

AIDS and the Rights of the Individual: Toward a More Sophisticated Understanding of Discrimination

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BETWEEN 1918 AND 1920, IN RESPONSE TO PUBLIC fears over the spread of venereal diseases, especially concern for the health of the soldiers and sailors conscripted to fight in World War I, the government of the United States promoted and paid for the detention of more than 18,000 women suspected of prostitution (Brandt 1985). Under an act of Congress directing the creation of a "civilian quarantine and isolation fund," women were held against their will in state-run "reformatories" until it could be determined that they were not infectious. The government's program, while startling in size, is hardly unique in the history of American public health. When cholera struck New York City in 1832, officials rounded up alcoholics, especially poor Irishmen, in the belief that the illness arose in part from intemperance. During New York City's polio epidemic of 1916, health officials routinely conducted house-to-house searches and forcibly removed and quarantined children thought to have the disease (Risse 1988).

With AIDS the official response has been remarkably different. So far, the few serious proposals for mass quarantines have failed. The most vocal and visible public health officials, including the former surgeon general of the United States, have championed voluntary mea-

sures over coercive ones (Koop 1986). They have generally argued for greater compassion for those afflicted, and for heightened legal protections against discrimination. Indeed, the commission appointed by President Reagan to advise him on AIDS made unfair discrimination the centerpiece of its final report (Presidential Commission on the Human Immunodeficiency Virus Epidemic 1988).

What accounts for the turnabout? The answer may lie partly in the nature of the disease. HIV, the virus believed to cause AIDS, is fragile and difficult to transmit. But venereal diseases are also difficult to transmit, and yet concern over their spread led to the largest quarantine in American history.

Another factor may be the vigor of the advocacy on behalf of people with AIDS and others affected by the epidemic. AIDS is the first epidemic to have a corps of political activists arguing regularly for the rights, concerns, and interests of those who are sick or might become sick. But even the best advocacy cannot overcome massive dread, and, if the polls are correct, as many as one-fifth of the American people fear that they might themselves develop AIDS (Blendon and Donelan 1988). Moreover, these polls also show that a substantial portion of the populace—approximately 30 percent—support some form of quarantine for people with HIV in their blood.

The change in approach has major roots, we believe, in the law. Before the 1950s, American law—despite the promises of the Declaration of Independence, the Bill of Rights, and the Civil War amendments to the federal Constitution—gave only weak and unpredictable support to many core principles of individual rights. In the three decades between 1950 and 1980, however, civil liberties and civil rights received greater sustained attention than they had at any time since Reconstruction. In the courts, a long struggle over government-sponsored race discrimination led to the Supreme Court's decision in *Brown v. Board of Education*,¹ which condemned racial segregation in public schools as unconstitutionally denying black Americans equal protection under the law. In other cases decided during this period, the Supreme Court invalidated numerous historically rooted features of law that invidiously favored one group of persons over another. The invalidated legal provisions in-

¹*Brown v. Board of Education*, 347 U.S. 483 (1954).

cluded, for example, the poll tax, traditional methods of drawing boundaries for electoral districts, and various statutes discriminating against women.

Over the same period, state and local legislatures addressed for the first time discrimination by privately owned businesses, and enacted laws forbidding employment decisions based on race, national origin, religion, gender, and other categories. Congress followed suit with the Civil Rights Act of 1964,² and one year later acted against racial discrimination in the electoral process through the Voting Rights Act of 1965.³

The broad cultural developments that brought about these revolutionary shifts in the law are many: our changed sense of nationhood after World War II, postwar prosperity, the civil rights movement for black Americans, the movement against the war in Vietnam, and the emergence of a newer and more radical feminism. The general thrust of the changes, we believe, is reasonably clear; between 1950 and 1980 American law came to embrace the principle of eliminating prejudice based on factors unrelated to individual merit, and established concrete rules limiting many actions based on bias. This recasting of the law is incomplete; most jurisdictions, for example, still do not prohibit private discrimination on account of a person's marital status or sexual orientation. Nevertheless, the three decades after 1950 did undoubtedly mark a fundamental change in both legal doctrine and cultural values.

AIDS is the first public health crisis to arise after the midcentury civil rights revolution. In this article we will consider how this fundamental shift in the law affected society's response to the epidemic. We will also describe how discrimination arising from AIDS highlights the deficiencies and limitations of the Supreme Court's current approach to the constitutional concept of "equal protection of the laws." Finally, we will offer some thoughts on how the epidemic may further transform and refine the law, especially the concept of "equal protection."

²Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6).

³Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 241 (codified as amended at 42 U.S.C. § 1973 to 1973bb-4 and notes thereto).

The Development of the American Statutory Law of Civil Rights since World War II

The recent history of the American civil rights movement cannot be told merely by describing the central statutes, executive actions, and judicial decisions in the movement's long struggle. The civil rights movement or movements, since we are concerned with more than the struggle for racial equality, were political in a far more embracing sense—their consequences extended well beyond the law. Nonetheless, legal changes achieved since World War II are among the central features of this revolution in American society. A brief sketch of how these changes occurred—how the law shifted, or in some instances failed to shift, in ways that promoted equality—is a necessary prologue to a discussion of the law's response to AIDS.

The postwar development of civil rights in this country is the more remarkable in light of the depressing history between Reconstruction and World War II. During Reconstruction, Congress enacted a number of important statutes designed to prohibit racial discrimination by private persons. In 1883, however, the Supreme Court ruled that the fourteenth amendment had not granted Congress the constitutional authority to forbid discrimination by nongovernmental entities.⁴ This holding, which survived until 1964, left the problem of racial discrimination by private persons largely to the states.⁵

By 1964, 25 states had enacted laws forbidding racial discrimination in employment (Woll 1964, 94). Thirty-one states and the District of Columbia required places of public accommodation, such as hotels and restaurants, to serve all persons who requested service regardless of race (Caldwell 1965, 842).⁶ The federal Civil Rights Act of 1964 extended similar prohibitions nationwide; it prohibited most private employers

⁴*Civil Rights Cases*, 109 U.S. 3 (1883).

⁵In 1964 the Supreme Court upheld the power of Congress to forbid racial discrimination by most places of public accommodation: *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). Technically, this case avoided overruling the *Civil Rights Cases* by relying on the power of Congress under the commerce clause. As a practical matter, however, the holding of the *Civil Rights Cases* ceased to have much importance after *Heart of Atlanta Motel*.

⁶S. rep. no. 872, 88th Cong., 2d sess., repr. in *U.S. Code Congressional and Administrative News* 2355 (1964).

and places of public accommodation from discriminating by reason of, among other things, race, color, religion, or national origin. The following year, Congress passed the Voting Rights Act of 1965, which strengthened prohibitions in the Civil Rights Act of 1964 against racial discrimination in the conduct of elections.

The Civil Rights Act of 1964 also prohibited discrimination by most private employers based on sex. This provision had little precedent in state law; in 1964 only three states had legislation barring discrimination based on sex (*Iowa Law Review* 1965). Indeed, the prohibition on sex discrimination in the 1964 act was inserted by opponents of the act in a tactical effort to defeat the entire bill. In 1978 Congress strengthened the federal prohibition on sex discrimination by declaring in the Pregnancy Discrimination Act of 1978⁷ that discrimination against "pregnant persons" was unlawful discrimination based on sex—a proposition one might have thought obvious had the Supreme Court not expressly held to the contrary in 1976. And although the federal Equal Rights Amendment was ratified by only 35 of the necessary 38 states (disregarding purported rescissions of ratification) and therefore failed, by 1977, 17 states had adopted provisions in their state constitutions forbidding sex discrimination by state and local government (Kurtz 1977, 101-2).

In other areas of law related to equality, the states took the lead. For example, by 1966, 23 states had legislatively prohibited age discrimination by private employers (*New York University Law Review* 1966, 388); federal legislation was to follow (Age Discrimination in Employment Act of 1967).⁸

The antidiscrimination statutes that have been most important to people with AIDS or HIV began at the federal level. Only a very few states arguably protected handicapped or disabled people against discrimination when Congress passed the Rehabilitation Act of 1973⁹ (*Georgetown Law Journal* 1973, 1502 n.6.). This act prohibits em-

⁷Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (amending 42 U.S.C. § 2000e (1982)) (overturning result in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)).

⁸Age Discrimination in Employment Act of 1967, Pub. L. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 and 621 note).

⁹Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355 (codified as amended at 20 U.S.C. § 1414 note, 29 U.S.C. §§ 701-796i, 701 note, 795m note, 42 U.S.C. § 2000d-7).

ployers that receive federal financial assistance from discriminating against an individual with a "handicapping condition" who is "otherwise qualified." In 1987 the Supreme Court held in the case of *School Board of Nassau County v. Arline*¹⁰ that a contagious disease can qualify as a "handicapping condition." Although *Arline* concerned an employee with tuberculosis, the logic of the case compels the conclusion that AIDS is also a "handicapping condition" entitling the affected individual to the protection of the act (Turner 1988). After passage of the federal Rehabilitation Act, the states enacted their own handicap-discrimination laws. Most of those statutes *do* cover private employment, and have been of exceptional assistance to people with AIDS and HIV (Leonard 1989).

The proposed Americans with Disabilities Act,¹¹ which will probably be enacted in 1990, would establish a broad federal prohibition against disability-based discrimination by private employers, places of public accommodation, and transportation and communications services. The history of the bill to date demonstrates that Congress intends it to cover persons who carry HIV.¹²

The provisions of law that we have noted do not, of course, encompass the whole of this country's laws relating to civil rights. Furthermore, these laws were not imposed on American culture by judges, legislators, and executives who were isolated from the laws' concerns but in response to particular circumstances and were only one aspect of the profound social changes that affected the country throughout these decades.

The Supreme Court's Development of the Constitutional Right to Equality

Judicial enforcement of the United States Constitution has also had a critical place in the development of civil rights principles. Starting in

¹⁰*School Board v. Arline*, 480 U.S. 273 (1987).

¹¹Americans with Disabilities Act of 1989, S. 933, 101st Cong., 1st sess., 135 Congressional Record (daily ed., Sept. 12) S10954 (1989).

¹²E.g., S. Rep. no. 116, 101st Cong., 1st sess. 8, 22 (1989); 135 *Congressional Record* (daily ed., Sept. 7) S10718 [statement of Senator Kennedy], S10722 [statement of Senator Cranston] (1989); 135 Congressional Record (daily ed., Sept. 28) S12180-81 [statement of Senator Inouye] (1989).

the 1950s, the Supreme Court greatly revitalized and strengthened what might be called its jurisprudence of equality. In addition to the Court's race-discrimination cases, that jurisprudence encompasses the constitutional voting-rights cases, which require government to give every citizen's vote equal weight. The Supreme Court's jurisprudence of equality also covers a wide range of freedom of expression and religion cases, which prohibit the majority from violating the right to equality possessed by individuals with unpopular convictions. It extends as well to many of the Court's criminal procedure decisions, which prohibit government from denying fundamental equality to persons accused of a crime. The government, for example, must advise persons in custody of their rights and provide indigent persons accused of serious crime with free counsel, in part to defend the equality of the uninformed or poor. And finally, the Court's jurisprudence of equality includes the decisions often called privacy cases, to which we will return.

These decisions relied on numerous different constitutional provisions, but many were based on or influenced by the fourteenth amendment to the United States Constitution, which is the primary and most explicit guarantee of equality in the Constitution. That amendment, which was adopted shortly after the Civil War, provides in part that "[no] state shall deny to any person within its jurisdiction the equal protection of the laws." The equal-protection clause, like most other provisions in the United States Constitution, binds only the federal and state governments.¹³ The principal purpose of the amendment, however, was to outlaw racial discrimination by the states that had been part of the Confederacy.

Before 1950 the Supreme Court had interpreted the equal-protection clause to provide only very limited rights to equality, even in the area of racial discrimination. Most notoriously, the Court had held that the amendment did not prohibit the states from requiring racial segregation of public facilities, so long as the segregated facilities were "equal."¹⁴ In cases not involving racial discrimination, the force of the amendment was even weaker.

¹³The equal-protection clause mentions only the states, not the federal government. The Supreme Court has held, however, that actions forbidden to the states by the equal-protection clause are forbidden to the federal government through the due-process clause of the fifth amendment: *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹⁴*Plessy v. Ferguson*, 163 U.S. 537 (1896).

Equal-protection analysis took on a more familiar shape with the modern race-discrimination cases, the most important of which is the 1954 case of *Brown v. Board of Education*. These cases developed the beginnings of what is now frequently called "three-tiered" equal-protection review. Under this scheme, the courts apply three different levels of review in equal-protection cases: "strict scrutiny," "intermediate review," and "rational-basis review."

In *Brown*, a classic "strict-scrutiny" case, the Court held that racially segregated public schools are inherently unequal by reason of, among other things, the humiliation and insult that racial segregation inevitably inflicts on nonwhite students. The *Brown* opinion emphasized the importance of public schools in support of its holding, but it soon came to stand for the broader proposition that racial segregation in any government-run facility violates the Constitution. Race, the Court determined, is a "suspect" classification, and governmental action based on race is accordingly subject to "strict scrutiny" under the equal-protection clause. Under the test applied in strict-scrutiny cases, governmental action that discriminates by reason of race is unconstitutional unless that action is necessary to the achievement of a "compelling" governmental purpose, and unless the action is the narrowest means available to accomplish that purpose. The Court has also declared governmental classifications by national origin to be suspect.¹⁵ Setting aside the special case of affirmative action, the courts rarely uphold governmental conduct disadvantaging the members of a suspect class.

Strict scrutiny also applies to governmental classifications that trespass on certain rights the Court regards as "fundamental." In addition to rights explicitly protected by other provisions of the Constitution, the Court has ruled that individuals have a fundamental right to make certain basic decisions concerning one's body and personal conduct. According to the Court, aspects of this general right are implicit in the Constitution's guarantees of equal protection under the law and due process of law, and in certain other constitutional provisions. The cases identifying aspects of this right, which are often called the privacy cases, are potentially of great importance in shaping issues of constitutional law that may arise as a result of the AIDS epidemic.

Under the Court's decisions, this right to privacy precludes or shar-

¹⁵*Mathews v. Lucas*, 427 U.S. 495, 504 (1976).

ply limits governmental interference with personal decisions concerning the education of one's children;¹⁶ the use of contraception;¹⁷ and—at least as of this writing—the choice to have an abortion during the early stages of pregnancy.¹⁸ The Court has largely failed, however, to articulate an overarching theory explaining the scope of these decisions or even to define the term “privacy.” One plausible explanation for the privacy cases is the general proposition that individuals have a core right to individual autonomy—to make certain basic personal decisions for themselves, where those decisions will not harm others. Recent decisions, however, have rejected constitutional challenges to statutes that criminalize private homosexual conduct among adults¹⁹ and that extensively regulate abortion.²⁰ These cases call into question whether individuals will retain significant constitutional rights to privacy or autonomy under the new majority of conservative justices on the Court.

In another series of constitutional cases beginning in 1971, the Supreme Court began to treat with hostility governmental discrimination based on gender. The Court has not, however, applied to sex-discrimination cases the same stringent equal-protection standard that governs racial classifications. Legislative classifications by sex, according to the Court, must serve “important” (as opposed to “compelling”) governmental objectives and must be “substantially related” (rather than “necessary”) to achievement of those objectives.²¹ This less demanding form of review is the second equal-protection tier, often referred to as “intermediate review.”

The Court has apparently treated gender-based discrimination less severely than racial discrimination for two reasons. First, some justices believe that in light of the purposes of the fourteenth amendment and the need to eradicate the historical consequences of slavery, the equal-protection clause should apply with special force against racial discrimination. Second, some members of the Court apparently think that the biological differences between men and women give the government somewhat more authority to issue regulations based on sex than on

¹⁶*Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹⁷*Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁸*Roe v. Wade*, 410 U.S. 113 (1973).

¹⁹*Bowers v. Hardwick*, 478 U.S. 186 (1986).

²⁰*Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).

²¹*Craig v. Boren*, 429 U.S. 190 (1976).

race. The Court also subjects governmental action disadvantaging illegitimate children and aliens to “intermediate” review. These classifications, like gender-based classifications, are arguably relevant to some limited number of legislative purposes. The Court regards racial classifications, by contrast, as generally irrelevant to *any* appropriate legislative purpose.

Finally, the third and least demanding “tier” of equal-protection examination is “rational-basis” review, which merely requires that governmental action be rationally related to a legitimate governmental purpose. This form of review makes only very minimal demands, and, consequently, legislation reviewed under the test nearly always passes muster. It is the catch-all or residual test: all acts of federal, state, and local government that classify individuals—i.e., that treat some individuals differently from others—and are not subject to strict or intermediate scrutiny must be “rational.”

The Supreme Court has never explained convincingly why three different equal-protection tests are necessary to interpret the one equal-protection clause in the federal Constitution. But the three-tiered structure would not have survived its critics if it did not serve some purpose that the Court is unwilling to sacrifice. What purpose the Court’s rather arcane equal-protection structure, in fact, serves—and why that structure is unhelpful in constructing a theory of equality that is adequate for persons disadvantaged for reasons related to their own or another’s actual or perceived HIV status—is illuminated by looking at two cases in which the Court did not apply its usual framework.

The Inadequacy of Current Constitutional Doctrine for Cases Involving HIV

Among the most serious problems with the Court’s equal-protection structure is that it requires the Court to apply the *same* level of review to *all* governmental uses of a particular classification, regardless of the use to which the government puts the classification in a particular regulation. Because the government is sometimes but not always justified in treating people with AIDS or HIV differently, this indiscriminating approach to equal protection is poorly suited to equal-protection issues involving them.

In two cases, the Court has seemed to recognize the possibility of a different approach to equal protection. In *Plyler v. Doe*,²² decided in 1982, the plaintiffs challenged a Texas statute limiting state funding of public education as a violation of the equal-protection clause. Texas granted a free education in the public schools to children who were citizens of the United States or were legally admitted to the United States. The Texas statute attacked in *Plyler* denied, however, a free public education to children who could not prove that they were legally admitted to the United States. Texas argued, in substance, that it had no obligation to spend its money educating children whose very presence in the state was unlawful.

Attorneys for the excluded children attacked the Texas statute as unconstitutional under the equal-protection clause. They argued that the excluded children could not be blamed for the misdeeds of their parents. The attorneys also argued that the Texas statute could not realistically be expected to diminish illegal immigration. Instead, the main result of the statute, they claimed, would be to promote the creation of a permanent uneducated underclass in Texas, composed largely of persons unable to speak English fluently.

The statute attacked in *Plyler* did not deny any right the Court views as “fundamental”; the Court had already ruled in 1973 that there is no fundamental right to public education.²³ Moreover, *Plyler* did not involve discrimination based on a classification that is always or even usually irrelevant to governmental purpose, such as race or sex. A person’s status as an undocumented alien is highly relevant to, for example, a deportation proceeding. Thus, the Court was required to consider whether the classification that Texas had used—lack of documentation proving the right to live in the United States—was appropriate in light of the *specific purpose* to which Texas had put that classification.

By a vote of five to four, the Supreme Court ruled that the Texas statute was unconstitutional. The majority observed that the Texas statute “impose[d] a lifetime hardship on a discrete class of children not accountable for their disabling status.” This fact, according to the majority, meant that the Texas statute “can hardly be considered rational

²²*Plyler v. Doe*, 457 U.S. 202 (1982).

²³*Rodriguez v. San Antonio Independent School District*, 411 U.S. 1 (1973).

unless it furthers some substantial goal of the state.” The Court found that it furthered no such goal, and consequently held it unconstitutional.

Cleburne v. Cleburne Living Center,²⁴ which was decided in 1985, three years after *Plyler*, is reminiscent of that case. In *Cleburne*, the city of Cleburne, Texas, denied a private organization’s application to build a group home for the mentally retarded in a residential neighborhood. The city claimed that it was acting under a zoning ordinance designed to protect mentally retarded persons from floods, harassment from local school children, overcrowding, and various other alleged hazards in the neighborhood. The Supreme Court, however, found that the mentally retarded did not need any greater protection from such potential harms than the aged, the physically ill, and other persons permitted to live in the neighborhood. The Court concluded that the city’s claimed justifications for the denial of the permit reflected “an irrational prejudice against the mentally retarded.” The Court, therefore, found that the city’s decision failed even the highly deferential rational-basis test. Consequently, even though the Court stated that the mentally retarded are *not* a suspect class, it held the city’s decision to be unconstitutional.

In an important separate opinion, Justice Stevens criticized the entire three-tiered framework. He argued that the equal-protection clause applies to every act of government where “an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.” Judged by this unitary standard, he also found the city’s zoning decision to be unconstitutional.

Plyler and *Cleburne* must be viewed as cases in which the Court was forced to face the inadequacies of its own theories of equal protection. In each, the Court was faced with a morally repugnant denial by the government of equal concern and respect for individuals under its control. And in each, the Court rightly held those denials of equal concern and respect to be unconstitutional. The hard question is not really why the Court decided *Plyler* and *Cleburne* as it did. The hard question is this: Why did the Court ever burden itself with an unwieldy and mechanical three-tiered equal-protection scheme, which has no ascertain-

²⁴ *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

able roots in the equal-protection clause and no clear relation to the underlying principles served by the clause?

We think the answer lies primarily in the Supreme Court's desire to avoid adjudication that looks too "political." The Court's three-tiered structure tries to avoid appearing to displace the legislative and executive branches by dressing up the issues in equal-protection cases so as to make them look as "objective"—and thus, supposedly, as "judicial"—as possible. Strict scrutiny and intermediate review, the Court has suggested, are justified to protect classes of persons, such as racial minorities, that have historically been excluded from, or inadequately represented in, the political process (Ely 1981). Thus, when the political process has failed to represent the interests of a minority, the Court intervenes. On the other hand, when government disadvantages persons who have historically been able to look out for themselves through electoral politics, the Court typically assumes that a fair process must have produced a fair substantive result.

These theories seem to divide the judicial task of guarding the integrity of the political process from the political task of setting substantive policies. But as many commentators have shown, the supposed avoidance of substantive choices that such theories seem to offer is illusory (Cox 1981; Dworkin 1985, 57–71; Estreicher 1981; Tribe 1980). For example, persons addicted to intravenously administered drugs, lesbians and gay men, and aliens could all be considered underrepresented in or excluded from the political process. The question of which, if any, of these groups merits special judicial protection cannot be decided without smuggling in substantive judgments about the characteristics and behavior of members of these groups.

Moreover, laws disadvantaging constitutionally protected classes are not *conclusively* invalid; at least in theory, the Court just closely examines them to see if they genuinely advance a legitimate and sufficiently important state interest. Is the suppression of homosexuality to promote a particular vision of public morality a state interest of this character? Is the criminal punishment of drug use driven by compulsive addiction such a state interest? These questions inevitably concern substantive problems of political philosophy.

That three-tiered review represents an attempt to distance judicial action from political considerations can also be seen in the Court's cumbersome efforts to avoid asking explicitly whether the good

achieved by a governmental action justifies the harm inflicted on the disadvantaged class. The Court, apparently concerned that such balancing would look overly "subjective," and therefore insufficiently judicial, takes account of the harm inflicted by an action challenged under the equal-protection clause only in a clumsy and mechanical way. To be valid under strict scrutiny, for example, the Court must find that a racial classification is necessary to achieve a compelling state interest. Under the Court's structure, apparently *all* racial classifications are valid only if they accomplish some apparently fixed measure of good.

Logically, this approach makes sense only if all racial classifications offended equality in the same way and to the same extent. We believe that this is not so, that racial classifications employed in affirmative-action programs, for example, are legitimately measured by a moral calculus quite different from that properly applied to the prejudice-driven racial segregation at issue in *Brown* (Dworkin 1978, 223-39). The same problem arises for sex discrimination. Governmental classifications by sex are valid only if substantially related to an important objective: whether the classification is supported by biological differences between the sexes, by efforts to remedy the historical oppression of women, or by mere prejudice and stereotyping (Law 1984).

Thus, under traditional Supreme Court jurisprudence, the level of scrutiny applied by the Court depends *only* on whether the challenged governmental action implicates a fundamental right or a specially protected class. It does not depend on the use to which the government puts the classification. And once that "level" is set for a particular classification, the Court's method assigns one of three supposedly fixed weights as the necessary amount of good to be accomplished by *every* governmental use of that classification.

Justice Stevens's method, in contrast, asks the more sensible question of whether "the adverse impact" of government action "may reasonably be viewed as an acceptable cost of achieving a larger goal." That question need not lead the court into legislating; it demands only that governmental action be reasonably justifiable on grounds other than prejudice. For legislation that can be justified in this way, the further question of whether the legislation, in fact, advances appropriate goals at an acceptable cost is for political lawmakers.

Without the new directions charted by *Plyler* and *Cleburne*, the Court's standard equal-protection jurisprudence would be seriously inadequate for cases involving people with AIDS, or people who carry

HIV. As a class, such people have many of the same characteristics as groups that the Court has formally recognized and protected through "strict scrutiny" or "intermediate review." Most persons carrying HIV, for example, belong to feared or disliked groups: gay men, or intravenous drug users and their sexual partners and children, who are disproportionately black or Hispanic. And members of these groups, once known to carry HIV, are obviously even more likely to suffer from irrational prejudice. Such persons are consequently in very real danger of having the executive and legislative branches act against them unfairly.

Nonetheless, the government undoubtedly could treat persons who carry HIV differently from others for some purposes. It plainly could, for example, prohibit a person who knows that he or she has HIV from donating blood. But because HIV is not spread through casual contact, the government could not in our view, for example, constitutionally refuse to employ HIV-positive persons. In short, some governmental classifications by HIV status are consistent with equal concern and respect for people with AIDS or HIV. Other such classifications, however, are not, and should be unconstitutional for that reason.

Given these facts, the Court's traditional structure leaves it poorly equipped to deal with constitutional cases involving people with AIDS or HIV-positive persons. Because HIV-positive status is relevant to some governmental actions, the Court would under its classical analysis almost certainly decline to apply strict scrutiny or intermediate review to classifications involving the status. Furthermore, the Court's typical reluctance to examine carefully the harm inflicted by a challenged action would seriously compromise its ability to decide cases involving HIV-positive persons in a realistic way. In short, if equal-protection cases involving discrimination against people with AIDS or HIV, when and if they arise, are simply stamped "rational-basis review" and given only peremptory consideration, then the prospects for real justice in this area are dim indeed.

Plyler and *Cleburne* offer a way out of the Court's usual understanding of the equal-protection clause. Those cases both involved classifications that are legitimately relevant to some governmental actions. Undocumented status, as we have said, is certainly relevant to immigration-related decisions, and mentally retarded status is relevant to a wide variety of state decisions involving education, benefit programs, and other matters. But in *Plyler* and *Cleburne*, the government applied these classifications unreasonably. The challenged govern-

mental actions would not have discernibly reduced unlawful immigration or protected the well-being of the retarded, and would certainly have inflicted disproportionate harm on already disadvantaged people. Such harm could not, in Justice Stevens's formulation, be "reasonably viewed as an acceptable cost" in light of the insubstantial or nonexistent benefits of the challenged actions.

These two cases raise the encouraging possibility of a more coherent and less fragmented approach to questions of individual rights. Such a jurisprudence would not focus so insistently on the category of individuals that the government has disadvantaged. It would give greater weight to how the government has actually employed a particular classification. *Plyler*, it must be admitted, was a fragile five-to-four decision that the Supreme Court as now constituted might well decide differently. And in *Cleburne* the equities of the case were extraordinarily compelling; *Cleburne's* influence as a precedent in more difficult situations may be limited. Nonetheless, *Plyler* and *Cleburne* illustrate the way in which a more thoughtful and valuable doctrine of equal protection could be developed—to the benefit of, among others, people with AIDS and HIV infection.

Even if the Supreme Court was to develop and extend *Plyler* and *Cleburne*, the resulting doctrine would limit government conduct only, not the behavior of private persons. A multitude of state constitutional provisions and federal, state, and local regulations regulating public and private actions, however, also implicate principles of equality. The Supreme Court's constitutional decisions have plainly influenced many of those laws: *Brown*, for example, certainly affected the Civil Rights Act of 1964. The vision of equality that we believe *Plyler* and *Cleburne* support—whether or not it takes permanent root in federal constitutional law—is relevant for lawmakers considering antidiscrimination measures, for judges interpreting those measures, and for judges interpreting state constitutions. It is critical for the fair legal treatment of HIV-positive persons—and many others—that the broad lessons of *Plyler* and *Cleburne* be fully absorbed and understood.

AIDS: The Forging of a Consensus

In the beginning—the summer of 1981—the phenomenon we now call AIDS had no name and no known cause, and appeared to affect very

small numbers of people. Within a year it became clear that the disease was far more than a scientific curiosity; it was transmissible and spreading, and extraordinarily deadly. Associated at first almost exclusively with gay men, the disease acquired a name indicating that association—gay-related immune deficiency, or “GRID.” As the caseload grew past 1,000, gay organizations and leaders in New York, San Francisco, and Los Angeles took note of this grim development, and began to contemplate and discuss the medical and political consequences of such an epidemic for gay people. A group of gay men in New York created an organization called Gay Men’s Health Crisis to provide advice and services to those in need, and to engage in advocacy (Shilts 1987). The National Gay Task Force and other gay organizations established links to the scientists and officials studying the epidemic. Among other things, they helped convince the Centers for Disease Control that the term “GRID” was misleading and inappropriate, and the disease was renamed “AIDS,” for acquired immune deficiency syndrome.

Their effort to substitute “AIDS” for “GRID” was evidence of a larger concern: that the new illness would exacerbate the stigmatization already accorded gay people in the United States. Gay advocates also argued for more scientific and medical resources. Government, it must be recorded, was appallingly slow to respond (Shilts 1987). But both on principle and out of concern for the fight against the illness itself, they devoted considerable energy to the issue of the discrimination they believed AIDS would trigger.

In New York, these advocates looked in large measure to the state and city disability-discrimination laws.²⁵ In the fall of 1983—barely two years after the disease was first identified—and in response to concerns about possible discrimination, the New York State Division of Human Rights issued a statement declaring that discrimination related to AIDS was prohibited by the state’s disability statute (New York State Division of Human Rights 1983). The division asserted that the law covered not only people with full-blown AIDS, but also individuals “perceived” to have AIDS, those belonging to a group “perceived to be particularly susceptible to AIDS,” and those related to or living with

²⁵N.Y. Exec. Law §§ 292(21), 296 (McKinney 1982 and Supp. 1989); New York City Charter and Administrative Code: New York City Administrative Code §§ 8-108, 8-109 (Williams 1986).

someone with AIDS. By the end of 1983, the division had received two formal complaints alleging discrimination on account of AIDS. The next year brought six complaints. By October of 1986, there were more than 30 reports or complaints (Eisnaugle 1986).

Shortly after the division's announcement, in October of 1983, Lambda Legal Defense and Education Fund, a gay-rights advocacy group, brought the first lawsuit alleging discrimination linked to AIDS.²⁶ The landlord who leased office space to Joseph A. Sonnabend, a physician practicing internal medicine in New York City's Greenwich Village, had tried to evict Dr. Sonnabend from his office because he treated patients with AIDS there. Lambda, in tandem with the state attorney general's office, argued on his behalf that those patients were "disabled" under the New York State statute, and that the attempted eviction amounted to illegal discrimination against them. A New York City civil court judge issued a preliminary ruling in December in Dr. Sonnabend's favor, which constituted the first application by any judge in the country of a disability or handicap-discrimination statute to the new epidemic. (After the ruling, the parties settled the suit to Dr. Sonnabend's satisfaction.)

Two related scientific developments—the identification of HIV as the probable underlying cause of AIDS in the spring of 1984, and the approval by the Food and Drug Administration one year later of a test for the presence of antibodies to that virus—while encouraging from the perspective of medical research, significantly increased the potential for discrimination. Until the antibody test, people with AIDS were identifiable only through their history of symptoms associated with AIDS. The test not only simplified the diagnosis for some patients, but also permitted identification of those who had been infected, but had no present symptoms of disease. In the hands of an employer, a landlord, or an insurance company with a discriminatory motive, a positive antibody test could result in serious harm to the person tested.

Gay advocates in California, fearing widespread discrimination as a result of the licensing of the test, went beyond reliance on the state's existing handicap-discrimination statute. They asked the state legislature for a specific statute to address the issue, arguing that without such protection, many gay men, among others presumed to be "at risk," would decide not to be tested. Their arguments succeeded. In

²⁶*People v. 49 West 12 Tenants Corp.*, Index no. 43604/83 (N.Y. Civ. Ct. N.Y. Co. 1987).

the spring of 1985, the California legislature approved, and Governor Deukmejian signed, a bill outlawing HIV-antibody testing without the consent of the subject and specifically barring discrimination on account of HIV status by employers and insurance companies.²⁷

In the fall of 1985, an increasingly aware public (affected in part by the disclosure that Rock Hudson was dying of AIDS) became witness to a sudden cascade of articles, programs, and conferences on AIDS. Many of these presentations speculated that the epidemic might spread significantly beyond the groups identified as at special risk. No longer did the disease seem confined to the remote worlds and “unspeakable” acts associated with gay men and drug users. The emergence of AIDS in young children—most of whom contracted the illness through blood transfusions or before birth from their mothers—made AIDS seem a more palpable threat to “ordinary” and “innocent” Americans. And medicine still offered little hope, except for the alleviation of pain. In these circumstances, how would the public and the politicians react?

In 1930, perhaps even in 1950, such a scenario would almost certainly have led to systematic coercion and discrimination: widespread loss of livelihood, forcible testing and treatment, mass detention, or worse. But in 1985 it did not. Some voices did call for compulsory measures. William F. Buckley, Jr. (1986), for instance, suggested that every person with a positive antibody test be marked on the buttocks with a distinctive tattoo. Followers of Lyndon Larouche gathered signatures in California for a “Prevent AIDS Now” ballot initiative, which appeared to authorize, among other things, a quarantine of HIV-positive persons (Kohorn 1987). (It failed at the polls in the fall of 1986.) By and large, however, politicians, judges, and administrators turned away from draconian proposals.

Two opinions rendered during this period are instructive. In December of 1985, the Florida Commission on Human Rights issued the first ruling in the country concerning the dismissal from employment of someone with AIDS.²⁸ The Broward County Office of Budget and Management Policy had fired Todd Shuttleworth, an intern with a satisfactory work record, because he had developed Kaposi’s sarcoma, a

²⁷1985 Cal. Stat. ch. 22, § 1 (codified as amended at Cal. Health and Safety Code § 199.22a (West Supp. 1989)).

²⁸*Shuttleworth v. Broward County Office of Budget and Management Policy*, 2 Empl. Prac. Guide (CCH) ¶ 5014 (Fla. Comm. on Human Relations Dec. 1, 1985).

skin condition associated with AIDS. Shuttleworth claimed he was able and willing to perform the duties of the job. The county based its dismissal on fear of transmission of the virus to others; it alleged that there was a general “lack of knowledge as to the severity and communicable aspect” of AIDS and that it could not risk even a slight possibility that another person would contract the virus. The commission totally rejected the county’s arguments. Under Florida’s handicap-discrimination statute, any risk of infection would have to be “substantial,” the commission said, and the county had been unable to show even a “reasonable probability that AIDS can be transmitted by casual contact that commonly occurs in the workplace.”

In New York City two months later, a state judge rendered his decision in a suit brought by parents seeking to keep children with AIDS out of the public schools.²⁹ The trial had taken five weeks. Eleven medical experts had testified. Because of the importance attached to the case by the city, the corporation counsel—the head of its law department—had personally conducted the defense. Like the Florida commission, the New York judge rejected fully the arguments in favor of discrimination. He ruled that under the federal disability statute—the Rehabilitation Act of 1973—the board was compelled to admit not only children with full-blown AIDS, but also children with asymptomatic HIV infections and children viewed as having AIDS or HIV infection, whether they actually did or not. He also held that the parents’ request to exclude children with AIDS violated the equal-protection clause of the federal Constitution because it would be irrational to bar those children, but not necessarily children who were merely antibody-positive. (The parents had requested the exclusion of children only with fully developed AIDS.) The judge wrote:

Although this Court certainly empathizes with the fears and concerns of parents for the health and welfare of their children within the school setting, at the same time it is duty bound to objectively evaluate the issue of automatic exclusion according to the evidence and not be influenced by unsubstantiated fears of catastrophe.

These two opinions demonstrate how far the law had advanced in the three decades before the onset of the virus. The two statutes relied

²⁹*District 27 Community School Board v. Board of Education*, 130 Misc.2d 398, 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986).

upon—Florida’s handicap-discrimination statute and the federal Rehabilitation Act—did not exist before 1973. And the constitutional analysis offered by the New York court would probably have been seen as preposterous before the revolution in Supreme Court jurisprudence since World War II; indeed, it was daring even in the context of the Supreme Court’s equal-protection cases before *Plyler* and *Cleburne*.

Of course, both judicial decisions and legislative actions are merely a part of the political culture from which they arise. In the AIDS epidemic, several factors promoted some degree of responsiveness to the issue of discrimination. One was that the disease first arose among gay men—a group traditionally viewed with distaste and scorn by most Americans, but one also including many educated, affluent people with some degree of political sophistication and personal influence. More important, groups representing the afflicted had significant allies in trying to persuade the government that oppressive measures against HIV-positive people would only make the epidemic worse. By the fall of 1985 the weight of public health opinion strongly favored voluntary measures over coercive ones—even though there still remained some scientific uncertainties about HIV, such as the percentage of people with HIV antibodies who would ultimately develop AIDS itself and the actual risk of transmission through unintentional hypodermic punctures. Witness this revealing passage from the first report in 1986 of the Committee on a National Strategy for AIDS of the National Academy of Sciences’ Institute of Medicine (1986), probably the most prestigious panel to speak on the epidemic:

The active voluntary cooperation of individuals who are at risk will be needed to curtail the epidemic. Coercive measures will not solicit this cooperation and could prevent it. Believing that coercive measures would not be effective in altering the course of the epidemic, the committee recommends that public health authorities use the least restrictive measures commensurate with the goal of controlling the spread of infection.

The phrase “least restrictive measures” in this passage echoes well-known passages from civil liberties cases decided by the Supreme Court. That the Court’s rhetoric should reappear here suggests the degree to which its efforts since 1950 to advance individual rights had become a part of our national conscience.

As already stated, this view of AIDS and public health is unquestionably tied to some degree to the vigorous advocacy of gay rights groups and their allies in the earliest years of the epidemic. But lobbying alone cannot account for the startling shift in attitude from previous epidemics. After all, gay rights groups were and still are small in membership and resources, and have been generally unable to achieve other goals on their agenda, except at the municipal level. And the shift by the public health experts has been too profound; in no previous epidemic had they expressed a collective preference for the "least restrictive" measures of controlling infection, and in no previous medical emergency had they put forward the view that the government should "solicit the cooperation" of those infected.

Such a dramatic change must have a more fundamental explanation. We believe that the legal and social revolution of the 1950s, 1960s, and 1970s created a climate in which the advocacy of gay rights groups and others could be effective—an atmosphere in which arguments made on behalf of the groups most affected would seem more than self-interested. The cases and statutes discussed in this article served, among other things, to direct the country's attention to the importance of fair treatment, encouraging educated Americans to think more deeply about the appropriate interplay between government and private institutional authority on the one hand and individual needs and interests on the other. When is discrimination justifiable? What does the state have to prove in order to engage in a discriminatory or coercive act? Must it try less drastic measures first? How does discrimination relate to public health concerns? The constitutional principles developed by the Supreme Court, as well as the discrimination statutes from the 1960s and 1970s, require that questions of this kind be explored in some depth. They force more careful and more rational thoughts. When the advocates asked these questions of scientists and public health officials in the first few years of the epidemic, they found an audience willing to consider them seriously.

By the time the public awoke to the scope and peril of the AIDS epidemic toward the end of 1985, a consensus against coercive measures and in favor of voluntary ones had already emerged among the experts (Gostin, Curran, and Clark 1987). They and the advocates for people with AIDS conveyed that consensus to the judges and administrators. And these judges and administrators, through opinions and actions like those described above, themselves reinforced the emerging

consensus, helping to reassure and pacify the general public. Only later did most legislative bodies begin to address AIDS, and by then the general approach had already been largely set.

The consensus eventually reached even the commission created by President Reagan in 1987 to advise the federal government on the epidemic. The president's announcement of his initial appointments to the commission was received with dismay by most experts and advocates for people with AIDS because the list included few who were knowledgeable about AIDS and also because it had a distinctly one-sided sociopolitical cast. The final report of a somewhat restructured commission, issued in the summer of 1988, contained, however, the following advice (Presidential Commission on the Human Immunodeficiency Virus Epidemic 1988):

The primary focus in developing a comprehensive public health strategy to control HIV infection should be placed on those public health measures that are based on voluntary cooperation in risk-reducing behavior change.

The commission also spoke with conviction about the dangers of discrimination against people with AIDS or the virus:

HIV-related discrimination is impairing this nation's ability to limit the spread of the epidemic. Crucial to this effort are epidemiological studies to track the epidemic as well as the education, testing, and counseling of those who have been exposed to the virus. Public health officials will not be able to gain the confidence and cooperation of infected individuals or those at high risk for infection if such individuals fear that they will be unable to retain their jobs and their housing, and that they will be unable to obtain the medical and support services they need because of the discrimination based on a positive HIV antibody test.

There is further evidence of the consensus against punitive or coercive measures. As of this writing, officials in 34 states have issued determinations, either administrative or judicial, that their disability or handicap-discrimination statutes cover AIDS, and in most instances HIV infection as well—an especially remarkable development in light of the fact that the first such declaration came as recently as 1983 (Gostin 1989; Leonard 1989). Legislatures in 29 states have enacted statutes to protect the confidentiality of HIV test results. Legislatures in

15 states have passed laws specifically outlawing discrimination on account of AIDS or HIV infection. And courts in several states in addition to New York have specifically upheld the right of children with AIDS to attend public school.³⁰

And what is even more significant, as of this writing no state has pursued any plan for mass detention or quarantine. Only one state has cut back a discrimination statute in response to AIDS. (In Tennessee, the legislature approved an amendment to its disability-discrimination law excluding “infectious or contagious” diseases generally [*AIDS Policy and Law* 1988].) And while discrimination unquestionably exists, systematic attempts to deny employment, housing, goods, or services to people with AIDS or HIV have been fewer than history would have led one to fear.

Exceptions and Deviations

That the most knowledgeable doctors, scientists, and public health officials have generally come to agree that compulsory measures would hinder rather than enhance the fight against AIDS does not mean that, over the course of the epidemic, the rights of the individual have invariably prevailed. In two areas in particular, civil rights’ or civil liberties’ questions have often been decided against the interests or desires of people with AIDS or HIV: government antibody screening, and the mandatory reporting of test results.

Government Antibody Screening

Most public health experts have opposed mandatory screening of the general public, or of segments of the general public (Gostin, Curran, and Clark 1987), and thus most legislatures have rejected such schemes. Two states, Louisiana and Illinois, dabbled briefly with compulsory testing for couples seeking marriage licenses, but in both instances the idea proved expensive and unproductive and was abandoned (Wilkerson 1989). Nonetheless, many states and the federal

³⁰*Ray v. School District*, 666 F. Supp. 1524 (M.D. Fla. 1987); *Thomas v. Atascadero Unified School District*, 662 F. Supp. 376 (C.D. Cal. 1987); *Board of Education v. Cooperman*, 105 N.J. 587, 523 A.2d 655 (1987).

government have instituted compulsory screening programs for certain specially situated groups. The federal government has been especially aggressive on this front. It has, since 1987, methodically tested six categories of people subject directly to its supervision, with the general result that individuals with positive results are excluded: members and recruits of the armed services; applicants for immigration; volunteers for the Peace Corps; Foreign Service officers and their spouses and dependents; federal prisoners; and applications for residential placement in the Job Corps, a training program for poor teenagers (Gostin 1989).

At the state level, 14 states have engaged in the screening of prisoners, 6 among them segregating those with seropositive results. And 18 states have passed statutes permitting or requiring the testing without consent of any defendant convicted (or, in some states, merely accused) of a crime involving sex or drugs (Gostin 1989).

This testing without consent of certain special groups, both at the federal level and the state level, has encountered little opposition or complaint from either the public health experts or the public. Moreover, the few judicial challenges to their legality have for the most part failed.³¹ Why has there been so little concern for compulsory testing of these particular categories of people, when the more general mandatory testing schemes have been seen as inappropriate? Lack of political advocacy may be one answer; unlike gay men, the groups tested are generally not organized in any political sense, and have few or no advocates to promote their perspectives. Moreover, all of the categories involve individuals who at some point engaged in an act setting them substantially apart from most other people; they applied for a special job—service in the Army or the Peace Corps—or requested an unusual benefit—residency in the United States as a foreigner or Job Corps training—or engaged in a crime. Some may believe that such individuals, by virtue of their special conduct, waive or forfeit any right to refuse or protest screening for HIV.

Such a belief does not, however, make the compulsory testing programs sensible, or even rational, as at least in theory they must be to

³¹*Local 1812, American Federation of Government Employees v. United States Department of State*, 662 F. Supp. 50 (D.D.C. 1987); *Batten v. Lehman*, no. CA 85-4108 (D.D.C. Jan. 18, 1986). But see *Glover v. Eastern Nebraska Community Office of Retardation*, 686 F. Supp. 243 (D. Neb. 1988), *aff'd*, 867 F.2d 461 (8th Cir.), *cert. denied*, 110 S. Ct. 321 (1989); *People v. Madison*, no. 88-123613 (Cir. Ct. Cook Co., Ill. Aug. 3, 1989).

comport with the basic constitutional principles developed by the Supreme Court. Screening Job Corps applications for HIV, for example, discourages participation from precisely the population of poor, inner-city teenagers the program was established to assist. Testing certain categories of federal workers goes against the central principle of handicap-discrimination statutes, especially the federal government's own Rehabilitation Act of 1973—that workers subject to disabilities should not be treated differently unless they pose a direct threat to others at the work site, or are unable to perform their jobs—and thus threatens to undermine that principle.

The way in which the legal concept of equal protection has developed since 1950 may help to explain the dichotomy over mandatory antibody testing: opposition to general screening proposals, but acquiescence to testing of certain discrete categories of people. The Supreme Court's jurisprudence of equal protection places great reliance on social classifications. Does the plaintiff belong to a "suspect" category or classification (the terms are used by the Court synonymously)? If so, some degree of "heightened scrutiny" may be appropriate; if not, the presumption is in favor of the government. Most antidiscrimination statutes rely similarly on special social or political categories. Perhaps the law's extraordinary emphasis in recent decades on categories of people in determining issues of individual rights has yielded the undesirable by-product of condemning those who fall into groups viewed with disfavor with significantly fewer rights than they really deserve—a sort of reverse strict-scrutiny test. Such disfavored persons—intravenous drug users, for example—should, we believe, be accorded an opportunity to have the rules that apply to them reviewed with full consideration of their rights and needs. As *Plyler* and *Cleburne* demonstrate, adjudication by category is often just too crude an instrument.

Privacy of Test Results

Certain privacy questions have also presented special difficulties in the history of AIDS to date. Four-fifths of the states, including all those most deeply affected by AIDS, permit people seeking antibody tests to obtain their results anonymously, generally at state-run clinics. Several recent studies indicate that some individuals will decline to be tested unless full anonymity can be assured (Fehrs et al. 1988; Johnson, Sy, and Jackson 1988). Eight states, however, not only do not make anony-

mous HIV tests available, but actually require doctors and clinics that administer the tests to report to state officials the names and addresses (and, in some states, the telephone numbers) of the people whose results are positive (Intergovernmental Health Policy Project 1989). The federal government has generally sidestepped the issue of whether such reporting requirements are appropriate; President Reagan's HIV commission endorsed compulsory reporting of antibody test results, but the Centers for Disease Control and the surgeon general have declined to take a formal position.

As described earlier, the Supreme Court's rulings on privacy have been rather opaque. While a federal constitutional right to privacy certainly exists, the Court has never formally defined—or offered a theory to explain—the right to privacy or personal autonomy. The Court's imprecision has made the resolution of issues like whether the federal Constitution permits states to require doctors to report names of patients who are HIV-positive very difficult, and has thus fostered division of opinion on these issues. In our view, the Court's failure to put forward a coherent conception of privacy has also given public health officials unduly broad latitude to collect sensitive medical information about individuals, permitting them to overlook or disregard studies showing that such schemes can discourage people from seeking care or treatment. In the absence of carefully developed constitutional principles surrounding informational privacy, the number of states compelling the reporting of personally sensitive HIV information is likely to grow.

Signposts to the Future

The response of most public health experts to AIDS, so at variance with the traditional approach to epidemics and other threats to the public well-being, underscores the profound changes in American legal doctrine and in American social attitudes wrought by the civil rights revolution of the midcentury, even though there are still shortcomings. Yet, the AIDS crisis has, we believe, done more than merely highlight previous developments. The crisis is of such significance, and the response to it of so extraordinary a character, that AIDS may itself play a role in the evolution of the concept of individual rights, both for lawyers and judges and for ordinary Americans with little formal under-

standing of the law. As in other ways, AIDS not only reveals changes, but may also promote them.

The AIDS crisis, as this country has confronted it, has the capacity to alter basic approaches to issues of individual rights in three ways. First, and most basically, this history of AIDS to date suggests that issues of discrimination, as well as questions about civil rights generally, are likely to be given very serious consideration in health crises to come—and perhaps in other kinds of crises as well. That is not to say that individuals will never again suffer unfair discrimination in the name of public health. But it does say that the issue of discrimination is not apt to be swept aside perfunctorily whenever an emergency arises, as has so often happened in the past.

Wars and panics as well as epidemics have all served at one time or another in the history of this country to justify significant incursions on the rights of individuals or groups. Traditionally, the mere invocation of an exigent circumstance has sufficed to explain the act of discrimination, with few voices raised in objection. After this country entered World War II, for example, President Roosevelt ordered the internment of more than 110,000 Americans of Japanese descent, supposedly because their national loyalty was in question (Mydans 1989). The detention provoked little public dissent or debate. And when the constitutionality of President Roosevelt's order came before the Supreme Court, the Court ruled that even under "the most rigid scrutiny," the internment was justified by the need to protect against the alleged threat of espionage during wartime.³² The Court accepted at face value the government's assertion that the interned Japanese-Americans posed a threat to national security, without requiring that the government adduce credible evidence to support that claim.

The handling of the AIDS crisis points to the conclusion that such a similarly reflexive acceptance of discrimination is much less likely to occur, even during an emergency. AIDS is itself an emergency, threatening the health and well-being of millions of Americans across the country. Yet, public health experts have generally declined to propose measures that would curtail the fundamental civil rights or liberties of those who carry HIV, even though such measures were routinely employed during epidemics in the nineteenth century and the early part of the twentieth century. The experts have largely accepted the argu-

³²*Korematsu v. United States*, 323 U.S. 214 (1944).

ments made by advocates for the people most affected by the epidemic that compulsory measures lead to needless deprivation and that such measures, far from advancing the public health, are actually apt to injure it. And, with the exceptions noted in the preceding section, government officials have acceded to the views of the experts. The present consensus may not hold together for the entire course of the epidemic, particularly as AIDS touches increasingly poor populations even further outside the American mainstream than gay men. But the consensus does still exist as of this writing and still does represent a new turn in this country's cultural perspective.

The second way in which AIDS may further transform ideas about discrimination emerges from the first. Before AIDS, many persons might well have guessed that during an epidemic of a transmissible disease, civil liberties and the public health were generally values in competition and tension with one another. Many people might also have thought that at a time of crisis, civil liberties would have to surrender to the public health—that the rights of the individual must succumb to the claims of the majority. The official response to AIDS has made plain that this simple opposition between civil liberties and public health is naive and misleading. As the passages quoted above from the Presidential Commission on the HIV Epidemic and from the National Academy of Sciences indicate, the public health experts have generally argued for a strengthening, not a diminishing, of individual rights, out of the view that the crisis will only worsen if the persons most in need turn away from the public health authorities and refuse to cooperate. As the President's commission urged, the "primary public health focus" has become "voluntary cooperation in risk-reducing behavior change," not forcible testing or quarantine.

Essentially, the experts have employed an ends-and-means analysis similar to those employed by the Supreme Court in its more thoughtful equal-protection cases applying "strict-scrutiny" or "intermediate" review. What is the end desired? What measures would help to achieve that end? If several means are possible, which one is the most narrowly tailored to accomplish the preferred result? The public health officials may not have known much about the Supreme Court cases, but they have nonetheless absorbed the general concern for the rights and needs of the individual that characterizes many of the Supreme Court's most important decisions since the midcentury.

The epidemic may have yet another enduring effect on the country's

approach to issues of discrimination. In *Plyler* and *Cleburne*, the Supreme Court indicated a readiness, at least on the part of some justices, to reframe the constitutional doctrine of “equal protection of the laws” to reflect the actual diversity and complexity of bias. Those two cases demonstrate, for instance, that prejudice need not be rooted in centuries of class-based oppression to be invidious or material. The new conservative majority of the Court may choose not to develop further this strand of federal constitutional law, but, even so, *Plyler* and *Cleburne* may influence nonconstitutional cases and the interpretation of the state constitutions by state courts.

The AIDS epidemic has actually yielded very few constitutional decisions to date, since the disability-discrimination statutes—and cases like *Arline* that have interpreted those statutes broadly—have provided a simpler and less risky basis for litigants wishing to challenge discrimination against them. But AIDS nonetheless provides cogent evidence of the need to reconceive the constitutional doctrines arising from the fourteenth amendment along the lines of *Plyler* and *Cleburne*. An awareness of how discrimination hinders the struggle against AIDS—if government and courts are prepared to attend to that knowledge—may help bring the law to a yet more sophisticated understanding of the issue of state-based discrimination generally, and thereby serve the interests of the entire society.

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