

The significance of this pervasive environment of fear and hostility towards people with AIDS and towards people in actual or perceived "high-risk" groups relative to AIDS, is hard to overstate. It must be borne in mind that the people in these groups were already among the targets of discrimination before the AIDS pandemic. Gay and lesbian persons have long been persecuted by a tremendous collection of oppressive laws and attitudes in American society.23 Disabled and handicapped persons have like-oral sex, and getting cum or vaginal fluid in your mouth, licking someone’s ass (rimming), fisting without a latex glove, and sharing sex toys" and that "[s]haring needles is a very effective way to spread the AIDS virus. If you shoot drugs don’t share needles. If you share a needle learn how to clean it with bleach." Id.

The American Public Health Association recently issued a report which states that the “major” routes of HIV transmission consist of sexual activity, injected blood and perinatal transmission; that “rare” routes of transmission consist of transfusion of blood and blood products and accidental clinical exposure; and that animals, blood donation, food, inanimate objects, insects, saliva, skin contact, vaccines and water have been “found not to transmit HIV.” American Public Health Association, Casual Contact and the Risk of HIV Infection (July 1988). Even so, others continue to publish materials claiming that HIV can be transmitted through these innocuous contacts. See, e.g., The McAlvany Intelligence Advisor 8 (Sept. 1988) (AIDS exposure occurs in “kissing strangers,” from “uncovered toilet seats,” “salad bars,” “public swimming pools" and “discos”).

22. Id. at 1023 n.16.
23. See J. D’EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970 (1983); J. KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. (1976) (recounts historical attitudes towards and of homosexuals through analysis of various writings). The history of persecution of gay and lesbian persons can well be examined in the context of homophobic and heterosexist law, particularly in judicial and legislative developments that deny custody, visitation and familial rights to gay and lesbian persons; limit gay/lesbian partnering and property rights; criminalize adult private sexual activity between consenting adults of the...
wise been victimized by legally recognized forms of discrimination. The history of racial discrimination against Black and Hispanic persons, who comprise forty percent of those diagnosed with AIDS in the United States, is notorious and well-established. Public disapprobation of drug abuse and punitive attitudes toward drug addicts seem to have risen to a crescendo in recent years. Bigoted attitudes toward poor people further ex-

same gender; authorize discharge, denial of re-enlistment and court martial of gay/lesbian persons in the United States military; exclude gay/lesbian persons from United States immigration and naturalization; permit discrimination based on sexual orientation against gay/lesbian persons in employment, insurance, credit, housing and public accommodations; and permit differentially severe and inhospitable treatment of juveniles who are gay or lesbian. See Hammill & Isaacs, supra note 16; see also Rivera, Our Straight-Laced Judges: The Position of Homosexual Persons in the United States, 30 Hastings L.J. 799, 947-48 (1979) (The author concludes that law shows "systematic and pervasive discrimination against homosexual individuals in our courts...[and] homosexual individuals are penalized in all aspects of their lives because of their sexual preference. They lose their jobs, their children, and numerous other precious rights as a result of many current judicial policies.... There are some signs of progress, but they are hard won...such successes only scratch the surface.").

24. See F. BOWE, HANDICAPPING AMERICA: BARRIERS TO DISABLED PEOPLE 30-34 (1978) (notes that while federal legislation now protects certain rights of the disabled, little is done in the way of enforcement of and education about those rights); DISABILITY RIGHTS, EDUCATION & DEFENSE FUND, NO MORE STARES (1984); L. ROTHSTEIN, RIGHTS OF PHYSICALLY HANDICAPPED PERSONS (1984) (extensive review of constitutional and statutory rights of handicapped persons to education, employment and transportation); SALES, POWELL & VAN DUIZEND, DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES 6 (1982) (compendious review of state legislative treatment of disabled persons notes that "[c]urrent state statutes governing personal and civil rights for disabled persons suffer from a number of inadequacies. These statutes...[e]mbody a gross overreaction to disabling conditions, resulting in more restrictive treatment of disabled persons than is warranted.")


27. This punitive mind set about drug abuse may have reached a new height in politicians’ promises of death penalties for “drug kingpins.” See, e.g., Transcript of the First TV Debate Between Bush and Dukakis, N.Y. Times, Sept. 26, 1988, at A17, col. 5 (statement of presidential candidate Michael Dukakis that Vice President George Bush favored death penalty for “drug kingpins”). The Supreme Court has denied protection from employment discrimination to persons on methadone maintenance for drug addiction despite a showing that 63% of the excluded group were Black and Hispanic. See New York City Transit
AIDS and Discrimination

AIDS and Discrimination

Acerbates the AIDS crisis, both as AIDS impoverishes its victims\(^{28}\) and as poor people are more susceptible to disease in general, and to HIV in particular.\(^{29}\)

Therefore, AIDS serves the dichotomous function of operating to accentuate and reinforce these extant prejudices while acting as a catalyst to uproot and expose them. As presented below, both entrenchment of biases and enlightenment appear to be associated with this unprecedented health crisis.

### III. Reaction to AIDS in the United States Emphasizes Blaming the Victims Rather Than Finding Causes

“AIDS is a cosmic kick in the ass.”\(^{30}\)

AIDS illuminates dramatic deficiencies in American legal and medical institutions as well as in the society that contains them. Among the problems magnified by AIDS are: that our legal system too often lends itself to punishing and proclaiming, rather than to educating and preventing, as methods of problem-solv-

---

\(^{28}\) Auth. v. Beazer, 440 U.S. 568 (1979). As this country’s medical establishment recognizes that drug addiction is a disease, it is submitted that discrimination against drug addicts should also be analyzed as a form of discrimination against disabled persons. But cf. Traynor v. Turnage, 485 U.S. 535 (1988) (denial of educational benefits by Veterans Administration to alcoholics in recovery does not constitute violation of § 504 of Rehabilitation Act; Court claimed not to be deciding whether “alcoholism is a disease whose course its victims cannot control”).

\(^{29}\) The cost of AIDS health care has been estimated at between $30,000 and $140,000 per person. See Fineberg, supra note 3, at 133. For a discussion of the problems of coverage for people having AIDS and ARC under federal Medicaid and the Supplemental Social Security income system, see D. Altman, supra note 13, at 122.

\(^{30}\) An especially stunning form of this bias has manifested itself in the denial of opportunities to women to be among those tested for AIDS drugs such as Ampligen. Dr. Michael Greico of St. Luke’s Ampligen program in New York offered the following explanation for excluding women from the drug trials: “The best patients have been male homosexuals. Woman [sic] have less compliance. There’s less education, motivation, and understanding. It is different taking someone who is productive in the arts than someone living as a minority person. They’re not going to have the same grasp.” Schulman, Women Need Not Apply, Village Voice, Feb. 16, 1988, at 12, col. 1. The experience of women exposed to the devastating effects of thalidomide has been offered as an additional reason for not testing women, although logic should dictate an opposite result—women should be tested to identify drugs that have such gender-linked deleterious side-effects. Id. As many women of color suffer the deprivation of decent health care associated with poverty, it is predicted that their number and percentage among people with AIDS and ARC will increase. See Greaves, The Black Community, in Yale AIDS Guide, supra note 10, at 289.

\(^{30}\) This quotation is attributed to Michael Callen, a prominent New York artist, musician and person with AIDS, whose work against the virus and its associated bigotry is renowned.
ing; that decent medical care costs more money than most Americans can afford; that lack of insurance means poverty for ill and disabled people;\(^{31}\) that our nation suffers from a massive denial of the realities of illness and death;\(^{32}\) and that ours is a nation riddled with the waste and hurt of callous bigotry.\(^{33}\) AIDS has further exposed a troubling tendency of both individuals and institutions in the United States to blame victims.

The sentiment asserted by thousands of Americans that people with AIDS are "getting what they deserve"\(^{34}\) embodies and reflects a fundamental problem in the way we view health, disease and causes generally, both in and out of legal and medical circles. Given that a society which blames victims will readily seize upon models of causation that also do so, it is not surprising that most theories of the genesis of AIDS have moral overtones and implications which find fault and assess blame. Hence, the popular explanation of the spread of the HIV virus among gay and bisexual

---

31. In 1986, the United States spent almost 11\% of its gross national product on health care. 133 CONG. REC. E2929 (daily ed. July 15, 1987) (remarks of Rep. Hamilton). “Two out of three Americans say they would favor national health insurance, but they seem unwilling to pay for it.” 134 CONG. REC. E753 (daily ed. Mar. 22, 1988) (presentation of Rep. Porter). Meanwhile, proponents of national health care insurance continue to offer reasons for such insurance, affordable or not. “The U.S. health care system is too expensive, biased toward costly treatments rather than prevention. It leaves 27 million Americans with inadequate insurance or with no insurance at all. It most severely penalizes the less protected in our society: non-whites, women, the aged and the poor... The U.S. is now the only advanced industrial country which does not provide some form of publicly guaranteed, universally available health insurance.” The Washington Spectator, Apr. 15, 1988, at 1, col. 2. This national health care debate is currently being conducted in light of the stark fact that 69,085 Americans have been diagnosed with AIDS as of July 1988. 134 CONG. REC. S9842 (daily ed. July 26, 1988) (statement of Sen. Cranston). By 1992, there may be 300,000 more cases of AIDS in the United States. See Heyward & Curran, The Epidemiology of AIDS in the U.S., Sci. Am., Oct. 1988, at 81. Further, the cost of care for a person with an AIDS diagnosis in the United States ranges from less than $30,000 to more than $140,000, and people perceived to be at risk for AIDS, especially gay men and lesbians, are widely being denied health insurance. See Fineberg, supra note 3, at 133. See also Scherzer, supra note 18, at VII-1.

32. See E. KUBLER-ROSS, AIDS: THE ULTIMATE CHALLENGE (1987). Applying her “stages-of-dying” analysis to the AIDS crisis, Ross notes that “[j]ust as Americans have been known to be death-denying people, so it has become quite obvious that we also attempt to deny AIDS.” Id. at 5. “Feelings of denial abound when it comes to facing the reality of a son’s homosexuality; a child’s contact and infection with the AIDS virus; a husband’s bisexuality that led to an infected newborn baby.” Id.

33. For examples of such callous bigotry, see supra notes 23-29; infra notes 48-53 & 70 and accompanying text.

34. For a discussion of a recent study demonstrating public hostility toward HIV-positive persons, see supra note 21 and accompanying text.
men that turns upon images of promiscuity and debauchery\textsuperscript{35} becomes increasingly resistant to recognition of the complexity of this pandemic disease and to the reality that AIDS has reached epidemic proportions throughout central and southern Africa among populations of both male and female heterosexuals.\textsuperscript{36}

In a zeitgeist of “blame the victim,” every possible correlate with HIV seropositivity, whether it be homosexuality or drug abuse or even hemophilia, becomes a moral sword that swings to cut the standing and rights of any population identified with it, while every non-correlate becomes a moral shield used to defend and ennable the “immune” conduct. Thus, for example, because of the established connection between needle-sharing by IV drug users and HIV transmission, those who are already prepared to blame IV drug users for their additions rely righteously upon the “fact” that these people are “AIDS carriers” to blame them for their illness and its ravaging consequences. If the correlations some have observed between HIV seropositivity and syphilis,\textsuperscript{37} or between HIV seropositivity and alcoholism,\textsuperscript{38} are scientifically proven, those with a “blame the victim” mentality will use these correlates to discriminate increasingly against people with sexually transmitted diseases (STDs) and alcoholics, as well as against those already differentially impacted by the HIV virus.

It is possible that the environment of “blame the victim” itself heightens susceptibility to the HIV virus. If the hatred and hostility that accompany racism, homophobia and recriminatory reactions to drug addicts enhance the likelihood that people targeted by these biases may be particularly vulnerable to drug and alcohol abuse, or otherwise may suffer poor health, then a systemic model of causation that looks beyond the immediate viremic causes of disease to the larger societal factors that con-

\begin{itemize}
  \item \textsuperscript{35} See R. Shilts, supra note 6, passim. The best-seller And the Band Played On says nothing of the existence of Robert R. and of the presence of HIV in the United States in the late 1960s. See id. Instead, Shilts elects to present its protagonist, Gaetan Dugas, as the jet-setting bad guy in a story of transcontinental AIDS terrorism. Id. It is interesting to consider whether And the Band Played On would be a best-seller if Shilts had refused to pander to homophobia in depicting Mr. Dugas and the tragedy of AIDS as a twentieth century morality play, rather than as an international health crisis.

  \item \textsuperscript{36} See Mann, Chin, Piot & Quinn, supra note 9, at 85 (cumulative total of AIDS cases in Africa estimated at 100,000 by mid-1988, with additional 400,000 projected within next five years).

  \item \textsuperscript{37} See Leishman, AIDS and Syphilis, ATLANTIC, Jan. 1988, at 17.

  \item \textsuperscript{38} See An Important Message, supra note 20 (poster) (“Most unsafe sex takes place when people are under the influence of alcohol and drugs.”).
\end{itemize}
tribute to vulnerability might label societal bigotry the real “killer agent” accompanying the HIV virus in the United States.

In formulating any causal model, choices are made as to which factors will be emphasized and which will be ignored or trivialized. By keeping statistics as to the demographics of those diagnosed with AIDS primarily by such limited variables as sexual orientation, race and IV drug use, many other variables which more accurately describe AIDS victims and which may have greater utility in explaining HIV transmission become masked or obscured. The absence of statistics as to the extent of homophobia, racism and other forms of bigotry suffered by people with AIDS both before and after diagnosis makes it unlikely that we will ever be able to conclude, using current empirical principles of causation, that bigotry is a medical cause of HIV vulnerability. Nonetheless, a causal model that incorporates psychological and political factors in disease patterns would underscore the effects of homophobia, racism and poverty as significant contributors to the AIDS epidemic in the United States. Such a multidisciplinary causal model for AIDS would no more accept the popular explanation of sexual “promiscuity” among gay men as the “cause” of AIDS in the United States than it would accept the explanation that AIDS in Africa is “caused” by heterosexuality.

IV. THE AIDS PANDEMIC IN THE UNITED STATES MAGNIFIES STRENGTHS SHOWN IN REACTION TO THE LOSSES BROUGHT BY AIDS

Weighing sixteen tons and including 8,288 panels, rife with the diversity and personal identification of the lives symbolized and remembered through it that have been lost to AIDS, the NAMES Project’s AIDS Memorial Quilt was spread out for viewing in Washington, D.C., in October 1988.40 Accepting that, for most people in the United States, AIDS has become a reality mainly by means of a wildfire fear of contagion, it must also be considered that the AIDS Quilt has juxtaposed that reality with another one: No one can truly see this work of folk art and craft,


40. For a discussion of fear as an aspect of AIDS, see supra note 13 and accompanying text.
this massive and powerful political statement, this extraordinary tribute to people united by a common fate, and not experience some of the loss that AIDS signifies in this nation.

The AIDS Memorial Quilt typifies a number of strengths that have been demonstrated in reaction to the AIDS pandemic. Like many of the projects for feeding, housing and providing care to people with AIDS and ARC, the Quilt grew and continues to grow through a grassroots effort. Like many of those projects, the Quilt colorfully and movingly represents the power of people to build coalitions across lines of race, class, age, gender, sexual orientation, religion, geography and disability. Like the most effective educational and preventive HIV programs, much of the Quilt is expressive and explicit, specific and real, speaking with life-and-death urgency and intensity in the complex splendor of truth itself. Like other enterprises that have grown from the motivation to act against AIDS itself (and not against people with AIDS), such as this Symposium as well as the numerous meetings, conferences, colloquia, writings and combinations of new resources emerging across the nation, the Quilt is the essence of human collaboration and co-operation; it has taken thousands of people to make it and to carry it to all the places where it will

41. In San Francisco, examples of other grassroots projects include: the San Francisco AIDS Foundation, the Bay Area Lawyers for Freedom's AIDS Legal Referral Panel, Project Open Hand (delivering two meals a day to hundreds of people with AIDS and ARC), Shanti Project (providing psychological support and counseling to people with AIDS and ARC), and the AIDS Emergency Fund. Numerous other projects providing food, housing and care for people with AIDS and ARC have resulted from the activism of private citizens, with and without government cooperation. See O'Loughlin, AIDS and Comfort, San Francisco Examiner, Oct. 2, 1988, (Image) at 34, col. 1.

42. In November 1987, for example, the Human Rights Commission of the City and County of San Francisco worked with the National Lawyers Guild, the San Francisco Bar Association and the Multicultural Alliance for the Prevention of AIDS of the Bayview-Hunters' Point Foundation to present an “AIDS and Minorities Legal Forum.” Such programs have occurred across the country.

43. While many of the panels contain the full names of people who are remembered in it, there are the anonymous panels as well, such as the one made by a little girl to remember her father that reads “the best daddy in the world” without his name, because her mother blacked out the name, and the panel made for a man by his lover, in which the surname was literally cut out by the lover’s parents. See Abbott, supra note 39, at 21.

44. For example, on November 11, 1988, a national conference entitled “AIDSLaw” took place in San Francisco at which hundreds of persons concerned with legal aspects of the AIDS pandemic presented and exchanged ideas and experiences. The workbook (approximately 600 pages) from that conference, emphasizing the “how-to’s” of legal assistance to people with AIDS and ARC, is available from the AIDS Legal Referral Panel, 25 Hickory Street, San Francisco, California 94102.
convey a sense of connectedness, hope and caring. Like the coalitions and insights that have sprung from this holocaust, the Quilt is provocative and strong.

V. A Legal Sampler of the Pattern of Discrimination: AIDS As an Excuse for Discrimination and AIDS As a Catalyst to End Discrimination Against People in “High-Risk” Groups

A. A Note on Measures of Law

Two crucial inquiries about the legal system relative to AIDS are: (1) to what extent is AIDS magnifying extant weaknesses in the system and enabling or enhancing biased rules and decisions; and (2) to what extent is AIDS encouraging strengths, diminishing biased rules and decisions and exposing discrimination in the system? No one author in a single article can pretend to answer these central questions fully. This article offers a few illustrative examples of these contradictory propensities in law and some observations about the future directions of law indicated by its current leanings.

Before examining the nature of our legal system, it is necessary to outline the parameters of the law to be examined. Many lawyers, legal scholars and law students think narrowly of the law as consisting mainly of that which is “on the books”—the statutes, cases and other sources of legal authority on which lawyers rely for citations or precedent or, at least, for discovery of the best analogy to their cases. In this view, law is fixed, discoverable and retrievable by the person who is educated in legal research. This definition of law is misleading, if not outright wrong, as any examination of the legal system that looks solely at the body of law available in writing, or even at the written body in the context of legal process, will miss the everyday dimensions of law under which people live, thrive and suffer.

Consider this brief illustration of the error of taking a narrow view of law without regard to the context in which it operates. Imagine that a person wanted to know the current state of the law affecting the rights of American Indians in a dispute over ownership in a particular parcel of property. Imagine further that the dispute is between a tribe of Indians and the federal government. The written “law” might consist of a treaty, duly signed and authorized, establishing the tribe’s right to the land, plus the
supremacy clause of the Constitution, establishing that such a treaty is part of the "supreme law of the land." To stop here and assume that one has a grasp of the law governing the tribe's claim of right to the land, much less a sure answer that the tribe will win the dispute, would ignore centuries of political and social authority establishing that Indians frequently have lost their land in disputes with the government, treaties or no treaties. The "law" of realistic outcomes and historic probabilities is that in disputes over land between the government and Indians, Indians tend to lose. This "law" is hardly discoverable from reading the supposedly authoritative treaty at issue and the supremacy clause that should render it binding upon judges.

The traditional model of law rests upon the premise that law can be separated from other institutions, including politics, and that it can somehow be studied without reference to the institutions that shape and color it. However, law is to politics as ice is to water—there is never an absence of relationship between the two. The political sentiments and beliefs of people flow through politics and, from time to time, are frozen in the form of laws. Laws can be "on the books" or, equally real in their effect upon lives, laws can consist simply of those rules and customs that are imposed upon the individual by the police officer on a beat, or by the judge's ruling, or by a neighbor's or employer's use of force from which the law provides no recourse, with or without regard to "the books."

Thus, in application, the law usually leaves room for differences in interpretation and for conscious as well as unconscious biases, so that the real-life legal system can vary considerably in both process and result for different groups of people. When this practical operation of law is applied to legal rules and decisions that openly declare certain biases to be permissible, even mandated, it becomes reasonable to expect that the legal system that dictates the rights of people with AIDS and ARC is markedly distinct from the legal system that dictates the rights of people outside this group. This legal reality is far more complex and po-

45. U.S. Const. art. VI, § 2.
47. For examples of such bigotry and biases, see supra notes 23-29 and accompanying text.
tentially inconsistent in determining legal rights than a discrete body of written law that can be discovered in a law library.

B. *A Glimpse at the Most Political Branches: Federal Legislative and Executive Responses to AIDS in 1987-1988*

On October 14, 1987, the United States Senate voted ninety-three to two for an amendment to federal AIDS budgeting that prohibited “the use of any funds . . . to provide AIDS education, information, or prevention materials and activities that promote, encourage, or condone homosexual activities or the intravenous use of illegal drugs.” 48 This calculated rejection of the legitimacy of homosexuality occurred, not coincidentally, one day after over 600 persons were arrested on the steps of the Supreme Court for non-violent civil disobedience in protest 49 of the Court’s decision upholding the criminalization of gay private consensual sexual activity in the case of *Bowers v. Hardwick*, 50 and three days after the most massive demonstration for gay and lesbian rights in history had taken place, by means of a march by hundreds of thousands of persons through the streets of Washington, D.C., 51 ending at the AIDS Memorial Quilt spread out along the mall. 52 The Senate’s action followed an anti-gay speech by Senator Jesse Helms decrying a “safe sex” comic book which depicted a gay man putting on a condom before engaging in sexual activity with another man, in reaction to which Senator Helms exclaimed: “Good Lord, Mr. President, I may throw up” and “[o]ne of [the safe sex educators’] . . . myths is that it is just as good to be a homosexual as to be a heterosexual.” 53

In 1988, similar attempts to maneuver Senate majorities to support anti-gay amendments to federal AIDS spending bills

48. 133 Cong. Rec. S14202-20 (daily ed. Oct. 14, 1987). The two “nay” votes were cast by Senators Daniel Moynihan (D-NY) and Lowell Weicker (R-Conn.). *Id.*


largely failed.\textsuperscript{54} The House and Senate have also passed bills providing limited protection against the unauthorized disclosure of test results.\textsuperscript{55} Senator Helms has effectively blocked the appointment of conferees to the joint committee which would reconcile the House and Senate versions of bills because of his opposition to any confidentiality provisions. Senator Helms has also insisted on a provision allowing the death penalty for any person found guilty of knowingly transmitting the HIV virus.\textsuperscript{56}

As telling in their tone and content about the current federal politics of HIV as these congressional debates are, the continuing absence of any omnibus civil rights protection for those affected by mistreatment and discrimination due to AIDS or ARC tells more. Despite the conclusion of the President's Select Commission on HIV that omnibus civil rights protection for those experiencing discrimination due to the HIV epidemic should be forthcoming,\textsuperscript{57} Congress has yet to yield such legislation and the President has yet to urge its passage.

The announcement in October 1988 of an affirmative change of position by the Attorney General of the United States, upholding inclusion of HIV-positive persons, symptomatic and asymptomatic alike, under the protections of section 504 of the Rehabilitation Act (which prohibits discrimination in federally funded programs) marked a partial success in protecting the civil rights of people affected by HIV.\textsuperscript{58} Especially given the past posi-
tion of the Department of Justice under Attorney General Edwin Meese that section 504 did not provide such protection, the change in position by Attorney General Thornburgh must be hailed as an important victory. However, because section 504 does not prohibit discrimination by private persons and entities, nor by other than federally-funded entities, this executive-level recognition of coverage for HIV-positive persons does not provide remedies for most forms of discrimination against HIV-positive persons.59

C. Selected Judicial Decisions about AIDS: An Uneven Pattern of Protection against and Permission for Discrimination

The courts of the United States have handled a considerable number of controversies about HIV in the few years that it has been identified. While this body of law is sufficiently sizeable that no brief summary of its content is feasible, certain trends and features can be identified here.60

Courts generally have upheld interpretations of existing civil rights laws prohibiting disability-based discrimination as including HIV-positive persons in employment and school admission cases.61 Overall, courts confronted with factually clear instances of discrimination based on HIV seropositivity, AIDS, ARC, or

59. For a discussion of the extent and types of private discrimination, see supra notes 16-19 and accompanying text.

60. Cases concerning HIV seropositivity, AIDS, ARC and related matters have been reported in a number of sources. See, e.g., YALE AIDS GUIDE, supra note 10; AIDS PRACTICE MANUAL, supra note 10; SEXUAL ORIENTATION AND THE LAW supra, note 16; 3 AIDS UPDATE, supra note 55. For another excellent source of legal authorities concerning the AIDS pandemic, see Bar Association for Human Rights of Greater New York, Lesbian/Gay Law Notes (prepared by Professor Arthur Leonard of New York University Law School).

61. See, e.g., Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988) (public school teacher entitled to civil protection from discrimination under § 504 where school officials ousted him from teaching position without showing that AIDS diagnosis put anyone at risk or that he was unable to perform his position); Doe v. Centinela Hosp., 57 U.S.L.W. 2034 (C.D. Cal. June 30, 1988) (holding that § 504 of Rehabilitation Act protects person who entered defendant's drug rehabilitation program from exclusion based on HIV-seropositivity, in that he was handicapped person within § 504 and that likelihood of risk of transmission of HIV to others is "extremely minimal"); Thomas v. Atascadero Unified School Dist., 662 F. Supp. 376 (C.D. Cal. 1987) (schoolchild protected from expulsion for having AIDS under § 504); Raytheon v. FEHC, 46 Fair Empl. Prac. Cas. (BNA) 1089 (Cal. Sup. Ct. 1988) (California Fair Employment & Housing Act protects private employee from discrimination based on AIDS); Cronan v. New England Tel. Co., Lab. Rel. Rep. (BNA), IER Cases 658 (D. Mass. 1986) (Massachusetts law protects employee from discrimination based on AIDS or ARC).
fear of these conditions have provided legal redress to discrimination victims in the employment arena.

However, recent cases involving discrimination in housing and public accommodations relative to AIDS show a mixed pattern of protection, indicating a need for statutes and ordinances that explicitly prohibit HIV-related discrimination in these areas. Current state and local protections against HIV-related discrimination are a patchwork, varying from extensive protections in some localities to no protections in most places. The variable political clout and voice of persons affected by HIV in different regions and cities has much to do with this disparity.

Perhaps the most important facet of case law governing HIV-related issues is that the courts have not yet addressed what are likely to be the hardest, or at least the hardest-fought, cases in this realm. Issues of mandatory testing, confidentiality of medical testing and diagnosis, differential criminal penalties for defendants who are HIV-positive as well as issues of public policy regarding AIDS-based exclusions of persons from employment, education and other institutions have generally not been decided to date. These cases, expected to raise fundamental constitutional issues such as privacy, equal protection and due process in the context of enactments of law by federal and state govern-
ments and by voters, simply have not yet gone to court.\textsuperscript{68}

D. *The Least Protected of the Unprotected: HIV-Related Treatment of Prostitutes and Prisoners*

On November 8, 1988, California voters passed an initiative imposing mandatory HIV testing upon, *inter alia*, all persons convicted of any sex offense.\textsuperscript{69} Prostitutes and other sex workers have been the particular targets of numerous similar legal and political attacks rationalized on the basis of alleged health hazards.\textsuperscript{70}

Present empirical evidence does not support singling out prostitutes for mandatory testing or other forcible legal measures in the fight against HIV transmission.\textsuperscript{71} However, because of the

\textsuperscript{68} A paramount electoral test of the relationship between constitutional rights of privacy, equal protection and due process on the one hand, and the capacity of the electorate to enact a law that mandates testing and reporting of all persons suspected of being HIV-positive and that eliminates confidential testing on the other, occurred when California voters rejected Proposition 102 on November 8, 1988. See ACLU Northern California, The Dannemeyer AIDS Initiative (Proposition 102), Aug. 18, 1988 (memorandum) (copy on file with Villanova Law Review).

\textsuperscript{69} Proposition 96, termed the “Communicable Disease Test Initiative,” is comprised of three major components. The first part enables courts to order persons charged with sex offenses to undergo testing for HIV upon petition of the victim or prosecuting attorney and after a hearing. The second part provides that if police, firefighters or emergency personnel are assaulted in the course of their duties and it is likely that bodily fluids were transferred as a result, a court may at the request of the victim order HIV testing of the defendant. The third part of the initiative allows the defendant, each requesting victim, and if the defendant is incarcerated, the warden and chief medical officer of the facility to receive a copy of a prisoner’s test results. Under this initiative, HIV test results must be kept confidential, except for disclosure necessary to obtain medical or psychological treatment, and may not be used as evidence in any criminal prosecution. See 3 AIDS POLICY & LAW (BNA) 8 (June 1, 1988).

Two cases challenging the constitutionality of Proposition 96 arising out of application of its second provision have thus far been brought in California courts. See San Francisco Sheriff’s Office v. Johnson, No. A045336 (Cal. App. 1st Dist. Div. 5 filed Mar. 16, 1989) (testing sought of single welfare mother who bit sheriff’s deputy; challenge to validity of Proposition 96 on fourth amendment argument that no probable cause exists to believe that material evidence will be produced by AIDS test); Rice v. Palo Alto Municipal Court, 1989 AIDS Litigation Rep. (Andrews) 2498 (Super. Ct. Mar. 14, 1989) (test sought of teenager who collided with police roadblock and suffered minor wound, resulting in blood-to-blood contact when police officer cut himself attempting to remove teenager from car; challenged on fourth amendment ground that no probable cause exists for test, and on California’s constitutional right to privacy).

\textsuperscript{70} Proposition 102 would have made it a felony for someone to commit prostitution while knowing that they were infected with HIV. For a discussion of Proposition 102, see supra note 68.

\textsuperscript{71} See Decker, *Prostitution As a Public Health Issue*, in *Yale AIDS Guide*, supra note 10, at 81; Lambert, *AIDS Among Prostitutes Not as Prevalent as Believed*, *Studies
relative political powerlessness of prostitutes and a tendency of the legal system to replace reason with prurient punitiveness in sexual matters, and because some seek scapegoats for the AIDS pandemic, prostitutes have reason to fear the legal system's reaction to this health crisis.

Likewise, prisoners have been the recipients of terrible treatment, including segregation, assault, failure to prevent assault by fellow inmates and inadequate health care. Like prostitutes, prisoners frequently are the target of demonstrably harsher treatment than common citizens in our legal system. The AIDS pandemic provides an excuse and a method for the reinforcement of that differential harshness.

VI. LESSONS FROM THE LEGAL SAMPLER: TOWARD MORE HUMANE TREATMENT OF THOSE AFFECTED BY HIV

A. Rational Decision-Making about HIV Must Include Recognition of the Presence of Hatred and Hostility Toward Those Affected

The legal system has had frequent contact with the effects of HIV and has succeeded in being most fair and balanced in those cases where the presence of public fear and hostility towards those affected by the HIV virus has been most openly recognized. If politicians, public officials and judges strive to follow these examples and make an effort to remove their own internal


73. For a discussion of the oppressive laws and views existing towards gays and lesbians, see supra notes 21-23 and accompanying text.

74. See Vaid, Prisons, in Yale AIDS Guide, supra note 10, at 235 (noting failure of prison officials to prevent sexual assault and HIV exposure, failure to provide condoms and adequate health care to prisoners, segregation of prisoners with HIV; and other mistreatment); see also Arriola, AIDS in Prisons and Jails, in AIDS Practice Manual, supra note 10, at VII-1.

75. For a discussion of various case law and legislative reactions to the AIDS pandemic, see supra notes 60-66 and accompanying text.

biases, perhaps the trend of HIV employment discrimination cases toward protection and recognition of the need for rights and remedies for victims of AIDS discrimination can be extended to other areas. Recognition of the harm which flows from prejudice against people affected by HIV should result in federal statutory civil rights protections for these people, an action that has been recommended by those who have most closely studied the problem. However, if federal decision makers reflect the hostility and fear that has been documented against people affected by HIV, the legal system will continue to perpetuate the prejudices that HIV promotes.

B. Finding Balances: Prioritizing in the Pandemic

[B]ehind every statistic, behind every death, is a human being—a young man in the prime of his life, a child who never knew life without AIDS, a mother struggling to survive to care for her children.

Too often, the debates dealing with AIDS have focused on politics and posturing and not on people. Our AIDS policies should have only one goal—saving lives.

A vital reason to work against fear and hostility as reactions to people with AIDS and ARC is the destructive impact which such reactions have on the quality of life for those affected. The legal system must be approached with an eye not only to the basic priority that the HIV pandemic must be ended to save lives, but also to its obligation to protect people from the mistreatment that the reaction to HIV has so widely mobilized.

C. AIDS as a Whistleblower: Exposing Institutional Flaws

The capacity of the AIDS crisis to illuminate institutional problems has, as explored in this article, revealed a number of these in conjunction with our legal and political systems including: the absence of national health insurance and universal health care; the absence of comprehensive civil rights protections and equal law enforcement for many of those struck by HIV, including

77. For a discussion of this trend in employment discrimination cases, see supra note 61.
78. For the views expressed by various governmental affiliates, see supra notes 57-59 and accompanying text.
gay men, drug addicts, Black and Hispanic people, poor and disabled people; the presence of violent bigotry against some of these groups in this society and the absence of sufficient law enforcement to prevent this violence; and the pre-existing of discriminatory treatment of some persons differentially affected by the HIV virus before the pandemic began. In addition, the international nature of the AIDS crisis and the lack of international problem-solving mechanisms in our legal and political systems must be noted. Thinking about the HIV virus must go beyond the concept of AIDS and ARC as temporary and isolated phenomena to the larger problems that these devastating diseases have underscored in our government and society.

D. A Final Word about Constitutional Values in Crisis

The time in which constitutional values of privacy, equal protection and due process are most precious is often a time during which they seem most unworkable, inconvenient and burdensome. The lessons of this nation's legal system in other times of crisis, such as the rationalization of second-class treatment of people of color under Jim Crowe laws, and the internment of Japanese-Americans during World War II, as well as the misuse of law to silence Communists and other dissenters in this nation support the conclusion that constitutional values must not be subverted in dealing with the HIV crisis.

The wave of fearful and hostile public reaction to HIV, pul-

80. For a discussion of some of these institutional flaws, see supra notes 23-29 and accompanying text. Ironically, the AIDS crisis has actually given greater legitimacy to the gay movement, owing to increased recognition in the judicial and political arenas that gays constitute a legitimate community. See Altman, Legitimation Through Disaster: AIDS and the Gay Movement, in AIDS: The Burdens of History 301, 307-08 (E. Fee & D. Fox ed. 1988).

81. For a discussion of the international nature of the AIDS crisis, see supra note 9 and accompanying text; see also 134 Cong. Rec. S8788 (daily ed. June 29, 1988) (Sen. Cranston noted international scope of AIDS pandemic and absence of resources necessary to provide AIDS drugs such as AZT in developing countries).

82. See Plessy v. Ferguson, 163 U.S. 537 (1896).

83. See Korematsu v. United States, 323 U.S. 214, 220 (1944) ("[W]hen under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."); Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding curfew on Japanese-Americans in West).

84. See generally L. Tribe, supra note 26, at 608-17 (discussion of first amendment cases).

led by undercurrents of prejudice against its worst victims, cannot
be permitted to crash upon our constitutional rights. If this is
allowed, not only all of the precious lives taken by this virus will
have been lost, but the progress of our human freedoms, devel-
oped over two centuries in the interpretation of the United States
Constitution, will go under with them.