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Frances Means

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# COMMENT

## AIDS—THE LEGAL IMPLICATIONS

### INTRODUCTION

In December of 1981, an article in the *New England Journal of Medicine* reported the treatment of four previously healthy homosexual men for *Pneumocystis carinii* pneumonia and other multiple viral infections.<sup>1</sup> The physicians reporting the cases characterized the study in the following manner: "This syndrome represents a potentially transmissible immune deficiency."<sup>2</sup> From this first report the syndrome has become known as AIDS—acquired immunodeficiency syndrome. The disease has spread across the country and the world, creating complex medical and legal questions. As of December 8, 1986, 28,098 cases of AIDS had been reported. Of these cases, 15,757 people have already died.<sup>3</sup>

Medical knowledge about AIDS is by no means complete. AIDS is a disease which alters the body's immune system and its ability to fight off disease. The Centers for Disease Control (CDC) has determined that an individual has contracted AIDS, if among other criteria, he has been diagnosed as having a life threatening opportunistic infection,<sup>4</sup> or he has been diagnosed as having Kaposi's sarcoma, and he has tested positive for the HTLV-III (Human T-Cell Lymphotropic Virus Type III) antibody.<sup>5</sup> The virus can be detected by a blood test, which has

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1. Gottlieb, *Pneumocystis Carinii Pneumonia and Mucosal Candidiasis in Previously Healthy Homosexual Men*, 305 *NEW ENG. J. MED.* 1425 (1981).

2. *Id.*

3. *Update: Acquired Immunodeficiency Syndrome—United States*, 35 *MORBIDITY & MORTALITY WEEKLY REP.* 757 (December 12, 1986) [hereinafter *Update*].

4. An opportunistic infection is one that is caused by an organism that would not ordinarily cause disease in a healthy individual. The virus or bacteria exist in the body, but do not usually manifest themselves as a disease process. *HARRISON'S PRINCIPLES OF INTERNAL MEDICINE* 470 (M. Braumwald ed. 1987).

5. *Revision of the Case Definition of Acquired Immunodeficiency Syndrome for National Reporting - United States* 34 *MORBIDITY & MORTALITY WEEKLY REP.* 373 (June 28, 1985). The Human T-Cell Lymphotropic Virus Type III (HTLV-III) is the virus that actually causes the

made diagnosis of the disease more definite.<sup>6</sup> However, the existence of two groups of people that have diseases similar to AIDS complicates the diagnosis of AIDS. The first group consists of people who have the HTLV-III virus in their blood without manifesting the disease.<sup>7</sup> Within the second group are people who have AIDS-type immunologic abnormalities, but who do not meet all the criteria to be diagnosed as having AIDS. People within this second group are characterized as having an "AIDS-related complex."<sup>8</sup> Whether or not individuals in either of these classes will eventually develop AIDS is unknown. It is also unknown whether they are capable of transmitting the disease.<sup>9</sup>

The mortality rate for AIDS is high. At least 50% of its victims die within eighteen months of diagnosis and 80% die within three years.<sup>10</sup> The CDC has identified six classes of people at high risk for contracting AIDS: (1) homosexually active men, (2) intravenous drug users, (3) Haitian immigrants, (4) hemophiliacs, (5) heterosexuals having sexual contact with persons having AIDS or at risk for AIDS, and (6) recipients of blood or blood products.<sup>11</sup> However, people not included in these classes can still contract the disease.

Although it is known that AIDS can be transmitted by sexual contact or by contaminated blood or needles, doctors and scientists have still been unable to establish that the disease cannot be transmitted by other means. The CDC has stated: "There continues to be no evidence of nonspecific transmission through casual contact; insect bites; or food-borne, waterborne or environmental spread among AIDS cases."<sup>12</sup> However, the HTLV-III virus has been found to thrive in the saliva, semen, and other body fluids of patients with AIDS, leaving open the question whether other types of contact might spread the disease.<sup>13</sup>

In the face of medical uncertainty, a number of difficult legal questions have arisen. On one side are the victims of this devastating and fatal disease. On the other side is a frightened society, confronted by a disease about which there exists incomplete medical knowledge.

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disease known as AIDS. See Goedert & Blattner, *The Epidemiology of AIDS and Related Conditions*, in AIDS at 2 (1985).

6. Goedert & Blattner, *supra* note 5, at 2.

7. *Id.* at 5.

8. *Id.* at 7.

9. *Id.* at 6.

10. *Id.* at 7.

11. *Id.* at 6.

12. *Update, supra* note 3, at 760.

13. *Acquired Immunodeficiency Syndrome in the United States: A Selective Review*, 14 CRITICAL CARE MED. 819, 820 (1986).

Despite the debilitating nature of the disease, the victims often wish to maintain as normal a life-style as possible. They want to be able to continue to work or go to school for as long as possible. When they are acutely ill, they want the best medical care they can receive. But society has often attempted to limit AIDS victims' movement and participation in society. AIDS patients have been forced to fight to attend public schools,<sup>14</sup> to keep their jobs and job benefits,<sup>15</sup> and for medical<sup>16</sup> and even mortuary care.<sup>17</sup> The most important question raised by this mysterious disease is a basic one: Where should we draw the line between the right of an individual with a contagious disease to live his life free in society and the right of society to protect itself from the disease the individual carries? The disease has also raised the narrower question of whether an AIDS victim can be held liable for transmitting the disease to other persons. Finally, accompanying AIDS is a difficult issue concerning confidentiality: Now that a test for AIDS is available, who has a right to know the results of an individual's test? This commentary will examine these questions and some of the answers.

### I. PUBLIC HEALTH LAWS AND THE POLICE POWER

AIDS is not the first contagious disease that has frightened society and placed limits on individual rights. One of the first public health cases in the United States involved the right of an individual to refuse vaccination ordered by a state statute. In *Jacobson v. Massachusetts*<sup>18</sup> the Cambridge Board of Health had required all adults in Cambridge to be vaccinated against the threat of a smallpox outbreak. Jacobson, who had experienced a severe reaction to a vaccination as a child, challenged the constitutionality of the order. He alleged that subjecting him to fines or imprisonment for failing to be vaccinated deprived him of liberty without due process.<sup>19</sup> The United States Supreme Court held that the board's requirement was constitutional. In reaching its decision, the Court first determined that the state had the authority to enact the statute under the police power.<sup>20</sup> The Court stated that the state's right to exercise its police powers is limited by the rights guar-

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14. *White v. Western School Corp.*, No. 85 Civ. 1192 (S.D. Ind. Aug. 16, 1985).

15. See Comment, *AIDS: A Legal Epidemic?*, 17 AKRON L. REV. 717, 733 (1985).

16. *AIDS and the Law*, 69 A.B.A. J. 1014, 1015 (1983).

17. Mathews, *The Initial Impact of AIDS on Public Health Law in the United States*, 257 J. A.M.A. 345, 349 (1987).

18. 197 U.S. 11 (1905).

19. *Id.* at 26.

20. *Id.* at 25.

anteed to individuals under the Constitution.<sup>21</sup> Individual liberties, in turn, are limited by the need for society to protect the general public.<sup>22</sup> The Court noted that it is possible for local police powers to be exercised in such a manner that they are arbitrary or unreasonable.<sup>23</sup> In this case, the Court held that the police powers were not exercised in an unreasonable manner.<sup>24</sup>

In arriving at its holding in *Jacobson*, the Supreme Court analyzed the relationship of society and the individual. The Court reasoned that society has a duty to protect its members and would fail in this duty if it allowed the rights of one individual to endanger society.<sup>25</sup> The Constitution does not guarantee a person the right to dominate the majority. Individuals living in the community and taking advantage of the benefits of the local government must submit to its laws.<sup>26</sup> Constitutional liberties are not absolute rights to be totally free from any restraints at all times. Restraints are necessary for the common good.<sup>27</sup>

In *Jew Ho v. Williamson*,<sup>28</sup> another early case, a federal court examined the right of a city board of health to quarantine individuals. The San Francisco Board of Health quarantined a large portion of the Chinese section of the city after the bubonic plague allegedly caused nine deaths.<sup>29</sup> Although the court recognized that the Board of Health had broad discretion in enacting and implementing its regulations,<sup>30</sup> the court found this regulation to be unreasonable.<sup>31</sup> Under the terms of the Board's order, ten to twelve blocks of the Chinese portion of the city were sealed off. Cases of plague had been reported in some of the blocks, but not in others. The court found that by quarantining such a large area, and by allowing movement within the quarantined area, the regulation would encourage the spread of the disease rather than confine it.<sup>32</sup>

As both *Jacobson* and *Jew Ho* indicate, exercise of the police power in the public health setting affects two groups in opposite fashion. It is clear that the states have discretion to restrict an individual's

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21. *Id.*

22. *Id.* at 26.

23. *Id.* at 28.

24. *Id.* at 39.

25. *Id.* at 29.

26. *Id.* at 38.

27. *Id.* at 29.

28. 103 F. 10 (N.D. Cal. 1900).

29. *Id.* at 12.

30. *Id.* at 21.

31. *Id.* at 26.

32. *Id.* at 21-22.

personal freedoms in an effort to control a contagious disease. A regulation will likely be held valid if it is rationally designed to protect the health of society.<sup>33</sup>

Unlike smallpox or the plague, it now appears that anyone with AIDS can transmit the disease for as long as he has it. Since there is no known cure for the disease,<sup>34</sup> its victims are contagious for the rest of their lives. The public health background provides a foundation for regulations and laws which affect AIDS victims. However, AIDS brings new problems to rules established in the area of public health. The questions, unanswered as of yet by medical research, intensify the difficulty in drawing the line between individual freedom and the safety of society. Medical research has not been able to discover the exact modes of transmission of AIDS. The uncertainty as to when and how the disease can be transmitted must be considered when victims of AIDS attempt to join the mainstream of society.

The first reported case addressing the question of whether AIDS victims should be kept separate from the healthy population was *LaRocca v. Dalsheim*.<sup>35</sup> In that case, uninfected inmates in the New York correctional system sought an order requiring physical examination of all inmates and employees before there could be any further movement into or out of the facility. The inmates also sought an order that prisoners with AIDS be removed from the prison system and placed in hospitals.<sup>36</sup> The New York Supreme Court denied relief, relying heavily on testimony from medical personnel. Because there was no known test for the disease at that time, the court denied the inmates' request that persons at the facility be tested for AIDS.<sup>37</sup> The court also refused to order that the inmates diagnosed as having AIDS be removed from the prison. The court recognized that under New York law, prison officials could remove inmates from the institution in the event of an outbreak of a contagious disease.<sup>38</sup> However, after considering medical testimony, the court concluded that prisoners with AIDS were adequately isolated from the general prison population.<sup>39</sup>

The attitude of the healthy prisoners in *LaRocca* is representative in many ways of society's reaction to AIDS victims. Faced with a deadly disease about which little is known, we simply attempt to have

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33. LEGAL ASPECTS OF HEALTH POLICY 9 (R. Roemer & G. McKray ed. 1980).

34. See Mathews, *supra* note 17, at 344.

35. 467 N.Y.S.2d 302 (1983).

36. *Id.* at 304.

37. *Id.* at 310.

38. *Id.*

39. *Id.* at 311.

the infected individual removed from society. After careful consideration of what is medically known about the disease, the court in *LaRocca* concluded that those people with AIDS presented no threat to the community. AIDS sufferers were allowed to remain in the prison and the only restrictions placed on the victims were medical precautions which governed contact between healthy individuals and body fluids of the victim.<sup>40</sup>

## II. AIDS IN THE PUBLIC SCHOOLS

The Court's position in *LaRocca* that there is no reason to exclude AIDS victims from public institutions is also the apparent trend in cases involving attendance of public schools by children who have AIDS. Lawsuits have been brought in several states; some to keep children out of schools, some by parents trying to get their children into school. Even children who do not actually have AIDS, but who have tested positive for the AIDS antibody, have met with resistance from the public school systems.<sup>41</sup> And in the most extreme case, a child was prevented from attending school merely because his sister had died of AIDS.<sup>42</sup>

The Centers for Disease Control (CDC) has conducted a study of the problem of children with AIDS and the hazards of placing these children in a public school setting.<sup>43</sup> The study first reiterated the finding that AIDS is primarily transmitted through sexual contact and infected blood or blood products.<sup>44</sup> The study stated: "Based on current evidence, casual person-to-person contact as would occur among school children appears to pose no risk."<sup>45</sup> However, the CDC noted that young children, or children with neurological disorders, theoretically pose an increased risk of transmitting the disease due to their lack of control of body secretions.<sup>46</sup> The CDC's recommendations include the following: "For most infected school-aged children, the benefits of an unrestricted setting would outweigh the risks of their acquiring poten-

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40. *Id.*

41. See Mathews, *supra* note 17, at 345.

42. Matthews & Neslund, *The Initial Impact of AIDS on Public Health Law in the United States - 1986*, 257 J. A.M.A. 345 (1987) (citing Beasley, *Fear of AIDS Bars Georgia Boy From Class*, Atlanta Constitution, Feb. 15, 1986 at 1-A).

43. *Education and Foster Care of Children with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus*, 34 MORBIDITY & MORTALITY WEEKLY REP. 517 (August 30, 1985) [hereinafter *Education*].

44. *Id.* at 518.

45. *Id.* at 519.

46. *Id.*

tially harmful infections in the setting and the apparent nonexistent risk of transmission of HTLV-III/LAV."<sup>47</sup> Thus, the CDC has taken the position that casual contact among school children poses little risk that the virus will be transmitted.<sup>48</sup>

Despite these findings from the CDC, school children with AIDS have had to fight to establish a right to attend public schools. An illustrative case is that of an Indiana teenager named Ryan White.<sup>49</sup> White is a hemophiliac who contracted AIDS after receiving a contaminated blood product.<sup>50</sup> Although the school system had offered home instruction, Ryan White's parents wanted him to be able to attend classes. The Whites filed suit for a preliminary injunction to prevent the school board from barring the boy from classes.<sup>51</sup> They sought relief under the Education for All Handicapped Children Act (EAHCA),<sup>52</sup> the Rehabilitation Act,<sup>53</sup> the Civil Rights Act,<sup>54</sup> and the fourteenth amendment due process and equal protection clauses of the United States Constitution.<sup>55</sup> The court refused to issue the preliminary injunction because White had failed to exhaust his administrative remedies.<sup>56</sup> White was eventually admitted to school, but was promptly barred again after parents of other students filed suit under an Indiana statute governing communicable diseases.<sup>57</sup> The statute prohibited a person having custody of a child with a communicable disease from allowing the child to attend school.<sup>58</sup> The court issued a preliminary injunction restraining White's mother and the school district from allowing him to attend classes. However, the court later discovered that the Health Officer of Howard County had issued a certificate giving White the right to return to school.<sup>59</sup> The court found that the legislature did not intend for the statute to apply to persons who have custody of a child with a communicable disease, if the appropriate health officer has given written permission for the child to attend school.<sup>60</sup> The order preventing White

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47. *Id.*

48. *Id.*

49. *White v. Western School Corp.*, No. 85 Civ. 1192 (S.D. Ind. Aug. 16, 1985).

50. *Id.* at 1. See Conant, *AIDS in the Classroom*, 107 *Newsweek* 6 (March 3, 1986).

51. *White*, No. 85 Civ. 1192 at 1.

52. 20 U.S.C. §§ 1400-1454 (1982).

53. 29 U.S.C. § 794 (1982).

54. 28 U.S.C. §§ 2201-2202 (1982).

55. U.S. CONST. amend. XIV.

56. *White v. Western School Corp.*, No. 85 Civ. 1192 (S.D. Ind. Aug. 16, 1985).

57. See *Bogart v. White*, No. 86-144 (Clinton Cir. Ct. Apr. 10, 1986).

58. IND. CODE § 16-1-9-7 (1983).

59. *Bogart v. White*, No. 86-144 (Clinton Cir. Ct. Apr. 10, 1986).

60. *Id.* at 4.

from attending school was therefore dissolved and he was permitted to return to classes.<sup>61</sup>

In *Thomas v. Atascadero Unified School District*<sup>62</sup> a California district court addressed the question of whether AIDS is a protected "handicap" under Section 504 of the Vocational Rehabilitation Act,<sup>63</sup> an issue which the court failed to reach in *White*. The Act provides that qualified handicapped individuals cannot be excluded solely on the basis of their handicap from participation in programs receiving federal financial assistance.<sup>64</sup> Thomas, a five-year-old with AIDS, had been barred from school after he bit another child. The court in *Thomas* ruled that AIDS is a "handicap" under the statute. Therefore, the school district was required to reasonably accommodate Thomas.<sup>65</sup> Thus, the court required the school district to readmit Thomas and allow him to attend school in a regular classroom.<sup>66</sup> The court went a step further and found that the school district had not shown that Thomas presented a risk of transmission of the disease by his presence in the classroom.<sup>67</sup> The court placed the burden of showing that the infected child was a risk on the party seeking to exclude him.<sup>68</sup>

In *Thomas* and *White*, the infected children were allowed to return to their regular classrooms. Both courts decided the question of whether the children should be allowed in a regular classroom by relying on medical knowledge about AIDS and the risk of transmission. As medical knowledge about AIDS becomes more certain, it should be possible for individual school districts to formulate guidelines governing class attendance by children who have AIDS. The CDC has published recommendations for developing guidelines for school children with AIDS.<sup>69</sup> These recommendations state that the decision whether to allow a child to attend regular classes should be made on a case-by-case basis by a team that includes the child's physician, public health officials, and educational personnel.<sup>70</sup> They also indicate that most infected children should be allowed to attend school. They do not advocate

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61. *Id.*

62. No. 886-609AHSC(BY) (C.D. Cal. 1986), noted in *Federal Judge Terms AIDS a Handicap Under Vocational Rehabilitation Act* 1 AIDS Pol'y & L. (BNA) No. 22, at 2 (Nov. 19, 1986) [hereinafter *AIDS a Handicap*].

63. 29 U.S.C. § 794 (1982).

64. *Id.*

65. *Thomas*, noted in *AIDS a Handicap*, *supra* note 62, at 1.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Education*, *supra* note 43.

70. *Id.* at 519.

mandatory screening for AIDS.<sup>71</sup> The Board of Directors of the National Education Association has also recommended that local school officials establish guidelines for students with AIDS. These recommendations also suggest that decisions be made on a case-by-case basis and "based solely on scientific and medical evidence and not on unfounded fears of AIDS or public pressure."<sup>72</sup> Both sets of guidelines recommend that restrictions be imposed on children who are unable to control their bodily secretions or who display behavior such as biting.<sup>73</sup>

### III. AIDS AND EMPLOYMENT DISCRIMINATION

The presence of AIDS in the work place has also raised many questions. Workers fired from their jobs because of AIDS have infrequently gone to the courts due to fear of the publicity that would result.<sup>74</sup> Employers have fired workers with AIDS or placed them on involuntary disability leave with full salary and benefits.<sup>75</sup> In the employment setting, victims of other communicable diseases have sought protection under the Rehabilitation Act.<sup>76</sup> In *Arline v. School Board of Nassau County*<sup>77</sup> a third grade teacher was fired because she was susceptible to tuberculosis. Arline alleged that she was "otherwise qualified" for the job, and that her susceptibility to tuberculosis made her a "handicapped individual" under the Vocational Rehabilitation Act.<sup>78</sup> The district court had ruled that contagious diseases were not a "handicap" under the Act.<sup>79</sup> The Eleventh Circuit reversed the district court and found that the language of the Act supports a conclusion that the Act covers a contagious disease.<sup>80</sup> The Supreme Court affirmed the court of appeals and found that a contagious disease is a "handicap" under the statute.<sup>81</sup> The Court refused to distinguish between the physical effects of a disease on the patient and the effects of

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71. *Id.* at 520.

72. *New Guidelines Issued by NEA on Teachers, Students with AIDS*, 1 AIDS Pol'y & L. (BNA) No. 13, at 4 (Jul. 16, 1986).

73. *Id.* See also *Education*, *supra* note 43.

74. N.Y. Times, Apr. 15, 1986, at D2, col. 1.

75. *Id.* at col. 2.

76. 29 U.S.C. § 706(7)(B) (1982) states in relevant part: "Subject to the second sentence of this subparagraph, the term 'handicapped individual' means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment or (iii) is regarded as having such an impairment."

77. 772 F.2d 759 (11th Cir. 1986), *aff'd*, 107 S. Ct. 1123 (1987).

78. *Id.* at 761.

79. See *id.*

80. *Id.* at 764.

81. *School Board of Nassau County v. Arline*, 107 S. Ct. 1123 (1987).

the disease on others.<sup>82</sup> In addition, the majority opinion by Justice Brennan stated that employers who receive federal funds would not be allowed to use the distinction to justify discriminatory treatment.<sup>83</sup> The Court then considered the question of whether Arline was "otherwise qualified" for her job. The Court noted that in some instances the risk of contagion may prevent a person from being "otherwise qualified" for the job. It discussed four factors (suggested by the American Medical Association as *amicus curiae*) that should be analyzed in making this determination: (1) the means of transmission of the disease, (2) the duration of the risk of contagion, (3) the severity of the risk and (4) the probability that the disease will be transmitted.<sup>84</sup> The Court stated that in making these four inquiries, deference should be given to "the reasonable medical judgments of the public health officials."<sup>85</sup> The court must then determine if the employer can reasonably accommodate the handicapped employee. The Court remanded the case to the district court for additional factual findings on the issue of whether Arline was "otherwise qualified." Justices Rehnquist and Scalia dissented.<sup>86</sup>

The *Arline* decision impacts on the AIDS issue in several ways. First, the law is now clear that a contagious disease can be a "handicap." The Court's ruling in *Arline* will enable AIDS patients who have been fired from their jobs with employers who receive federal funds to seek relief under the Vocational Rehabilitation Act. Second, because the Court held that deference should be given to the reasonable medical judgment of public health officials in determining if the threat of contagion prevents the individual from being "otherwise qualified" under the Act, medical officials and not individual employers will determine whether workers who have AIDS pose a threat to co-workers.

Another case in the context of employment discrimination involved an AIDS victim who was fired by Broward County in Florida because

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82. *Id.* at 1128.

83. *Id.*

84. *Id.* at 1130-31.

85. *Id.* at 1131.

86. Justice Rehnquist contended that § 504 of the Rehabilitation Act, which applies to any program receiving federal financial assistance, does not unambiguously express the requirement that, as a condition on the grant of federal funds, recipients must bear the costs of providing employment to persons whose conditions pose a threat to others. Since obligations imposed on federal grantees in exchange for funds create a relationship in the nature of a contract, Justice Rehnquist reasoned that the validity of such a *quid pro quo* turns on the knowing and voluntary acceptance of the terms. Those terms must be clearly expressed by Congress. *Id.* at 1132-34 (Rehnquist, C.J., dissenting) (citing *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981)).

he had the disease.<sup>87</sup> Todd Shuttleworth, the victim, challenged the firing by filing a charge with the Florida Commission on Human Relations.<sup>88</sup> The district court ruled that it was not necessary that Shuttleworth exhaust state and federal administrative remedies, despite the Rehabilitation Act's requirement that such remedies be exhausted.<sup>89</sup> Shuttleworth obtained an administrative ruling that AIDS was a protected handicap, but he eventually settled the suit.<sup>90</sup>

Although AIDS victims have sought relief in the courts, both the Justice Department and state legislatures have addressed the problem of employment discrimination against AIDS patients. The Justice Department has issued a memorandum adopting the approach that the disabling effects of AIDS may be a "handicap" under the Vocational Rehabilitation Act, but that the ability to transmit the disease is not a "handicap."<sup>91</sup> Some states have adopted policies that prohibit discrimination against the handicapped and have specifically declared AIDS to be a handicap.<sup>92</sup>

#### IV. CIVIL LIABILITY

One of the primary modes of transmission of AIDS is through sexual contact. Since the disease is fatal, the question arises whether a person with AIDS may be held liable for transmitting the disease to another person. Also at issue is whether a person with the disease is responsible for informing his sexual partners that he is contagious. The law of negligence may provide answers to these questions.

A cause of action arising from negligence has four basic elements: (1) a duty to conform to a standard of conduct recognized by society, (2) a failure to act in that manner, (3) proximate cause between the conduct and an injury to another person, and (4) actual damage or loss to another person.<sup>93</sup> If an infected person transmits AIDS to another, he could be held liable if the above criteria are met. There is some authority that a person who has a sexually transmissible disease has a duty to warn his sexual partners that he has such a disease.<sup>94</sup>

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87. See Lacayo, *AIDS Goes to Court*, TIME, Dec. 8, 1986, at 73.

88. *Shuttleworth v. Broward County*, Fair Empl. Prac. Cas. (BNA) 406 (S.D. Fla. July 8, 1986).

89. *Id.* See also 29 U.S.C. § 794(a)(2) (1982).

90. *Landmark AIDS Bias Suit Settled*, 1 Individual Empl. Rights (BNA), at 2 (Dec. 23, 1986).

91. N.Y. Times, Jun. 23, 1986, at A3, col. 1.

92. N.Y. Times, Sept. 16, 1986, at A20, col. 1.

93. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971).

94. See generally *State v. Lankford*, 29 Del. 594, 102 A. 63 (1917); *Crowell v. Crowell*, 180

In *Kathleen K. v. Robert B.*<sup>95</sup> a California court held that a woman had stated a cause of action against a man who infected her with genital herpes.<sup>96</sup> The court found that consent to sexual intercourse is vitiated when one partner fraudulently represents that there is no risk of transmission of a venereal disease.<sup>97</sup> The cause of action was based on the injury to the woman's body as a result of a man's failure to inform her that he had a venereal disease before they engaged in sexual relations. The defendant argued that he was protected by his constitutional right to privacy,<sup>98</sup> but the court found that his right of privacy was outweighed by the state's right to protect the health, welfare, and safety of its citizens.<sup>99</sup>

The duty to inform others of the possibility of contracting a communicable disease such as AIDS is a pivotal point in determining the limits of an individual's right of privacy. At this time of this writing, a suit is pending against actor Rock Hudson's estate. The plaintiff has alleged that Hudson knew he had AIDS, but that he continued to engage in sexual relations with plaintiff.<sup>100</sup> In addition, the suit names two advisors and two physicians as defendants.<sup>101</sup>

In a different context, the question of when a duty to warn arises was considered by the California Supreme Court in *Tarasoff v. Regents of University of California*.<sup>102</sup> In *Tarasoff*, the court held that a therapist who determines that a patient may present a danger of violence has a duty to take reasonably necessary steps to protect the victim.<sup>103</sup> Although AIDS does not present a threat of violence, it does present a threat of death. The legal question now raised is whether the rule announced in *Tarasoff* will be expanded to require physicians treating AIDS patients to inform the patient's sexual partners of the risk. The court in *Tarasoff* held that the need to protect others from harm outweighs the need to protect the patient's confidentiality.<sup>104</sup> It is logical to assume that this reasoning can be applied to require doctors of AIDS patients to inform the patients' sexual partners of the risks of

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N.C. 516, 105 S.E. 206 (1920); *DeVall v. Strunsk*, 96 S.W.2d 245 (Tex. Civ. App. 1936).

95. 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984).

96. *Id.*

97. *Id.* at 997, 198 Cal. Rptr. at 277.

98. *Id.* at 996, 198 Cal. Rptr. at 276.

99. *Id.*

100. *Washington Post*, Nov. 14, 1986, at C1, col. 2.

101. *Id.*

102. 131 Cal. Rptr. 14, 551 P.2d 334 (1976).

103. *Id.* at 20, 551 P.2d at 340.

104. *Id.* at 27, 551 P.2d at 347.

transmission, under some circumstances.

The duty to warn others of the danger of transmission of AIDS is also present when children with AIDS attend school. In *Thomas*, the child had been removed from the classroom after biting a classmate.<sup>105</sup> So far, there have been no reported cases of AIDS being transmitted by biting. But if it is possible to transmit AIDS by biting, could Thomas be held liable? Because he is a child, Thomas might not realize the danger he caused by biting another person.

A person may be held liable for negligence if his conduct does not meet an objective standard. This standard of conduct is that which a reasonable man would exhibit in the same situation.<sup>106</sup> But in applying this standard of care, courts may take into consideration the age and physical handicaps of the actor. Thus, the age and handicaps of the actor can be taken into consideration when determining the reasonableness of the actions involved.<sup>107</sup> In an early case, *Charbonneau v. MacRury*,<sup>108</sup> a New Hampshire court considered the standard of care expected of a minor. *Charbonneau* was an action for damages in which a three-year-old was killed by a car driven by a seventeen-year-old. One of the defenses raised was that the driver's age should be considered in determining the prescribed standard of care.<sup>109</sup> The court determined that the development as indicated by the age and experience of an individual were considerations in determining the standard of care.<sup>110</sup> If youngsters such as Thomas cannot understand the consequences of biting other children, this lack of understanding will probably be considered in deciding the issue of negligence.

Physical handicaps can also alter the standard of care.<sup>111</sup> In *Smith v. Sneller*,<sup>112</sup> the court considered the precautions a blind person should take to protect himself. The plaintiff (a blind man) in *Smith*, had fallen into an open trench. The court found that a blind person must use the common devices available to blind persons to protect his own safety.<sup>113</sup> If a handicapped person must exercise special precautions for his own safety, it follows that he must also exercise those precautions to

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105. *Thomas*, noted in *AIDS a Handicap*, *supra* note 62, at 1.

106. W. PROSSER, *supra* note 93, § 32.

107. *Id.*

108. 84 N.H. 501, 153 A. 457 (1931).

109. *Id.* at 502, 153 A. at 459.

110. *Id.* at 508, 153 A. at 462; *see also* *Argo v. Goodstein*, 438 Pa. 468, 265 A.2d 783 (1970); *Davis v. Feinstein*, 370 Pa. 449, 88 A.2d 695 (1952).

111. *Smith v. Sneller*, 345 Pa. 68, 72, 26 A.2d 452, 454 (1942).

112. 345 Pa. 68, 26 A.2d 452 (1942).

113. *Id.* at 72, 26 A.2d at 454.

protect the safety of others. Thus, an AIDS victim could be held to a standard of care that requires him to inform others of the risk of transmission of the disease.

### CONCLUSION

The questions presented by AIDS are numerous. AIDS victims are filing lawsuits to remain in public schools and to keep their jobs, and they are winning. But society is still frightened by AIDS. In the absence of medical answers as to the communicability of the disease, courts will have to set standards regarding the place of AIDS victims in society. Courts in the past have been faced with conflicting medical viewpoints on communicable diseases and have deferred to legislatures. The legislatures of today are in a position to consider the available information and to set standards for AIDS patients to participate in both school and work settings. The ruling in *Arline* that a contagious disease can be a protected handicap gives victims of AIDS a ground for relief when they are discriminated against by the public schools or by employers.

As AIDS continues to spread and the cost of caring for its victims increases, more victims may seek to impose liability upon those who are responsible for infecting them. Voluntary abstinence from activities known to transmit the disease would avoid the problem. At a minimum, infected individuals should have a duty to inform those they might infect of the dangers.

An individual's right of confidentiality may be determined by the conduct involved. If there is little or no risk of transmitting the disease, such as in a school or work setting, there is no need to inform others. However, if the individual is engaging in conduct likely to spread the disease, such as sexual intercourse, those at risk of becoming infected should have the right to know of the danger.

The legal problems presented by the disease AIDS are numerous. Society has often sought to exclude AIDS victims from public schools and to keep them out of the work place. *Thomas* and *White* indicate that the courts will not permit schools to arbitrarily exclude children with AIDS from the classroom. In the work place as well, the courts have protected AIDS victims from unwarranted dismissals. However, the law is less settled with regard to the imposition of civil liability. The question of who has a duty to warn third persons that an individual has AIDS is still open, although a decision in the lawsuit against Rock Hudson's estate may provide answers to this question. One thing is certain: Until a cure is found for AIDS, the disease will continue to

present complex questions to courts, legislatures, and the entire legal system.

*Frances Means*

