PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 13 | Issue 4 Article 4

5-15-1986

AIDS: Do Children With AIDS Have A Right to Attend School?

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I. INTRODUCTION

A. *Background*

"AIDS (Acquired Immune Deficiency Syndrome) is an incurable, fatal disease caused by a virus known as HTLV-III that destroys the body's immune system, leaving it vulnerable to otherwise rare infections."[1] "The AIDS virus, designated HTLV-III/LAV, has been detected in four bodily fluids: semen, blood, saliva, and tears."[2] It can

1. L.A. Times, Sept. 20, 1985, § 1, at 3, col. 2. The Centers for Disease Control defines AIDS as "a reliably diagnosed disease that is at least moderately indicative of an underlying cellular immunodeficiency in a person who has had no known underlying cause of cellular immunodeficiency nor any other cause of reduced resistance reported to be associated with that disease." *Acquired Immune Deficiency Syndrome (AIDS) Update—United States*, 32 MORBIDITY & MORTALITY WEEKLY REP. 310 (1983), *quoted in* Comment, *AIDS: A Legal Epidemic?*, 17 AKRON L. REV. 717, 717 n.6 (1984).

> Isolation by Robert C. Gallo and his colleagues at the National Cancer Institute of HTLV-III, a virus that appeared to be the agent of AIDS, was announced last April. A year earlier, workers in the laboratory of Luc Montagnier at the Pasteur Institute in France identified a virus they called LAV and suggested it might cause AIDS. Soon after HTLV-III was reported Jay A. Levy and his colleagues at the University of California at San Francisco School of Medicine described an AIDS virus they called ARV. All three isolets are retroviruses: viruses whose genetic material is not the usual DNA but the related nucleic acid RNA, which is the "reverse-transcribed" into DNA in the infected host by a viral enzyme, reverse transcriptas.
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> Now the full nucleotide sequences of the three viruses have been published. As expected, HTLV-III, LAV, and ARV are variants of a single highly heterogenous virus.

Science and the Citizen: AIDS Update, SCI. AM., Apr. 1978, at 70, 70.

> Patients with the disease seem to lack the normal body defense mechanisms and become prey to a wide range of infections usually what are known as opportunistic organisms including parasites, certain viruses and fungi not normally seen as pathogens in man, and to rare malignancies of which the best known is Kaposi's sarcoma. This is a malignant tumor of the blood vessels and tissues of the skin particularly involving the feet and legs.

Johnson, *AIDS*, 52 MEDICO-LEGAL J. 3, 3 (1984).

2. Church, *Not an Easy Disease to Come By*, TIME, Sept. 23, 1985, at 27, 27. The AIDS virus has been found only in small amounts in saliva and tears, and no cases of transmission by these fluids have been documented. *Id. But see* Silberner, *AIDS: Disease, Research Efforts Advance*, 127 SCI. NEWS 260, 260 (1985) (although saliva is a very unlikely source of transmission, it is possible for the virus to be so transmitted). Researchers have now discovered the AIDS virus in vaginal secretions as well, which increases the possibility that women can transmit AIDS. *Research: USA women could transmit AIDS*, U.S.A. Today, Mar. 7, 1986, § D, at 1, col. 6.

"live only a very short time outside the human body. It does not linger on doorknobs, clothing, food, dishes, glasses, utensils, or toilet seats."[3] The disease was first reported in 1981 in homosexual men and intravenous drug abusers.[4] There is still no known cure.[5]

"AIDS has been found to be present in infants, adults, men, women, whites, minorities, homosexuals, and heterosexuals."[6] It is, however, largely confined to homosexuals, drug addicts, Haitians, and a small number of hemophiliacs.[7] There are four ways in which the disease is known to be transmitted: (1) by transfusion of blood products; (2) by the sharing of needles among people who inject drugs intravenously; (3) by childbirth (either in the womb or during birth); and (4) by sexual intercourse.[8]

"[E]vidence strongly suggests that AIDS cannot be transmitted by casual contact."[9] Nor is there "evidence to suggest transmission by airborne spread."[10] This evidence is confirmed by studies which show that "the risk of transmission of [the] HTLV-III/LAV infection to health care workers from patients [with AIDS] is extremely low."[11] Moreover, the virus has not been contracted by any family

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3. Church, *supra* note 2, at 27.

4. Feorino, *Transfusion Associated Acquired Immunodeficiency Syndrome: Evidence for Persistent Infection in Blood Donors*, 312 NEW ENG. J. MED. 1293 (1985).

5. Landesman, *The AIDS Epidemic*, 312 NEW ENG. J. MED. 521, 521 (1985).

6. Comment, *supra* note 1, at 720.

7. *See* Johnson, *supra* note 1, at 3. "The development of a test to indicate whether a person has been exposed to the AIDS virus has made the nation's blood supply safe again." Adler, *The AIDS Conflict*, NEWSWEEK, Sept. 23, 1985 at 18, 18. The risks for transfusion recipients and persons with hemophilia have therefore nearly been eliminated. *See Update: Evaluation of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infection in Health-Care Personnel—United States*, 34 MORBIDITY & MORTALITY WEEKLY REP. 575, 575-76 (1985) [hereinafter cited as *Infection in Health-Care Personnel*].

8. Church, *supra* note 2, at 27. "The most prevalent method of transmission from man to man (and possibly man to woman) is thought to be anal intercourse, which frequently results in ruptures of the rectum, through which the semen of an infected man can enter the blood of a male or female sexual partner." *Id.* But it "is almost certainly spread through vaginal intercourse as well." Wallis, *Battling AIDS*, TIME, Apr. 29, 1985, at 68, 68.

The "transmission [of the AIDS virus] from mother to fetus in *utero* has been established." *AIDS*, 127 SCI. NEWS 328, 328 (1985). It "may also be transferred through the breast milk of an infected mother." *Id.*

9. Johnson, *supra* note 1, at 4.

10. Comment, *supra* note 1, at 724.

11. *Infection in Health-Care Personnel*, *supra* note 7, at 576.

> Because health-care personnel may be inadvertently exposed to the blood of AIDS patients, several studies have been conducted to determine the prevalence of HTLV-III/LAV antibodies in health-care personnel who have cared for these patients. Combining published results with data reported to CDC [Centers for Disease Control] show that to date, 1,758 health-care workers participating in such studies have been tested for antibodies to HTLV-III. Twenty-six (1.5%) were seropositive, and all but three of these persons belonged to groups recognized to be at increased risk for AIDS.

Id.

member living in close contact with AIDS sufferers, even though few have taken special precautions.[12] Although researchers agree that the transmission of AIDS through casual contact among members of the same household is unlikely in the United States,[13] it does occur in Africa.[14] The reason for this difference is unknown.[15]

Although "[f]ew other physicians admit that in cases of casual contact doubt exists,"[16] at least one neurologist has argued that "the incubation period is sufficiently lengthy to cast doubt on any proclamations, no matter how seemingly authoritative, in regard to the transmissibility of the illness."[17] The reason is that "[r]ecent AIDS research has revealed . . . a longer lead time for the virus."[18] Research shows that the virus may be persistent and asymptomatic for many years,[19] "so that people infected five or more years ago may still run the risk of infection."[20]

Sexual promiscuity seems to be the main risk factor associated with the spread of the disease.[21] No one is certain how many persons

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> However, there is one published report from England of a nurse who developed HTLV-III/LAV antibody following an accidental needlestick injury. Her serum was negative for antibody to HTLV-III/LAV at the time of exposure. The nurse had none of the recognized risk factors for AIDS and was asymptomatic at the time the report was published.

Id. at 577.

Furthermore, there are only two reported cases of probable occupational transmission of AIDS in the United States. *Id.*

> This confirms that the risk of transmission of HTLV-III/LAV infection to health-care workers from patients is extremely low . . . . Nonetheless, [health-care] personnel should follow recommendations designed to minimize the risk of exposure to parental or mucosal (e.g., blood spatters on conjuctiva) contact with potentially infectious material from patients with AIDS or suspected AIDS.

Id.

12. *See* Barber, *An Epidemic of Fear*, MACLEAN'S, Sept. 23, 1985, at 61.

13. *Id.* at 63.

14. AIDS is thought to have originated in Africa. *See* Barnes, *The New Victims*, LIFE, July 1985, at 12, 17.

15. *See* Silberner, *supra* note 2, at 260.

16. Barber, *supra* note 12, at 63.

17. *Id.* (quoting Dr. Richard Restak, a Washington, D.C., neurologist).

18. *AIDS*, *supra* note 8, at 328.

19. *Id.*

20. Wallis, *supra* note 8, at 68. "The incubation period in adults [may] range as high as six years or more." *U.S. Offers Goal to End Spread of Deadly AIDS*, N.Y. Times, Oct. 1, 1985, § I, at 17, col. 1 [hereinafter cited as *U.S. Offers Goal*]. Furthermore, "[i]n the May 9 NEJM [New England Journal of Medicine], researchers from the Medical College of Georgia in Augusta describe a child who got AIDS five and a half years after receiving a transfusion from an asymptomatic homosexual intravenous drug abuser." *AIDS*, *supra* note 8, at 328.

21. *See* Johnson, *supra* note 1, at 4.

may have been infected, but the United States Centers for Disease Control have quietly estimated the number to be as high as two million.[22] Other authorities state that the number has already reached one million (most of which are homosexuals) and that the number continues to increase.[23] "The usual figure is that 10 percent of those who have been infected come down with AIDS, although some doctors believe that proportion will grow."[24] Furthermore, "[t]hose who have the virus without the disease . . . may actually be the real threat because they are likely to have sex."[25]

"[N]ever before in the history of medicine has so much been learned about an entirely new disease in so short a time."[26] However, "the United States Public Health Service . . . acknowledges that no vaccine or cure is likely for at least five more years . . . ."[27] "The chief problem in developing a vaccine is that the AIDS virus changes its outer coat so rapidly that vaccine makers will have a difficult time keeping up with it, unless some unchanging feature of the virus can be found to serve as the basis for a vaccine."[28] As such, the disease is likely to continue to spread until the turn of the century.[29]

"As of [September 20, 1985], there had been 13,228 reported cases [of AIDS] in the United States and 6,758 deaths."[30] The number is expected to double every year.[31] At the International AIDS Conference in Atlanta, Georgia, experts agreed that AIDS is continuing to increase exponentially and gaining a foothold on more risk groups.[32] Furthermore, "many researchers now say that one in ten North Americans—including 20-30 percent of college age women—will

22. *See* Adler, *supra* note 7, at 18.

23. *See U.S. Offers Goal*, *supra* note 20, at 17, col. 1.

24. Adler, *supra* note 7, at 21-22.

25. *Id.* at 22.

26. Wallis, *supra* note 8, at 68.

27. *U.S. Offers Goal*, *supra* note 20, at 17, col. 1.

28. *Id.* at 21, col. 1. "The chief problem in developing a drug is that viral diseases in general are not readily treated with drugs, and the AIDS virus poses particular problems because it incorporates itself permanently into the genetic machinery of critical body cells, where it is difficult if not impossible to dislodge." *Id.* "Variability of the envelope proteins [of the virus] may complicate the development of a vaccine." *Science and the Citizen: AIDS Update*, *supra* note 1, at 70.

29. *U.S. Offers Goal*, *supra* note 20, at 17.

30. L.A. Times, Sept. 20, 1985, § I, at 3, col. 2.

31. Gergen, *What Answer for Aids?*, U.S. NEWS & WORLD REP., Sept. 23, 1985, at 78, 78. Data compiled by the Centers for Disease Control for the 38 week period ending on September 22, 1984, showed 2,940 reported cases of AIDS as compared to 5,604 for the 38 week period ending on September 22, 1985. *Infection in Health-Care Personnel*, *supra* note 7, at 578.

32. *See* Silberner, *supra* note 2, at 260. "The Centers for Disease Control currently estimates that 8000 new cases of AIDS will be reported for the 12-month period ending in October 1985 . . . [and] 40,000 new cases of AIDS in the next two years." Landesman, *supra* note 5, at 523. *See generally* Quinn, *Perspectives on the Future of AIDS*, 253 J. A.M.A. 247 (1985); Hardy, *The Incidence Rate of Acquired Immunodeficiency Syndrome in Selected Populations*, 253 J. A.M.A. 215 (1985).

eventually become infected through sexual transmission."[33]

AIDS has become one of the greatest problems facing modern medicine today,[34] and it has already cost more than $5.6 billion dollars to combat.[35] "Today information and misinformation about the disease are everywhere, and society is only now beginning to ask questions that may take the rest of this decade or longer to answer."[36]

B. Fear and Children with AIDS

Recently, debates have begun to rage over the right of children infected with AIDS to attend school, and cases are now beginning to reach the courtroom.[37] Judges will be called upon to break new ground in the balance between societal and individual rights. But before the legal implications can be understood, the prevailing attitude of the general public, as well as the opinion of medical experts, must be discussed.

It has been said that " '[f]ear consists in capitulating to the instinct of self-preservation.' "[38] It is clear that "AIDS has become one of the most sinister infectious diseases of this or any other century, threatening the world's general population and assuming the proportions of what epidemiologists call a 'pandemic.' "[39] "[I]f AIDS didn't exist, yellow journalism might have invented it. The story has every ingredient: sex, drugs, death and panic."[40]

President Reagan, when he spoke publicly for the first time on the issue of whether children with AIDS should be allowed to attend school, stated somberly: "I'm glad I'm not faced with that problem."[41] According to figures released in late August, 1985, more than 150 cases of AIDS have been diagnosed among children,[42] and more than

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33. Barber, *supra* note 12, at 63.

34. Lane, *Qualitative Analysis of Immune Function in Patients with the Acquired Immunodeficiency Syndrome*, 313 NEW ENG. J. MED. 79, 79 (1985).

35. Silberner, *supra* note 2, at 261.

36. Adler, *supra* note 7, at 18.

37. *See infra* notes 72-77.

38. Everett v. Paschall, 61 Wash. 47, 51, 111 P. 879, 880 (1910) (quoting Mazade, 49 PARIS REVUE 290 (1910) (citing Alfred Capus, a psychological playwright).

39. Clark, *AIDS: A Growing 'Pandemic'?*, NEWSWEEK, Apr. 29, 1985, at 71, 71.

40. Alter, *Sins of Omission*, NEWSWEEK, Sept. 23, 1985, at 25, 25.

41. *Reagan Sympathizes With Both Sides in AIDS Furor*, L.A. Times, Sept. 18, 1985, § I, at 1, col. 5 [hereinafter cited as *Reagan Sympathizes*].

42. *AIDS Victim, 8, Kept Out of Carmel School; 'Reasonable Social Environment' Sought*, L.A. Times, Sept. 13, 1985, § I, at 21, col. 1 [hereinafter cited as *AIDS Victim*].

100 have died from AIDS or diseases related to the syndrome.[43] "The majority of infected children acquired the virus from infected mothers during pregnancy or through the transfusion of blood or blood products."[44]

Most of the medical community believes that children with AIDS should be allowed to attend school, and that the risk of a child contracting AIDS from another child in school is negligible.[45] Their reasoning is based on the premise that casual contact is insufficient to transmit the disease.[46] This premise is supported by studies of children with AIDS. For periods of study ranging from a few months to five years, it was shown that not a single person in the children's households had developed the disease, or even antibodies, indicating infection as the result of contact with the child.[47] As stated by Dr. Thomas Peterman, an AIDS researcher with the Centers for Disease Control in Atlanta, "[i]f you are not getting transmission in families, it is extremely unlikely to occur in schools."[48] Furthermore, "[o]n Aug. 29, the federal Centers for Disease Control . . . recommended that children suffering from AIDS in most cases should be allowed to attend school."[49]

Not all physicians agree with this conclusion. Dr. Jose Giron stated that there are risks of the disease spreading to other children

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43. *Reagan Sympathizes*, *supra* note 41, at 14, col. 2.

44. *Id.* at 14, col. 3. *See also supra* note 8 and accompanying text.

45. *Public Is Reassured on AIDS Fears*, N.Y. Times, Sept. 20, 1985, § A, at 15, col. 4.

> Dr. James O. Mason, director of the national Centers for Disease Control in Atlanta, said the risk of a child's getting AIDS from another child in school was like the risk of "being struck by lightning when you walk out the front door in the morning" and "much less than the chance of the boiler that heats the building blowing up."

Id. Furthermore, William A. Haseltine, an authority on AIDS from Harvard University, stated, "Nobody says the risk is absolutely zero. But it is absolutely an extreme remote possibility." Barber, *supra* note 12, at 61. *See also Don't bar AIDS students, health official says*, U.S.A. Today, Sept. 16, 1985, § A, at 2, col. 1.

46. *See supra* notes 1-3, 8-9, and accompanying text.

47. *"Epidemic of Fear" on AIDS Is Unjustified, 3 Officials Say*, N.Y. Times, Sept. 20, 1985, § I, at 1, col. 1. As this paper was prepared for publication, "the first known case of transmission of the AIDS virus by a child to his parent" was reported. *Child, 2, Transmits AIDS Virus to Mother*, L.A. Times, Feb. 7, 1986, § I, at 4, col. 1. In this case, "the child suffered from a serious gastrointestinal disorder" that brought his mother, a nurse, "into frequent contact with her child's blood." *Id.* The Centers for Disease Control emphasized that "[s]he often performed extensive medical procedures on him, such as drawing blood and changing feeding tubes, intravenous lines and bags of wastes . . . ." *Id.* Nonetheless, the CDC commented "that the situation was an unusual one and did not contradict overwhelming evidence that AIDS is not spread through normal household contact." *Id.*

48. Barber, *supra* note 12, at 61.

49. *Reagan Sympathizes*, *supra* note 41, at 14, col. 3. *See also Battle Over AIDS Student Spills Into New York Court*, L.A. Times, Sept. 12, 1985, § I, at 1, col. 1 [hereinafter cited as *Battle Over AIDS Student*].

through open sores, bites, or nose bleeds.[50] Although unlikely, the uninfected child might contract AIDS if the blood from the AIDS victim entered his body through a cut.[51] Certain types of contact between infected and healthy schoolchildren, such as a bloody fight or classroom incontinence, may be sufficient to cause transmission.[52]

The latency period of the disease also casts doubt on whether AIDS may be transmitted by casual contact.[53] Even the Pentagon is starting to take precautions, and "announced that it would begin screening all new recruits . . . for exposure to the AIDS virus—and rejecting those who test positive."[54] Furthermore, it is the parents of healthy school children whom the fear of AIDS has hit the hardest. "Darlynn Spizzeri, a New York City mother who said she was keeping her child out of school because 'we are afraid our children will catch the disease even if those so-called, quote-unquote experts say it is impossible.' "[55] Her frustration can be summed up by Samuel Granier, president of a New York school board which was recently boycotted,[56] who stated, "If they keep kids out of school with chicken pox, why not with AIDS? It doesn't make sense."[57]

While the debate continues, school boards have already been called upon to decide the fate of children with the disease. The most publicized case involves an unknown second-grader with AIDS attending school in New York. The child's identity has been hidden, even from her principal.[58] Her admission into school has caused such a furor in

50. *See Doctor Wants Teachers Warned of AIDS Pupils*, L.A. Times, Sept. 19, 1985, § I, at 18, col. 4 (citing Dr. Jose Giron). Dr. Giron is a graduate of the Harvard Medical School and is a clinical assistant professor of medicine at New York State University Medical School. *Id.*

51. Church, *supra* note 2, at 27.

52. *Id.* It should be noted, however, that "urine, like saliva, has not been known to spread AIDS." *Id.*

53. Barber, *supra* note 12, at 63.

54. Adler, *supra* note 7, at 21.

55. *Id.* at 18.

56. *See infra* note 60 and accompanying text.

57. Barber, *supra* note 12, at 61.

58. *Battle Over AIDS Student*, *supra* note 49, at 1, col. 1. "Under the policy at issue, the city decides case by case whether children with AIDS should attend regular classes." *A Reporter's Notebook: AIDS Suit In Queens Produces Few Answers*, N.Y. Times, Sept. 23, 1985, § I, at 19, col. 1. "[N]obody at a school with an AIDS pupil is to know such a child is there." *Id.* at 19, col. 3.

The issue raised under this city policy is "whether such a child *should* be identified to the teacher." *Judge in Pupil AIDS Case Calls It a 'Tough Decision,'* N.Y. Times, Sept. 30, 1985, § B, at 5, col. 1 (emphasis added). For a discussion of the privacy rights of the student versus disclosure of the information of the disease, see *infra* note 131 and accompanying text.

the New York school system that a trial is now underway to determine the communicability of the disease.[59] The presence of the child in class, pending the outcome of the litigation, led angered parents to keep 12,000 children out of school.[60]

Other school districts have taken a more cautious approach. In Carmel, California, an eight-year-old boy diagnosed as having AIDS is being kept from attending class until "a reasonable social environment" can be created to facilitate the child's acceptance in the classroom.[61] In Kokomo, Indiana, Ryan White, a thirteen-year-old hemophiliac, contracted AIDS through the use of contaminated blood products. He has been monitoring his classes via a telephone hookup in his home.[62]

These cases represent the varying responses arrived at through the balancing of private rights against societal fears, either real or imagined. The problem in weighing the interests involved is best summed up by the following statements. On the one hand, "there are limits to what should be expected of society, too. Those who are well have a right to live reasonably free from fear and contamination from this disease. They should not be compelled to take unnecessary risks, especially with their children."[63] On the other hand, "[i]f suspicion and fear get the better of us, it could tear our society apart—and the ravages of AIDS will be doubled by the damage we inflict on ourselves."[64] The difficulty of the situation is compounded by the fact

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59. *Battle Over AIDS Student*, *supra* note 49, at 1, col. 1.

60. *Id.* "The boycotts were at their greatest on the opening day of school . . . when 12,000 students—25 percent of the total in Districts 27 and 29 were absent from classes. The actions diminished over the week, with 7,000 students—about 15 percent of the total—absent on Friday." N.Y. Times, Sept. 16, 1985, § B, at 1, col. 5. By September 20, 1985, attendance appeared to be normal. *City Sticks to Diagnosis of Girl in AIDS Dispute*, N.Y. Times, Sept. 20, 1985, § B, at 2, col. 5.

61. *AIDS Victim*, *supra* note 42, at 21, col. 1.

62. *See Health Experts Glad Reagan Cited AIDS*, L.A. Times, Sept. 19, 1985, § I, at 18, col. 1; White v. Western School Corp., No. IP 85-1192-C, slip op. (S.D. Ind. Aug. 23, 1985). On February 20, 1986, Ryan White was given permission to return to school. *AIDS victim to return to school*, USA Today, Feb. 20, 1986, § A, at 2, col. 1. Following a request by a parents' group, however, Circuit Judge Brubaker issued a temporary restraining order barring Ryan's future return to school. *AIDS Boy Back in School; Judge Later Blocks Return*, L.A. Times, Feb. 22, 1986, § I, at 18, col. 1.

63. Gergen, *supra* note 31, at 78.

64. Adler, *supra* note 7, at 24. "Down through the ages, society, in its reaction to epidemics, has not earned high marks." *Id.* at 23. Three examples are the Bubonic Plague, the worldwide influenza outbreak, and leprosy.

> [The] Bubonic Plague, an epidemic known as "the Black Death" that killed about 75 million people in Europe between 1347 and 1351, is a case in point. Carried from Asia by fleas (which, in turn, were carried by the rats who lived aboard merchant ships), the plague was widely perceived as a punishment for sin. It was also blamed, outrageously, on Europe's Jews, who were charged with poisoning the drinking water, and, in some cases, herded into wooden structures where they were burned alive.

Leerhsen, *Epidemics: A Paralyzing Effect*, NEWSWEEK, Sept. 23, 1985, at 23, 23.

that we are dealing with children. As David Ellenhorn, attorney for the seven-year-old girl in New York, stated, "She is a wonderful kid who just wants to go to school."[65]

II. CHILDREN WITH AIDS: AN EQUAL PROTECTION ANALYSIS[66]

The fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[67]

A. Rationality Test

In the context of equal protection decisions, it has been recognized that a state cannot function without classifying its citizens for various purposes and treating some differently than others.[68] Whether a

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> The worldwide influenza outbreak of 1918-19 was the third most devastating epidemic of all time, after bubonic plagues. As many as 50 million people were killed by virulent strains of the disease that circled the world several times. In Philadelphia, a particularly hard-hit U.S. city, as many as 4,500 died in one week; uniformed nurses going to and from house calls reported being alternately mobbed by flu victims seeking help or shunned by pedestrians fearful of encountering a carrier.

Id.

> Leprosy is, and always has been, universally regarded with horror and loathing, and it is conceded to be an incurable disease . . . . The horror of its contagion is as deep-seated today as it was more than two thousand years ago in Palestine. There are modern theories and opinions of medical experts that the contagion is remote and by no means dangerous; but the popular belief of its perils founded on the Biblical narrative, on the stringent provisions of the Mosaic law that show how dreadful were its ravages and how great the terror which it excited, and an almost universal sentiment, the result of a common concurrence of thought for centuries, cannot in this day be shaken or dispelled by mere scientific asseveration or conjecture.

Baltimore v. Fairfield Improvement Co., 87 Md. 352, 364-65, 39 A. 1081, 1084 (1898), *quoted in* Everett v. Paschall, 61 Wash. 47, 54, 111 P. 879, 882 (1910).

65. *Battle Over AIDS Student*, *supra* note 49, at 20, col. 1.

66. The fourteenth amendment applies as equally to children as to adults. *In re* Gault, 387 U.S. 1, 27-28 (1967).

67. U.S. CONST. amend. XIV. "We know from its history that it was meant particularly to combat inequality toward blacks. We also know, however—and would rightly presume it even if we didn't—that the decision to use general language, not tied to race, was a conscious one." J. ELY, DEMOCRACY AND DISTRUST 30 (1980). A substantive due process analysis need not be made. For a similar analysis, see the discussion of fundamental rights made under the equal protection clause, *infra* notes 107-18 and accompanying text.

68. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076 (1969). Under an equal protection analysis, there are three standards of review: (1) minimum scrutiny, requiring that the classification be rationally related to the achievement of a legitimate state interest; (2) intermediate scrutiny, requiring substantial relationship to the achievement of an important governmental interest; and

classification is valid depends upon "the character of the discrimination and its relation to legitimate aims."[69] This means that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[70]

Under the rational basis test,[71] deference is given to legislative judgment so that a classification is upheld where it is rationally related to achieving a legitimate state end.[72] This theory comprises the lowest level of equal protection scrutiny,[73] and an analysis of the AIDS dilemma should begin at this point.

In the 1930's, the Supreme Court handed down several landmark decisions establishing a federal right to protection from communicable disease.[74] This right is embedded in the police power of the state,[75] and allows the state, based upon principles of self defense and paramount necessity, to protect its citizens from epidemic disease.[76]

There are various steps of analysis which the government should undertake when confronted with a potentially hazardous situation involving a communicable disease. These include evaluation, measurement, and correlation.[77]

The first stage requires the involvement of the scientific community and, usually, the governing procedure "will reflect scientists' preferences for consequences, [and] attitudes towards risks."[78] However, if the outcome is unclear or debatable and further analysis is

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(3) strict scrutiny, which upholds legislation only if it is precisely tailored to further a compelling governmental interest. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-2, 16-6, 16-29, 16-30, 16-32 (1978).

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

70. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *See also* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949) (classification is valid if it includes "all [and only those] persons who are similarly situated with respect to the purpose of the law").

71. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371 (1971).

72. J. ELY, *supra* note 67, at 30. *See also* United States v. Carolene Prods. Co., 304 U.S. 144 (1938). This is especially true in the area of social welfare legislation. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 485 (1970); McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

73. J. ELY, *supra* note 67, at 30-31.

74. *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 525 (1934) (holding that the due process clause does not prohibit exercise of the regulatory power for the public welfare). *See also* Allen v. Ingalls, 182 Ark. 991, 33 S.W.2d 1099 (1930) (stating that compulsory immunization as a condition to school admission was constitutionally permissible); Morgenstern, *The Role of the Federal Government in Protecting Citizens From Communicable Diseases*, 47 U. CIN. L. REV. 537, 543 (1978).

75. Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

76. *Id.* at 27. *See, e.g.*, Immigration & Naturalization Act § 212(a),(b), 8 U.S.C. § 1182(a)(6) (1982) (permitting the exclusion of aliens "afflicted with any dangerous contagious disease").

77. Morgenstern, *supra* note 74, at 547.

78. *Id.*

needed, then any action taken must balance available information with governmental options.[79] Thus, as long as state action is promulgated for the common welfare, a future determination that the action was wrong is inconsequential.[80] Under such a theory, courts have determined that a rationality test is applicable when dealing with communicable diseases.[81]

States have, in the past, successfully used their police power to prevent the spread of contagious diseases. Small pox,[82] yellow fever,[83] tuberculosis,[84] and leprosy[85] are diseases which have been regulated by compelling vaccination[86] or by the quarantine of individuals.[87]

The AIDS dilemma, however, presents a more difficult situation. First, no vaccine is presently available,[88] and second, quarantine of an AIDS victim would have to be for life.[89] Moreover, this dilemma is further complicated by the fact that although AIDS is contagious, the

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79. *Id. See also* Furrow, *Governing Science: Public Risks and Private Remedies*, 231 U. PA. L. REV. 1403, 1450 (1983) (stating that the choice of any probabilities effecting tort litigation will inevitably reflect a political as well as an expert viewpoint).

80. *See* Morgenstern, *supra* note 74, at 547.

81. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905). *See also* Damme, *Controlling Genetic Disease Through Law*, 15 U.C.D. L. REV. 801, 804-5. *See generally* L. TRIBE, *supra* note 68, at §§ 16-2, 16-6, 16-12 (1978).

82. *See, e.g., Jacobson*, 197 U.S. at 25, 29.

83. *Id.* at 29.

84. *See, e.g.*, Cherry v. Williams, 147 N.C. 452, 61 S.E. 267 (1908) (granting temporary restraining order *against* maintenance of tuberculosis hospital which, if properly maintained, would be held to benefit the community rather than create a menace).

85. *See* 42 U.S.C. § 247e (1980) (granting the Surgeon General authority to apprehend, detain, and treat persons subject to the health care of the United States Public Health Service for leprosy).

86. *See, e.g., Jacobson*, 197 U.S. at 27-28 (holding that the risk associated with vaccination was slight compared to the public interest in the prevention of smallpox); Gamble v. State, 206 Tenn. 376, 383-87, 333 S.W.2d 816, 820-21 (1960) (holding a program requiring immunization as a prerequisite for school attendance to be a valid exercise of police power).

87. *See, e.g.*, People *ex rel.* Barmore v. Robertson, 302 Ill. 422, 134 N.E. 815 (1922). For a general discussion on valid state use of police power, see Damme, *supra* note 81; L. TRIBE, *supra* note 68.

88. *See supra* notes 27-28 and accompanying text.

89. *See* Pagano, *Quarantine Considered for Aids Victims*, CAL. LAW., Mar. 1984, at 17. *See also* Adler, *supra* note 7, at 23 (stating that "public-health officials have broad authority to quarantine people with dangerous illnesses, but their powers do not lend themselves well to the fight against AIDS").

Although quarantines deprive an individual of his right to liberty, they are nonetheless valid. *Jacobson*, 197 U.S. at 26-27. If necessary for the common good, " 'health authorities [need not] wait until the person affected with a contagious disease has actually caused others to become sick by contact with him, before he is placed under quarantine.' " Damme, *supra* note 81, at 812 n. 42 (quoting *Barmore*, 302 Ill. at 434, 134 N.E. at 820).

risk of contracting AIDS through casual contact is said to be negligible.[90]

Because so much about AIDS is still a mystery, society's right to be free from communicable disease must be factored in the balance between governmental objections and the rights of individuals with AIDS. Balancing these factors under a rationality test—the lowest level of judicial scrutiny—would most assuredly validate the policy excluding children with AIDS from school because this would be a reasonable method of protecting healthy school children. It is therefore necessary to determine whether a higher standard of review is mandated by the constitution.

B. Strict Scrutiny

Classifications may be subjected to strict scrutiny review[91] either because the classification has impinged upon a fundamental right,[92] or because the class has been determined to be suspect.[93] If either is established, then the state will have the burden of meeting a two-prong test. First, the state must establish that it has a compelling interest in taking action.[94] Second, the means that it uses to effectuate that interest must not compromise individual rights more than is necessary.[95]

1. Suspect Class

"[T]he experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups."[96] The Supreme Court has determined that these groups are deserving of extraordinary protection within the political process and should be deemed a suspect class.[97] Justice Stone, in his famous footnote in *United States v. Carolene Products Co.*,[98] defined a suspect class as a "discrete and insular minority" that is kept out of the political process.[99]

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90. *See supra* notes 9-15 and accompanying text.

91. *See supra* note 68 and accompanying text.

92. *See infra* notes 107-18 and accompanying text.

93. See *infra* notes 96-106 and accompanying text. *See also* Plyler v. Doe, 457 U.S. 202, 238 n.2 (1982) (Powell, J., concurring). "The essential inquiry . . . is . . . inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 173 (1972).

94. *See infra* notes 119-34 and accompanying text.

95. *See infra* notes 119, 135-43 and accompanying text.

96. *Plyler*, 457 U.S. at 216 n.14.

97. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (stating that suspect classifications tend to be irrelevant to any proper legitimate legislative purpose).

98. 304 U.S. 144 (1938).

99. *Id.* at 152 n.4 (stating that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those polit-

Three factors used to determine suspect classifications flowed from this definition: (1) the class must have a long history of discrimination; (2) it must have an immutable trait which distinguishes the class from others; and (3) there must exist stereotypical characteristics unrelated to the abilities of the class. All of these serve to keep the class out of the political process.[100] In the past, classifications based on race[101] and national origin[102] have qualified as suspect and have met the three factor test shown above. Application of this test to children with AIDS is necessary to determine whether they may be considered a suspect class.

First, although children with AIDS have not been subject to a long history of discrimination, prejudice and fear have already manifested themselves and there are no signs that either will subside. As such, logic does not dictate that this should be an overriding concern. Second, notwithstanding that visible signs of AIDS may not be readily apparent, the disease itself is an immutable characteristic because a child has no control over it and because, if the disease is publicized, a child will be marked just as strongly as if he possessed a physical trait.[103] Third, because children with AIDS are carriers of a communicable disease, they face being stereotyped and shunned by society.

However, children with AIDS do have their interests represented in both the political and social realm.[104] New York Mayor Edward Koch provides one example of a political leader who has sided with young AIDS victims,[105] thereby representing their political interests. Government spokespersons for the Centers for Disease Control have further represented AIDS victims by recommending that they be allowed to attend school.[106] Therefore, the *Carolene* footnote test is

ical processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

100. Comment, *Suspect Classifications: A Suspect Analysis*, 87 DICK. L. REV. 407, 413 (1983).

101. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964).

102. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

103. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 523 (1976) (Stevens, J., dissenting) ("The fact that illegitimacy is not as apparent to the observer as sex or race does not make this governmental classification any less odious.").

104. *See, e.g.*, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985) (holding that the mentally retarded are not a suspect class because they have had their interests sufficiently protected in the political processes).

105. *See, e.g., New Panel Named For AIDS Testing*, N.Y. Times, Sept. 29, 1985, § 4, at 8, col. 4.

106. *See Reagan Sympathizes*, *supra* note 41, at 14, col. 3; *Battle Over AIDS Student*, *supra* note 49, at 1, col. 1.

not satisfied, and children with AIDS do not compose a suspect class for strict scrutiny purposes.

2. Fundamental Rights

Under an equal protection analysis, state action may also be subjected to strict scrutiny if a fundamental right[107] is encroached upon.[108] The essential inquiry then becomes whether education rises to the level of a fundamental right.

In *Brown v. Board of Education*,[109] the Supreme Court stated:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . . . It is the very foundation of good citizenship . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[110]

Furthermore, "denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."[111] Yet in *San Antonio Independent School District v. Rodriguez*,[112] the Supreme Court held that education is not a right guaranteed to individuals under the constitution.[113] As such, education is not so fundamental a right as to trigger strict scrutiny analysis.[114]

There is some authority, however, for the proposition that education is a fundamental right. This is evidenced by Justice Marshall's dissent in *Rodriguez*,[115] where he stated that "the fundamental importance of education is amply indicated by the prior decisions of this Court . . . and by the close relationship between education and some of our most basic constitutional values."[116] The California Supreme

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107. A "fundamental right" is a right that is founded upon the express terms of the constitution or which may necessarily be implied from those terms. Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982). *See also* Sidle v. Majors, 264 Ind. 206, 209-10, 341 N.E.2d 763, 766 (1976); *Developments in the Law—Equal Protection*, *supra* note 68, at 1132. "When an equal protection decision rests on this basis, it may be little more than a substantive due process decision decked out in the trappings of equal protection."

108. *See* Graham v. Richardson, 403 U.S. 365, 375-76 (1971); *Developments in the Law—Equal Protection*, *supra* note 68, at 1120-21.

109. 347 U.S. 483 (1954).

110. *Id.* at 493.

111. *Plyler*, 457 U.S. at 221-22.

112. 411 U.S. 1 (1973).

113. *Id.* at 35.

114. The Supreme Court has recognized that education is not simply a benefit indistinguishable from other forms of social welfare. *Plyler*, 457 U.S. at 221. Once it is provided to citizens, there does exist a right to a certain minimum level of education. Fialkowski v. Shapp, 405 F. Supp. 946, 958 (E.D. Pa. 1975).

115. 411 U.S. at 70-133 (Marshall, J., dissenting) (appendices omitted).

116. *Rodriguez*, 411 U.S. at 111 (Marshall, J., dissenting). *See also* Brown v. Board of Educ., 347 U.S. 483 (1954).

Court in *Serrano v. Priest*,[117] also held education to be a fundamental right.

Marshall's reasoning in his dissent is persuasive, and perhaps it is time for the Court to reconsider its decisions in cases like *Rodriguez*. If courts are willing to consider education a fundamental right, then strict scrutiny analysis will apply and the prohibition of children with AIDS from attending school will be subject to the highest level of judicial review. If not, the standard of review for such laws *cannot* be strict scrutiny because children with AIDS do not form a suspect class and education is not considered a fundamental right.

If one proceeds on the premise that education is a fundamental right, then the state will have the burden of satisfying the two-prong strict scrutiny test, which will be discussed below. If not, then an intermediate level of review may be required.[118]

3. The Two-Prong Strict Scrutiny Test

Laws subjected to strict judicial scrutiny will only be upheld if (1) the state can demonstrate a compelling interest in the action taken, and (2) the action taken was precisely tailored to serve the governmental interest.[119] The first prong of this test requires that state action be "necessary to the accomplishment of some permissible state objective,"[120] and places a "very heavy burden of justification" on the state.[121] Although this is a heavy burden, it can be met if the "public interest involved outweighs the detriments that will be incurred by the affected private parties."[122]

In a situation where children with AIDS are excluded from school, the finding of a compelling state interest will necessarily depend on the communicability of the disease. In *New York State Association for Retarded Children, Inc. v. Carey*,[123] the decision of the New York City Board of Education to exclude certain mentally retarded chil-

117. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), *cert. denied sub nom.* Clowes v. Serrano, 432 U.S. 907 (1977).

118. *See infra* notes 144-53 and accompanying text.

119. *See, e.g., Cleburne*, 105 S. Ct. at 3255; *Plyler*, 457 U.S. at 217. *See generally* J. ELY, *supra* note 67, at 146; L. TRIBE, *supra* note 68, at §§ 16-2, 16-6, 16-29, 16-30, 16-32.

120. Loving v. Virginia, 388 U.S. 1, 11 (1967). The Court requires a "legitimate overriding purpose" behind the statute in order for it to withstand strict scrutiny. *Id.*

121. *Id.* at 9.

122. *Developments in the Law—Equal Protection*, *supra* note 68, at 1103. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 217-18 (1944) (upholding the exclusion of all Japanese from west coast military zones because of the danger of espionage and sabotage that they presented during World War II).

123. 612 F.2d 644 (2d Cir. 1979).

dren, who were carriers of hepatitis B,[124] from school was overturned. The court determined that the health hazard posed by hepatitis B carrier children was nothing more than a remote possibility,[125] and further added that the classification was invalid because "only mentally retarded youngsters who were carriers of the hepatitis B antigen were isolated; no effort was made to identify and exclude normal children who were carriers."[126]

Furthermore, in *LaRocca v. Dalsheim*,[127] prisoners at the Downstate Correctional Facility in Fishkill, New York, sought an injunction against the correctional facility to prohibit the forming or maintaining of a central AIDS program at the prison. They also sought removal of all AIDS sufferers from the prison for treatment at the hospital. The court denied the request for an injunction, stating that "removal [of prisoners with AIDS] is not necessary, as long as the precautions for hepatitis-B are followed in the prison."[128]

These cases represent situations very similar to those facing children with AIDS, and stand for the proposition that children with AIDS should be allowed to attend school. However, the holdings in both courts are limited and allow subsequent courts to re-evaluate the situations based on changing scientific knowledge.[129] Although the risk of contracting AIDS through casual contact is still considered slight,[130] scientists have discovered the virus in more bodily fluids[131] and have found that the latency period of the disease can last up to six years.[132] Furthermore, *Carey* dealt with hepatitis B, and although it is a serious disease, it is, unlike AIDS, not normally fatal.[133]

While these cases raise doubts as to whether the state has a compelling interest in excluding school children with AIDS, the state's right to protect life is so fundamental that it is firmly established as being within its police power.[134] Therefore, it may be argued that the state has a sufficiently compelling interest to meet the first prong of the strict scrutiny test.

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124. Hepatitis B is a viral disease transmitted by the exchange of body fluids. *See* MERCK MANUAL OF DIAGNOSIS & THERAPY 835-43 (14th ed. 1982).

125. *Carey*, 612 F.2d at 650.

126. *Id.* at 649. The court's reasoning here turns on the principle of underinclusion. For further discussion of this principle, see *infra* note 139 and accompanying text.

127. 120 Misc. 2d 697, 467 N.Y.S.2d 302 (1983).

128. *Id.* at 709, 467 N.Y.S.2d at 311.

129. *See id.*; *Carey*, 612 F.2d at 651.

130. *See supra* note 9 and accompanying text.

131. *See supra* notes 2, 13-15, and accompanying text.

132. *See supra* notes 17-20 and accompanying text.

133. MERCK MANUAL OF DIAGNOSIS & THERAPY, *supra* note 123, at 840.

134. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (holding that a state has a sufficiently compelling interest in the potentiality of life to proscribe abortion during the third trimester of pregnancy).

The second prong of the strict scrutiny test requires that the means the state uses to implement its policy be narrowly tailored to fit its desired goal.[135] A classification is valid only if it is "necessary to accomplish a legitimate purpose . . . [and] some alternative to the suspect classification [could not] have been used to attain the same end."[136] Furthermore, if a fundamental interest is involved, then "a less onerous alternative should, if possible, be employed to accomplish the state's objective."[137]

At first glance, the policy of excluding children with AIDS from school seems to fit the goal of preventing the spread of AIDS to children who appear perfectly healthy. However, two problems arise. First, completely denying a child the right to attend public school is a major intrusion upon the child's right to education, and it could be argued that a less onerous solution, such as allowing children with AIDS to attend school so long as they are carefully supervised, can be applied. Although appealing, the implementation of such a solution itself creates numerous problems, varying from invasion of the child's right to privacy[138] to the difficulty of closely watching a child

135. *See, e.g., Cleburne*, 105 S. Ct. at 3255; *Plyler*, 457 U.S. at 217.

136. *Developments in the Law—Equal Protection*, *supra* note 68, at 1102.

137. *Id.* at 1102 n.154. *See also* Carrington v. Rash, 380 U.S. 89 (1965); *Jacobson*, 197 U.S. at 31 (stating that if a statute purporting to preserve the public health has no real or substantial relation to the invasion of a fundamental right, then it is the duty of the courts to give effect to the Constitution).

138. The AIDS crisis creates a dilemma involving the privacy rights of AIDS victims and the duty of public disclosure. *See generally* Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426 (1982).

The first step in this analysis requires an evaluation of the privacy rights allegedly violated. For a discussion of the Court's application and development of the right to privacy, see Roe v. Wade, 410 U.S. 113 (1973) (holding that privacy rights encompass a woman's right to have an abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (granting unmarried persons the right to use contraceptives); Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing the use of contraceptives by married couples as a specific privacy right).

Privacy rights are not absolute, however, and may yield to a state's police power. *See, e.g.*, N.Y. PUB. HEALTH LAW §§ 2300-2311 (McKinney 1985), *construed in* LAMBDA LEGAL DEFENSE & EDUC. FUND, INC., AIDS LEGAL GUIDE 18 (1984) ("physicians have long been required to report confirmed cases of tuberculosis and syphilis to local health authorities"). *See also* Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (holding that a therapist has a duty to warn a foreseeable victim of the potential harm one of his patients may cause); Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920) (doctor's disclosure of patient whom he believed to have syphilis was privileged). *See generally* Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025 (1974). Courts have also allowed private suits over privacy objections. *See, e.g.*, Kathleen K. v. Robert B., 150 Cal. App. 3d 992, 996 & n.3, 198 Cal. Rptr. 273, 276 & n.3 (1984) (holding that privacy rights do not bar suits based on the fraudulent concealment of venereal disease and further

throughout the school day. These problems should not, however, invalidate any state action.

Second, a more difficult problem with the classification is that it is underinclusive,[139] and is therefore less acceptable when dealing with suspect classifications.[140] Even so, courts have been less apt to invalidate state actions based on underinclusiveness[141] because step-by-step reform may be needed,[142] and because it is often impossible to remedy an entire problem at once.[143]

Under the present scenario, a policy excluding children with AIDS from school is underinclusive because there are other persons from whom healthy school children could contract the disease, such as a janitor or a teacher. However, at the present time, it is impossible for the state to eliminate all the risks involved. Therefore, underinclusion is not determinative, and the means-ends test is nonetheless met.

At this point, it must be reiterated that under the previous analysis, children with AIDS do not compose a suspect class, nor is education considered a fundamental right by the Supreme Court. Therefore, the analysis of this two-prong test would be applicable *only* if the Court extends present constitutional doctrines. Nonetheless, if the strict scrutiny test can be satisfied, then intermediate scrutiny would also be met.

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implying the same rationale applicable to AIDS victims); Earle v. Kuklo, 26 N.J. Super. 471, 98 A.2d 107 (1953) (holding a landlord liable for failing to disclose the danger of a contagious disease).

The second step in this analysis requires a determination of the extent of disclosure required. *See, e.g.*, S. 292, 1985-86 Cong. Sess., Cal. Laws § 1 (protecting the identity of "any and all individuals who are subjects of research or surveillance funded in full or in part by the state concerning medical, psychological, social, or the behavioral aspect of AIDS. . . ."); N.Y. PUB. HEALTH LAW § 2306 (McKinney 1985), *construed in* AIDS LEGAL GUIDE, INC., *supra*, at 18 (reports of communicable diseases by physicians to public health authorities "are to be kept confidential and access is restricted except insofar as necessary to carry out the statute").

Although the issue of disclosure of the identity of AIDS students to teachers is beyond the scope of this comment, if children with AIDS are allowed in school, then limited disclosure should be made. *See generally* Blair v. Union Free School Dist., 67 Misc. 2d 248, 324 N.Y.S.2d 222 (Dist. Ct. 1971) (holding that a student-teacher relationship is a special or confidential relationship, the breach of which will give rise to a cause of action).

139. "Under-inclusion occurs when a state benefits or burdens persons in a manner that furthers a legitimate public purpose but does not confer this same benefit or place this same burden on others who are similarly situated." *Developments in the Law—Equal Protection*, *supra* note 68, at 1084.

140. *Id.* Overinclusive classifications are likewise unacceptable. Overinclusion occurs when a "classification imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims." Tussman & tenBroek, *supra* note 70, at 351.

141. *Developments in the Law—Equal Protection*, *supra* note 68, at 1084-85.

142. Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

143. *Developments in the Law—Equal Protection*, *supra* note 68, at 1085.

C. Intermediate Scrutiny

"The Supreme Court has created a two-tiered scheme of suspect classifications—those that receive 'strict' scrutiny and those that receive only 'intermediate' scrutiny."[144] Under an intermediate scrutiny analysis, the government interest must be substantially related to achieving important governmental objectives.[145] This allows the Court to "evaluate the rationality of the legislative judgment with reference to well-settled constitutional principles."[146] The Court may "lift them above the level of the pragmatic political judgments of a particular time and place."[147] Traditionally, intermediate scrutiny has been applied to classifications involving women because they possess an immutable trait and have been stereotyped in ways unrelated to their abilities.[148]

In *Plyler v. Doe*,[149] the Supreme Court held that under the equal protection clause, children of illegal aliens could not be denied public education. Although the Court did not hold children of illegal aliens to be a suspect class nor education to be a fundamental right, the Court did determine that education was more than just a "benefit indistinguishable from other forms of social legislation."[150] Denial of an education to a "discrete class of children not accountable for their disabling status" was a constitutional violation.[151] As Chief Justice Burger stated, "[B]y patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental rights analysis, the [majority] spins out a theory custom-tailored to the facts of these cases."[152]

Like children of illegal aliens, children with AIDS should be considered quasi-suspect because they are subject to extreme prejudice and are marked by an immutable characteristic. Moreover, education is a right that, if not considered fundamental, is at least deserving of

144. Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1287 n.14 (1985).

145. *Id. See also* Craig v. Boren, 429 U.S. 190, 197 (1976); Reed v. Reed, 404 U.S. 71, 76 (1971).

146. *Plyler*, 457 U.S. at 218 n.16.

147. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (quoting A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 114 (1976)), *construed in Plyler*, 457 U.S. at 218 n.16.

148. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

149. 457 U.S. 202 (1982).

150. *Id.* at 221.

151. *Id.* at 223-24.

152. *Id.* at 244 (Burger, C.J., dissenting).

a higher standard of review. Therefore, the combination of education and a discrete class of children deserving protection should be sufficient to trigger intermediate scrutiny.[153]

As previously stated, the standard of review under intermediate scrutiny analysis is a substantial relation test.[154] Although the Supreme Court has not fully elaborated on the degree of judicial scrutiny involved in evaluating what constitutes an "important governmental objective," a lengthy discussion is not required here because the state policy of keeping children with AIDS out of school has already been shown to meet a strict scrutiny test.[155] Furthermore, the problem of underinclusiveness that arises under the strict analysis would not cause difficulty under intermediate scrutiny. Therefore, a state policy excluding children with AIDS from public schools would pass an intermediate scrutiny test and would therefore be constitutional.

III. CONCLUSION

Courts are currently being called upon to decide whether school boards may constitutionally exclude children with AIDS from public schools. The issue presents an anomaly. On one hand, AIDS is a normally fatal disease with a long latency period, and conjures visions of mass hysteria. On the other hand, AIDS is apparently a very difficult disease to contract by casual contact, and the risk of its spreading in the classroom is negligible. Therefore, the issue cannot be answered in absolute terms, and the courts must keep close watch on medical discoveries.

Nonetheless, the constitutionality of excluding AIDS children from school can be determined under the equal protection clause of the fourteenth amendment. Under equal protection analysis, laws excluding children with AIDS from school will be upheld because each possible tier of judicial review can be satisfied. Even so, deprivation of a right so important as education, which includes social interaction, should not be taken lightly by the courts, and the compelling state interest in protecting its citizens must not be abused.

The long latency period, transmission by casual contact in Africa, and the rate at which medical science is learning about this disease dictate that, for the moment, the law proceed with caution. Yet we cannot let fear control our decisions. For in the end, we are dealing

153. *See, e.g., In re* G.H., 218 N.W.2d 441 (N.D. 1974) (accepting the argument that the handicapped should be classified as a suspect class). *But see Cleburne*, 105 S. Ct. at 3257-58 (stating that the mentally retarded cannot be held as quasi-suspect because it would open the door for too many new suspect classifications, such as the aged, the disabled, the mentally ill, and the infirmed).

154. *See supra* notes 144-53 and accompanying text.

155. *See supra* notes 119-22, 134-43 and accompanying text.

with children—not with fundamental rights or quasi-suspect classes—but with children who simply want to go to school.

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