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PREVENTING THE SPREAD OF AIDS BY RESTRICTING SEXUAL CONDUCT IN GAY BATHHOUSES: A CONSTITUTIONAL ANALYSIS

I. INTRODUCTION

In the late Spring of 1981, the Centers for Disease Control (CDC) in Atlanta received reports of clusters of two rare diseases, Kaposi's sarcoma (KS) and Pneumocistis carinii pneumonia (PCP).[1] All the cases reported to the CDC were linked by a characteristic immunodeficiency.[2] These were the first reported cases of Acquired Immune Deficiency Syndrome, commonly called "AIDS."

AIDS is a deadly disease[3] with no known cause or cure.[4] It can only be characterized by its expression, diseases which have as their necessary precondition an underlying immunodeficiency which cannot otherwise be explained.[5]

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1. Selik, Haverkos and Curran, *Acquired Immune Deficiency Syndrome (AIDS). Trends in the U.S., 1978-1982*, 76 AM. J. MED. 394 (1984). The first cases reported were of PCP in four homosexual men in Los Angeles. Shortly thereafter, 26 cases of KS were reported from New York, San Francisco, and Los Angeles.

2. *Id.* Immunodeficiency is a deficiency in the body's immune system.

3. Forty per cent of those stricken with the disease have died. Landesman and Vieira, *Acquired Immune Deficiency Syndrome (AIDS): A Review*, 143 ARCH. INTERNAL MED. 2307 (1983). Because the number of cases reported per quarter year increases, Selik, Haverkos, and Curran, *supra*, note 1, at 495, and the length of time from diagnosis to death is anywhere from days to years, the mortality rate for those diagnosed in previous years is higher. The two year mortality rate (those who have been diagnosed for two or more years) is in excess of 70%. Landesman and Vieira, *supra*, at 2307. "However, when one breaks down the mortality rate according to the year of diagnosis, the ultimate mortality may well approach 100%." Fauci, Macher, Longo, Lane, Rook, Masur and Gelman, *Acquired Immune Deficiency Syndrome; Epidemiologic, Clinical, Immunologic and Therapeutic Considerations*, 100 ANNALS OF INTERNAL MED. 92, 94 (1984) [hereinafter cited as Fauci.].

4. "The etiology of AIDS is unknown." Landesman and Vieira, *supra* note 3, at 2307. Treatment is limited to the diseases which arise out of the immunodepression, but not the basic immune defect. *Id.* at 2308.

5. "The CDC defines a case of AIDS as a patient with a reliably diagnosed disease that is at least moderately indicative of an underlying cellular immunodeficiency when no known cause or reduced resistence to that disease is present." Selik, Haverkos, and Curran, *supra* note 1, at 493. Typical of the diseases indicative of AIDS are

No patient has successfully regained immunocompetence (been cured) through treatment.[6] Therefore treatment has been mainly supportive, directed at controling the secondary infections and malignancies.[7]

The geographical, social and ethnic clustering of cases suggests that AIDS is caused by a transmissible agent, most likely a virus.[8] It is generally believed that the viral agent suppresses the

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Cryptosporidiosis: an intestinal infection causing diarrhea for more than one month; Pneumocystis carinii pneumonia; strongyloidosis: causing pneumonia or central nervous system infection; Toxoplasmosis: causing pneumonia or central nervous system infection; Candidiasis: causing esophagitis (inflamation of the esophagus); Cryptococcosis: causing central nervous system or disseminated (scattered) infection; "atypical" mycobacteriosis: causing disseminated infection; cytomegolovirus: causing pulmonary, gastrointestinal tract, or central nervous system infection; herpes simplex virus: causing chronic infection on the skin or mucous membrane with ulcers persisting for more than one month, or pulmonary, gastrointestinal tract or disseminated infection; progressive multifocal leukoencephalopathy: a fatal disease destroying the cerebral hemispheres of the brain; Kaposi's Sarcoma: a rare form of malignant skin cancer; and lyphoma limited to the brain: an unusual anatomic localization for cancer of the lymph nodes. *Id.* at 499.

6. Landesman and Vieira, *supra* note 3, at 2307.

7. Fauci, *supra* note 3, at 101.

8. In patients with AIDS the T-cells (a type of white blood cell) of the lymph system are reduced in number and function. These T-cells protect the body against infection from viruses, protozoa, fungi, and microbial agents. When T-cell dysfunction occurs due to AIDS, the body succumbs to these infectious agents. Ammann, Dristy, Volberding, *et al.*, *The Acquired Immune Deficiency Syndrome (AIDS)—A Multidiciplinary Enigma*, 140 W.J. MED. 66-67 (1984). Three viruses (or possibly variants of the same virus) have been identified as candidate AIDS agents. Human T-cell Leukemia virus Type III (HTLV-III) was isolated from the T-lymphocytes of AIDS patients by Dr. Gallo of the National Institute of Health. Types I and II have been found to cause immune impairment and a rare T-cell leukemia. Dr. Montagnier, at the Pasteur Institute in France, has isolated a virus from the lymphocytes of a patient with lymphadenopathy (sometimes referred to as "pre-AIDS"). This virus appears to be different than the one isolated by Gallo. Fauci, *supra* note 3, at 104. Dr. Jay Levy has independently isolated a virus from the T-cells of a patient suffering from lymphadenopathy which he calls AIDS Related Virus (ARV). S.F. Chron., Aug. 17, 1984, at 4, col. 1; Bay Area Reporter, Aug. 16, 1984, at 1, col. 3.

Lymphadenopathy ("pre-AIDS"), a disease of the lymph nodes, has been suggested as a prodrome (precursor) to classic AIDS. It has been defined by the CDC as a chronic, unexplained lymphadenopathy in gay men of at least 3 months duration involving 2 or more extrainguinal (outside the groin) sites absent any current illness or drug use known to cause lymphadenopathy; and the presence of reactive hyperplasia (abnormal increase in the number of cells in normal tissue) in a biopsy. CDC, *Persistent, Generalized Lymphadenopathy Among Homosexual Males*, 31 MORTALITY AND MORBIDITY WEEKLY REP. 249, 249 (1982). Although the relationship between lymphadenopathy in gay men and AIDS is unclear, its temporal relationship as a precursor and the substantial number of lymphadenopathy patients who eventually develop AIDS, suggests it is a prodrome of AIDS.

normal function of the body's immune system.[9]

Since the first reported outbreak in 1981, AIDS has spread in epidemic fashion. As of November 9, 1984, the Centers for Disease Control has received reports of 6,931 cases in the United States.[10] The disease has spread throughout the U.S. at a logarithmic rate. 935 cases were reported in 1982, and 1,924 cases were reported in 1983. As of March, 1984, five new cases were being reported to the CDC each day.[11] Presently the number of cases doubles every six months.[12] Of the cases reported, 70% are in homosexual and bisexual men, 18% in intravenous drug users, 4% in Haitians, 1% in hemophiliacs, and 7% in other groups.[13]

It is theorized that the causal agent of AIDS is transmitted via contact with the blood or mucus membranes of a carrier.[14] Close mucosal contact allows the carrier's blood to come in contact with the blood of the receiver, by which the agent is transferred. Such mucosal contact typically occurs during anal and oral sexual intercourse among homosexual males. This theory explains why homosexual males are in a high risk category. Direct blood transfer may account for the prevalence of the disease among intravenous drug users,[15] and hemophiliacs.[16] Present patterns of transmission suggest that AIDS will remain largely confined to the groups already affected.[17]

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9. Fauci, *supra* note 3, at 101.

10. Telephone interview with Michael Serban, Associate, John Artman and Associates (Dec. 12, 1984) (public relations contractor with the City of San Francisco Public Health Department).

11. Landesman and Vieira, *supra* note 3, at 2307.

12. As of June, 1984, there were 4,761 cases of AIDS nationwide reported to the CDC. Flaherty, *A Legal Emergency Brewing Over AIDS*, 6 NAT'L L.J. 44 (July 9, 1984).

13. Selik, Haverkos and Curran, *supra* note 1, at 499. Of the 7% reported in other groups, 0.9% of those persons had heterosexual intercourse with a person in one of the four principal risk groups, and 1.5% in persons who had received a blood transfusion within five years before the onset of AIDS.

14. La Rocca v. Dalsheim, 120 Misc. 2d 697 (N.Y. 1983). (Testimony of Dr. Hanrahan, internal medicine specialist and epidemiologist at CDC). There is no evidence that transmission by casual contact is possible. Fauci, *supra* note 3, at 93.

15. Intravenous drug users presumably transmit the disease by use of contaminated needles. Landesman and Vieira, *supra* note 3, at 2307.

16. Gottlieb, Schroff and Schanker, *Pneumocystis Carinii Pneumonia and Mucosal Candidiasis in Previously Healthy Homosexual Men*, 305 NEW ENG. J. MED. 1430 (Dec. 10, 1981); Seigal, Lopez and Hammer, *Severe Acquired Immunodeficiency in Male Homosexuals Manifested by Chronic Perinatal Ulcerative Herpes simplex lesions*, 305 NEW ENG. J. MED. 1439 (Dec. 10, 1981).

17. Researchers expect only minor intrusions into other populations, possibly

It appears that more people have been exposed to the agent than have developed the syndrome.[18] Therefore, it is possible that a significant number of persons have developed immunity.[19]

The probability of a person in a high risk category contracting AIDS is not known.[20] The San Francisco Department of Public Health, in conjunction with the CDC, made a study of the risk factors for AIDS in a sample of 50 homosexual and bisexual men with AIDS and 120 matched healthy homosexual controls.[21] The study revealed that among the major risk factors in the cases was a history of multiple and repeated infections with classic and parasitic sexually-transmitted diseases, and a history of multiple and diverse sexual encounters.[22] There was a significant preponderance of syphillis, non-B Hepatitis and acute amebiasis[23] in the histories of those with AIDS. Among the most significant findings was the promiscuity of the stricken patients. While the control group averaged a mean of 25 different sexual partners in the year prior to the study, the men with AIDS averaged a mean of 65 different sexual partners in the year prior to their diagnosis as carriers. Fifty percent or more of their partners were encountered in the anonymous setting of gay bathhouses.[24]

The rate of progression of the syndrome spans a broad continuum. At one extreme is a fulminating illness where the patient rapidly succumbs to opportunistic infection within hours or

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through a blood transfusion, Fauci, *supra* note 3, at 92; or sexual intercourse between gay or bisexual men and heterosexual women, S.F. Chron., Dec. 6, 1984, at 1, col. 4.

18. A 1984 study by Dr. Connant at the University of California in San Francisco found antibodies to AIDS Related Virus (ARV) in 64% of the gay men tested in a random sample. *See supra* note 7. Antibodies were found in the blood of all the AIDS patients and 92% of their sexual partners. No antibodies were found in the blood of heterosexuals not in the other high risk categories. S. F. Chron., Aug. 17, 1984, at 4, col. 1.

19. Fauci, *supra* note 3, at 94.

20. Kalish, Goldsmith, Green, Hsu, and Phair, *Acquired Immunodeficiency Syndrome in a Patient with Multiple Risk Factors*, 143 ARCH. INTERNAL MED. 2311 (Dec. 1983). Neither is the probability of contracting AIDS known for persons with multiple risk factors.

21. Jaffe, Choi, and Thomas *et al.*, *National Case Control Study of Kaposi's sarcoma and Pneumocystis carinii in Homosexual Males, Part I and II*, 99 ANNALS INTERNAL MED. 145 (1983) [hereinafter cited as Jaffe].

22. Ammann, *supra* note 8, at 69 (citing Jaffe, *supra* note 21, at 149).

23. Acute amebiasis is severe amoebic infection, often of the intestine, forming ulcers.

24. Jaffe, *supra* note 21, at 149.

days of the onset of the illness. At the other extreme, the patient may suffer from a prodrome such as lymphadenopathy,[25] lasting weeks to months prior to the onset of classic AIDS. This form of "pre-AIDS" may result in fevers, substantial weight loss, malaise, and diarrhea.[26] Midrange in the spectrum are patients who develop lesions of KS or other malignant neoplasms,[27] with the subsequent spread or complication of the malignancy by superimposed opportunistic infections. Most patients ultimately succumb to overwhelming infection.[28]

Classic AIDS has a substantial debilitating effect on the patient. One man's experience is illustrative:

> For the first time in my life . . . I found myself bedridden with a cold that wouldn't go away, viral bronchitis, fever, diarrhea, loss of appetite, and extreme fatigue. These problems persisted for several months and were coupled with the discovery of swollen lymph nodes. . . . Then I developed chronic ear infections, shingles on the backs of both legs and a persistent sore throat. The diarrhea continued and nausea became a fact of everyday life; eating became increasingly difficult — I began to lose weight.
>
> I was frightened and depressed by the fact that the illnesses were multiple, and that no sooner would one go away than something else would appear. I then began to experience with increasing frequency the most alarming and intimidating of all these maladies — night sweats. Sometimes I would wake up crying because I was so cold and frightened. No amount of preparation before bed could relieve the anxiety and fear. . . . I dreaded what I needed most — sleep. I didn't want to close my eyes.[29]

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25. See *supra* note 8 and accompanying text.

26. Landesman and Vieira, *supra* note 3, at 2307.

27. For definition of KS, *see supra* note 5; malignant neoplasm: a cancerous growth in tissue.

28. Landesman and Vieira, *supra* note 3, at 2307. An autopsy report of 36 AIDS victims found that 83% of the deaths were immediately due to opportunistic infection. S. F. Chron., Sept. 7, 1984, at 22, col. 1.

29. Morin and Batchelor, *Responding to the Psychological Crisis of AIDS: A*

The psychological impact on the patient is also profound. The majority of patients are young, previously healthy people in the prime of life. Upon diagnosis, they often go through a series of reactions, including a loss of self-esteem, fear of alienation by friends and lovers, fear of loss of physical attractiveness and change in body image, guilt about sexual or drug-related behavior,[30] fear of loss of control and dependency, loss of financial status, and fear of social stigmatization and exposure of lifestyle. All this is compounded by the general fear of death and dying.[31]

The AIDS epidemic has a deep psychological impact on the gay community as well. AIDS serves to magnify the pre-existing social antipathy towards gay and lesbian people.[32] Psychologists

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Clinical Perspective, 99 PUB. HEALTH REP. 4, 4 (1984).

Participation in treatment and medical research for a cure can be debilitating as well. Another patient's experience:

> My treatment with Alpha Interferon (a type of soluable protein produced by cells invaded by a virus which induce non-infected cells to produce antiviral proteins to inhibit viral growth) required ten days of injections, ten days of rest, and ten more daily injections. Within two hours of the first injection, I had severe chills, followed by high fever, and reversion back to chills. These side-effects subsided after a few days, but the most devastating were still to come. Over the 30-day course of treatment, I noticed myself becoming profoundly more fatigued and depressed. Where just before the course of Interferon I was still running four miles a day, there were days now that I barely wanted to get out of bed.

Id.

30. For some patients, the guilt can result in a rejection of their gay sexual identity and a reaffirmation of any residual self-hatred manifest prior to the "coming out" process. *See infra* notes 34 and 93. Forstein, *The Psychological Impact of AIDS*, 11 SEMINARS IN ONCOLOGY 77, 78 (1984).

31. *Id.* at 77. *See* Perry and Tross, *Psychiatric Problems of AIDS Inpatients at the New York Hospital: Preliminary Report*, 99 PUB. HEALTH REP. 200, 201 (1984).

In addition to these emotional reactions, the physical symptoms arising from AIDS can result in psychiatric complications. Fatigue and weight-loss associated with lymphadenopathy can lead to depression. Opportunistic infections which attack the central nervous system (such as encephalitis and primary lymphoma, *see supra* note 5) often produce cognitive defects such as confusion, disorientation, loss of memory, mood disturbances, involuntary or uncontrolled movements, and impulsive behavior. Perry and Tross, *supra*, at 201, 203.

32. Forstein, *supra* note 30, at 77. Discrimination in employment has resulted in the firing of gay employees because of fears that they may have AIDS. *See* Case v. County of Tulare, No. 111532 (Super. Ct. Tulare Co. Cal. filed 1983) (hairdresser fired for fear he had AIDS); Truman v. Camden, No. _____ (Oakland Co. Cir., Mich. 1983) (insurance agent fired when employer learned he had AIDS). A suit being brought against Los Angeles paramedics claiming that they delayed in treating the plaintiff because they feared (falsely) that he had AIDS. Bergman v. City of Los Angeles, No. C49773 (Los Angeles

have documented general anxiety among the "worried well," hypochondriasis, and excessive preoccupation with bodily health as anxiety states associated with gay men at risk of AIDS.[33] Although no study has yet been done, researchers believe that the threat of AIDS inhibits the process of acceptance of one's homosexual orientation, and exacerbates the difficulty of "coming out."[34] Sexual dysfunction from fear of spreading the disease can also be a problem.[35]

The impact of AIDS on the gay community is pervasive and the community is responding to the threat. Groups have been formed to combat the problem, including foundations devoted to funding research and health education,[36] and counseling and support groups for the terminally ill.[37] State and Federal government has limited its role to medical research and treatment, and has, in general, not attempted to limit sexual transmission of the disease.

The first effort to prohibit the transmission of the disease was made by the City of San Francisco, which has the highest per capita number of AIDS victims.[38] On October 9, 1984, Dr. Mervin Silverman, then Director of the San Francisco Public Health Department, ordered the closing of 14 gay bathhouses and sex establishments which he alleged "promote the spread of AIDS."[39] Within hours, six clubs reopened, challenging the order, and the City filed briefs seeking a court order enjoining the businesses from operating.[40] The Superior Court allowed the businesses to remain open, but enjoined certain practices and or-

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Super. Ct. Cal. filed May 1984). A New York City doctor who treats AIDS patients successfully defeated an eviction from his office by his neighbors who don't want AIDS patients coming into the building. People v. 49 West 12th Street, No. 43604-83 (App. Div., N.Y., filed 1983). Flaherty, *A Legal Emergency Brewing over AIDS*, 6 NAT'L L. J. 1, 44 (July 9, 1984).

33. Morin and Batchelor, *supra* note 29, at 7-8.

34. Forstein, *supra* note 30, at 81. "Coming out" has been defined as the self-admission and acceptance of ones homosexuality and the communication to others of that fact. Coleman, *Developmental Stages of the Coming Out Process*, HOMOSEXUALITY 151 (1982).

35. Forstein, *supra* note 30, at 81.

36. San Francisco AIDS Foundation, San Francisco AIDS Fund.

37. Shanti Project, Hospice.

38. Eight hundred and twenty six people have been diagnosed in San Francisco. Telephone interview with Michael Serban, *supra* note 10.

39. S.F. Chron., Oct. 10, 1984, at 1, col. 1; Bay Area Reporter, Oct. 11, 1984, at 1, col. 1.

40. S.F. Chron., *supra* note 39, at 18; Bay Area Reporter, *supra* note 39, at 1.

dered the businesses to hire employees to enforce compliance with the injunction.[41] The legal battle will test the state's authority to limit gay sexual behavior for the avowed purpose of preventing the spread of AIDS.

This analysis of the state's authority to limit sexual behavior in gay bathhouses will begin by examining the precedents involving the use of quarantine and nuisance statutes to control the spread of communicable diseases. A discussion of common law limitations on the use of those statutes will follow. The constitutional analysis begins with the right to privacy embodied in the United States and California Constitutions, and its relationship to gay sexual intimacy generally. The application of rational basis and strict scrutiny standards will be analyzed and arguments presented in favor of applying strict scrutiny. The state's compelling interest in stopping the spread of AIDS will be analyzed under strict scrutiny with appropriate attention to achieving the state's interest without broadly infringing on the individual's privacy. Discussion of enforcement of a limitation on bathhouse sexual activity and the fourth amendment issues it raises will conclude the Comment.

II. STATE'S INTEREST IN PROTECTING PUBLIC HEALTH

Protecting health and safety has long been recognized as a legitimate exercise of the state's police power.[42] The state's police power is vested entirely in the legislature,[43] and it alone can

41. S.F. Chron., Nov. 29, 1984, at 1, col. 5. The order specifically restrains the business from operating private rooms on the premises; orders the hiring of one employee for every 20 patrons to survey the entire premises every 20 minutes and expel all patrons engaging in high risk sexual activity as defined by the San Francisco AIDS Foundation; the removal of doors to individual rooms and cubicles; and education of patrons toward the prevention of high risk sexual activity. San Francisco v. Owen, No. 830-321 (Cal. Super. Ct., Nov. 28, 1984) (order granting preliminary injunction).

42. Roe v. Wade, 410 U.S. 113, 163 (1973), Whalen v. Roe, 429 U.S. 589, 598 (1977).

43. DeAryan v. Butler, 119 Cal. App. 2d 674, 681, 260 P.2d 98, 101-02 (1953).

> The Legislature is possessed of the entire police power of the state, except as its power is limited by the provisions of the Constitution and other laws applicable thereto. Such police power is an indispensable perogative of the sovereignty and may not be legally limited . . . so long as it is not *unreasonable and arbitrarily invoked and applied* (emphasis in the original).

delegate enforcement authority.[44] Health and safety legislation is given broad and liberal construction by courts,[45] and it is only limited by provisions of the Federal and State Constitutions.[46]

The state's interest in protecting the health of its people is strengthened as the particular threat to health becomes greater.[47] The stronger the state interest in protecting against a threat to health and safety, the broader construction given to the statute addressing that threat.

In the area of communicable diseases, the state has traditionally asserted its police power through quarantine isolation,[48]

Id. See Justesen's Food Stores, Inc. v. City of Tulare, 12 Cal. 2d 324, 329, 84 P.2d 140, 143 (1938); Boyd v. City of Sierra Madre, 41 Cal. App. 520, 523, 183 P. 230, 232 (1919); Miller v. Board of Public Works, 195 Cal. 477, 490, 234 P. 381, 383 (1925). "It is also competent for the Legislature, within the Constitutional limits of its powers, to declare any act criminal and make the repetition or continuance thereof a public nuisance . . . but it is not the province of the courts to ordain such jurisdiction for themselves." People v. Lim, 18 Cal. 2d 872, 879, 118 P.2d 472, 476 (1941) (quoting State v. Ehrlick, 65 W. Va. 700, 64 S.E. 935, 940 (1909)).

44. It is within the authority of the City of San Francisco to adopt regulations to promote health and safety, such as quarantine. CAL. CONST. art. XI, §§ 6, 11. *DeAryan*, 119 Cal. App. 2d at 681, 260 P.2d at 101-02.

45. *In re* Halko, 246 Cal. App. 2d 553, 557, 54 Cal. Rptr. 661, 663 (1966); *In re* Johnson, 40 Cal. App. 242, 244, 180 P. 644-45 (1919); People v. Johnson, 129 Cal. App. 2d 1, 7-8, 277 P.2d 45, 50 (1954).

46. *DeAryan*, 119 Cal. App. 2d at 681, 260 P.2d at 101.

47. Roe v. Wade, 410 U.S. 130, 150 (1973). The higher mortality rate among women receiving illegal abortions and abortions in the second and third trimester of pregnancy was a basis to assert a greater state interest in regulating conditions under which abortions are performed. Because the state's interest was stronger over more dangerous abortions late in pregnancy, *Roe* allowed states to ban abortions in the third trimester while forbidding the banning of them in the first and second.

48. CAL. HEALTH & SAFETY CODE §§ 3000-3125 (Deering 1981). CAL. ADMIN. CODE tit. 17, R 2520 (1981) defines quarantine as:

> [t]he limitation of freedom of movement of persons or animals that have been exposed to a communicable disease for a period of time equal to the longest usual incubation period of the disease, in such a manner as to prevent effective contact with those not exposed. If the disease is one requiring quarantine of the contacts in addition to isolation of the case, the local health officer shall determine the contacts who are subject to quarantine, specify the place to which they shall be quarantined, and issue instructions accordingly.

Isolation is defined as "separation of infected persons from other persons, for the period of communicability in such places and under such conditions as will prevent the transmission of the infectious agent." CAL. ADMIN. CODE tit. 17, R 2515 (1981).

Modified isolation shall be prescribed by the local health officer when only modified isolation is required. The technique of isolation shall depend on the disease. 17 CAL. ADMIN. CODE tit. 17, R 2518 (1981).

and nuisance abatement.[49] Government officials are likely, therefore, to consider traditional quarantine, isolation, and nuisance

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The State Department of Health may "quarantine, isolate, inspect, and disinfect persons animals, houses, rooms, other property, places, cities or localities, whenever in its judgment such action is necessary to protect or preserve the public health." CAL. HEALTH & SAFETY CODE § 3051 (Deering 1981). The State Department may "establish and maintain places of quarantine and isolation," § 3112, "adopt and enforce rules and regulations requiring isolation . . . or quarantine for any of the contagious, infectious or communicable diseases if in the opinion of the state department such action is necessary . . . ," § 3123, take any measures necessary to "ascertain the nature of the disease and prevent its spread," § 3053, and "take possession or control of the body of a living person," § 3053. The California Administrative Code gives local health officials the authority to examine and diagnose the infected person, investigate and determine the source of the infection, and "take appropriate steps to prevent or control the spread of the disease," 17 CAL. ADMIN. CODE tit. 17, R 2512 (1981). All persons have a duty to obey any health officer's isolation orders, CAL. HEALTH & SAFETY CODE § 3116 (Deering 1981) and anyone who opposes or neglects the orders of a health official rejecting quarantine or isolation is guilty of a misdemeanor, and subject to a fine of $50.00 to $1,000 or up to 90 days in jail or both. §§ 3350, 3354.

49. CAL. CIV. CODE §§ 3479-3499 (Deering 1984). Nuisance, is defined as:

> [a]nything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake or river, bay, stream, canal or basin, or any public park, square, street or highway is a nuisance.

CAL. CIV. CODE § 3479.

"A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individual may be unequal." CAL. CIV. CODE § 3480. "Every nuisance not included in the definition of [§ 3480] is private." CAL. CIV. CODE § 3481.

"A public nuisance may be abated by any public body or officer authorized thereto by law." CAL. CIV. CODE §3494. The remedies against a public nuisance are (1) criminal indictment or information, (2) civil action, or (3) abatement. CAL. CIV. CODE §3491.

The common law definition of a public nuisance includes "activity which endangers the health or safety or property of a considerable number of persons, offends public morals, or interferes with the comfort or convenience of a considerable number of people." O. BROWDER, R. CUNNINGHAM, J. JULIN AND A. SMITH, BASIC PROPERTY LAW 116 (3d ed. 1979) [hereinafter cited as BASIC PROPERTY LAW]. Public nuisances regarding interferences with public health have been found in cases concerning a hogpen, keeping diseased animals, and a malarial pond. W. PROSSER AND W. KEETON, THE LAW OF TORTS 643-44 (5th ed. 1984).

"To be considered public, the nuisance must affect an interest common to the general public, rather than peculiar to one individual, or several . . . . It is not necessary, however, that the entire community be affected, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right." PROSSER AND KEETON, *supra* at 645. "Most nuisance cases involve recurrent activity rather than an isolated wrongful act." BASIC PROPERTY LAW, *supra* at 117. Therefore, some courts require that the activity continue or recur over a period of time to be a nuisance. *Id.*

statutes as a means to control the spread of AIDS.[50] Constitutional challenges to quarantine and isolation statutes have been denied by courts citing the broad discretion given to legislative enactments promoting health and safety.[51] These California quarantine cases were decided prior to 1950, and therefore did not address these statutes in light of modern constitutional developments in privacy, due process, equal protection and search and seizure. (Later sections will discuss these doctrines as they concern the conflicting interests of the AIDS carriers and the state).[52] The quarantine cases fashioned a "reasonable cause" limitation on the police powers of the state to quarantine and isolate.[53]

Reasonable cause in the public health context requires that health officials have reasonable grounds to believe that a person is afflicted with a communicable disease before they can examine or isolate the person.[54] A mere suspicion, unsupported by facts giving rise to probable cause, is not enough to justify placing a person under quarantine. "It will not do to allow the inference of

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50. Since AIDS has been shown to be transmitted among homosexual and bisexual men via close mucosal contact during sexual intercourse, and not by casual contact, *supra* note 14 and accompanying text, it is most likely that modified isolation of AIDS carriers would be ordered before quarantine or full isolation. Such modified isolation has been proposed in a memorandum by James Chin, M.D., Chief of Infectious Diseases Section, California Department of Health Services, Proposed Public Health Action in Response to a Documented Recalcitrant AIDS Patient. (Dec. 1, 1983).

San Francisco v. Owen, No. 830-321 (Super. Ct. S.F. Cal. filed Oct. 18, 1984) (City attorneys sought an injunction on the theory that the 14 bathhouses and sex establishments ordered closed were a public nuisance).

51. *In re* Halko, 246 Cal. App. 2d at 557, 54 Cal. Rptr. at 663; *In re* Johnson, 40 Cal. App. at 244, 180 P. at 664-45; *In re* Culver, 187 Cal. 437, 440, 202 P. 661, 663 (1921).

> [B]y virtue of the broad power conferred by §§ 2979 and 2979(a) of the Political Code . . . the State Board of Health has power to order the quarantine of persons who have come in contact with cases and carriers of contagious diseases when the Board shall deem it necessary to preserve the public health.

Id.; *DeAryan*, 119 Cal. App. 2d at 682, 260 P.2d at 102. "The determination by the legislative body that a particular regulation is necessary for the protection or preservation of health is conclusive on the courts except only to the limitation that it must be a reasonable determination . . . and must not infringe upon the rights secured by the Constitution." *Id.*

52. *See infra* note 73 and accompanying text.

53. *See In re Milstead*, 44 Cal. App. 239, 244, 186 P. 170, 172 (1919); *In re Halko*, 256 Cal. App. 2d at 553, 54 Cal. Rptr. at 644; DeAryan v. Butler, 119 Cal. App. 2d 674, 682, 260 P.2d at 102; *In re Shepard*, 51 Cal. App. 49, 51, 195 P. 1077, 1077 (1921).

54. *In re Milstead*, 44 Cal. App. at 244, 186 P. at 172.

probable cause to be drawn from a mere suspicion."[55] Although the cases have more or less loosely used "reasonable cause" interchangably with "probable cause,"[56] the level of cause required to be shown by the state was not synonymous with the more probable than not standard in the criminal setting. Quarantine orders were issued to hold suspected prostitutes in custody until trial on the supposition that their release would allow them to spread venereal disease.[57] The courts required only that the state make a showing that the woman be of a class of persons (prostitutes) likely to have venereal disease in order to establish reasonable cause that the woman had venereal disease.[58] A showing that it was more probable than not that the individual prostitute had venereal disease was not required.

Underlying the reasonableness requirement of these cases is the use of quarantine statutes to restrain a criminal class of persons where the state viewed the usual criminal law processes as inadequate. These cases are distinguishable in application to the bathhouse setting because gay men are not a criminal class.[59] In determining the reasonableness requirement, courts should balance the need to quarantine in terms of the likelihood of reducing the spread of the disease against the invasion of liberty which would result.[60] Therefore, the first step in the inquiry is to determine the likelihood that bathhouse sexual conduct results in the transmission of AIDS. The extent of the invasion of a protected liberty interest is discussed below.[61]

Whether it is likely that a bathhouse patron will have sex with an AIDS carrier is a question of fact to be determined by medical testimony and research. The latest studies show a strong correlation between the number of sexual partners and

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55. *In re Arata*, 52 Cal. App. 380, 384, 198 P. 814, 816 (1921). *See also In re Shepard*, 51 Cal. App. at 51, 195 P. at 1077.

56. *In re Arata*, 52 Cal. App. at 383, 198 P. at 816 ("reasonable or probable"); *In re Shepard*, 51 Cal. App. at 51, 195 P. at 1077 (case dismissed because facts did not establish even a "well-defined suspicion.").

57. *See In re Arata* 52 Cal. App. 380, 198 P. 814; *In re Shepard*, 51 Cal. App. 49, 195 P. 1077.

58. *In re Arata*, 52 Cal. App. at 383-84, 198 P. at 814; *In re Shepard*, 51 Cal. App. at 51, 195 P. at 1077.

59. Homosexual conduct is no longer a criminal act in California.

60. Camara v. Municipal Court, 387 U.S. 523, 535-37 (1967).

61. *See infra* notes 73-116 and accompanying text.

the likelihood of contracting AIDS.[62] The Jaffe study found the frequency of intercourse was significantly correlated with ten other variables, including meeting partners in bathhouses, a history of syphillis and other sexually transmitted diseases, and the use of street drugs and nitrite inhalants.[63] Friedman-Kien attempts to explain a similar finding by associating numerous sex partners, use of bathhouses, sexually transmitted diseases, and drug usage with the development of a gay culture in the urban environment.[64] The not-yet-completed Darrow study, however, is said to show no significant correlation between bathhouse sex and the spread of AIDS.[65]

Although it seems clear that the frequency of sexual activity with different partners increases the probability of contracting AIDS, it is not demonstrable that the bathhouse environment itself adds significantly to the risks of contagion. At best, there is a correlation which is not yet fully understood or proven. The state would have to make a showing that restricting sexual conduct in bathhouses would be likely to reduce the spread of AIDS in order to satisfy the threshold reasonable cause requirement of the quarantine cases.

If a correlation is found between bathhouse sex and the spread of AIDS, nuisance law would support closure only if more narrow means of "abating" the problem do not exist.[66]

> Where the decree absolutely prohibits any acts, there should be abundant evidence that the continuance of the acts will inevitably result in irreparable injury. In the absence of such strong evidence, the decree should merely enjoin the doing of the particular acts in a manner calculated to

62. *See* Jaffe, *supra* note 21, at 147, 149; Friedman-Kien, Laubenstein, Rubenstein and Boimovici-Klein, *Disseminated Kaposi's sarcoma in Homosexual Men*, 96 ANNALS OF INTERNAL MED. 693, 697 (1982); Marmor, Laubenstein and Friedman-Kien, *Risk Factors for Kaposi's sarcoma in Homosexual Men*, LANCET 1083, 1085 (1982); A new study underway by Darrow of the CDC has also been reported to show a correlation with sexual promiscuity. Bay Area Reporter, Oct. 11, 1984, at 1, col. 1.

63. Jaffe, *supra* note 21, at 147.

64. Friedman Kien, Laubenstein, Rubenstein, and Boimovici-Klien, *supra* note 62, at 697.

65. Bay Area Reporter, Oct. 11, 1984, at 1, col. 1.

66. Anderson v. Souza, 38 Cal. 2d 825, 843-44, 243 P.2d 497, 509 (1952); Morton v. Superior Court, 124 Cal. App. 2d 577, 582, 269 P.2d 81, 84 (1954).

injure the plaintiff.[67]

Injunctions to abate a public nuisance where the business is not *per se* unlawful[68] should be limited in scope to just afford the state relief from the potential spread of AIDS.[69] Bathhouses are not a nuisance *per se* because their operation is not in violation of any state statute.[70] Therefore, a court injunction restricting their operation can only be as broad as necessary to stop the spread of the disease. "[T]he law is clear that injunctions against carrying on legitimate business should go no further than is absolutely necessary to protect the lawful rights of the parties seeking such injunction."[71]

III. A FUNDAMENTAL RIGHT OF PRIVACY IN SEXUAL INTIMACY

If the threshold correlation can be shown between sexual intercourse in the bathhouse and the spread of AIDS, to what extent can the government regulate the sexual practices of bathhouse patrons for the purposes of stopping its spread?[72] The answer depends on the classification of the activity for purposes of constitutional analysis.

The United States Constitution's right of privacy is founded in the penumbras of the Bill of Rights and is applied to the states through the due process clause of the fourteenth amend-

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67. Morton v. Superior Court, 124 Cal. App. 2d at 583, 269 P.2d at 86.

68. A *per se* nuisance is one in which its operation is always unlawful, no matter how operated (e.g., a building with numerous code violations which threatens the health and safety of the community). *See* People v. Wheeler, 30 Cal. App. 3d 282, 106 Cal. Rptr. 260 (1973).

69. *See* Fresno v. Fresno Canal and Irrigation Co., 98 Cal. 179, 183-84, 32 P. 943, 945 (1893); Byers v. Colonial Irrigation Co., 134 Cal. 553, 555, 66 P. 732, 733 (1901); McPheeters v. McMahon, 131 Cal. App. 418, 425; 21 P.2d 606, 609 (1933); Morton v. Superior Court, 124 Cal. App. 2d at 582, 269 P.2d at 85; Enos v. Harmon, 157 Cal. App. 2d 746, 750, 321 P.2d 810, 813 (1958); People v. Mason, 124 Cal. App. 3d 348, 354, 177 Cal. Rptr. 284, 288 (1981).

70. *See infra* note 72.

71. People v. Mason, 124 Cal. App. 3d at 354, 177 Cal. Rptr. at 288.

72. The author makes an assumption in this Comment that gay bathhouses are legal in most major metropolitan centers where adult consensual same-sex sexual conduct is not criminal, and the basis for restricting the activities which go on inside will be to stop the spread of AIDS. Other bases, besides health protection, such as welfare and morals, could also be argued by states where such conduct is criminalized. The author leaves criticism of these bases to other writers.

ment.[73] It is a fundamental right of the individual[74] which the Supreme Court has extended to decisions relating to marriage,[75] procreation,[76] contraception,[77] family relationships,[78] childrearing,[79] and abortion.[80] The Court in *Doe v. Commonwealth's Attorney* summarily affirmed that there is no fundamental right to privacy in homosexual intercourse,[81] but in a later case men-

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73. In Griswold v. Connecticut, 381 U.S. 479, 485 (1965), the right to privacy is drawn from the "penumbras" of the Bill of Rights, including the 1st, 3rd, 4th, 5th, 9th and 14th amendments. *Id.* at 484-85. The right may also "emanate from the totality of the constitutional scheme under which we live," *Id.* at 494. (Goldberg, J., concurring).

74. Eisenstadt v. Baird, 405 U.S. 438, 454-55 (1972). *See also* Roe v. Wade, 410 U.S. 113, 152-53 (1973).

75. Loving v. Va., 388 U.S. 1, 12 (1967).

76. Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942).

77. Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972).

78. Prince v. Mass., 312 U.S. 158, 166 (1944).

79. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

80. Roe v. Wade, 410 U.S. 113, 154 (1973).

81. Doe v. Commonwealth's Attorney for the City of Richmond, 425 U.S. 901 (1976) (summary affirmance of 403 F.Supp. 1199 (E.D. Va. 1975)). The district court in *Doe* rejected the constitutional challenge of a Virginia sodomy statute criminalizing adult consensual same sex sexual activity. Without briefs or oral argument, the Supreme Court summarily affirmed the district court's decision by a 6 to 3 vote (Marshall, Brennan and Stevens, JJ., dissenting).

The reasoning the lower court had used to hold that the statute did not "offend the Bill of Rights or any other Amendments," *Doe*, 403 F. Supp. at 1199, is flawed. Using a minimal rational basis test, the state never had to show its claim that homosexuality actually caused moral delinquency, but only that it was "likely to end in a contribution to moral delinquency." Judge Bryan based his finding that there was no fundamental right on gratuitous Supreme Court dicta by Justices Goldberg and Harlan, in previous minority opinions. *Id.* at 1201-02.

> Adultery, *homosexuality* and the like are sexual intimacies *which the State forbids . . . .*" *Id.* at 1201 (citing Griswold v. Connecticut, 381 U.S. at 498-99 (Goldberg, J., concurring)). "I would not suggest that *adultery homosexuality, fornication and incest are immune* from criminal inquiry, *however privately practiced.*" *Id.* at 1201 (citing Poe v. Ullman, 367 U.S. 497, 552-53 (1961) (Harlan, J., dissenting)). "The laws regarding marriage which provide both when the sexual powers may be used and legal societal context in which children are born and brought up, as well as laws forbidding adultery, fornication, and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.

Id. at 1201-02 (citing *Poe*, 367 U.S. at 546 (Harlan, J., dissenting)).

Bryan ignored Eisenstadt v. Baird, 405 U.S. at 454-55, which expanded the privacy right beyond the limits of the marital bedroom. In support of the statute he cited Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973), a case involving exposure of heterosexual

tioned that the issue of privacy in consensual sexual activity had not yet been settled.[82] Although courts have followed the Supreme Court's affirmance in *Doe*, some courts view the question as unsettled.[83] Because of the unsettled state of the law and the lack of a written Supreme Court opinion on the issue of adult consensual same-sex sexual intercourse, reexamination of the right to privacy issues involved is justified.

Many of the privacy cases concern decisions arising from sexual relations. The right to privacy in sexual relations has been found in the decisions to bear and beget children,[84] and whether to use contraception or have an abortion.[85] These decisions are different sides of the same coin. The decision to procreate involves a decision in each act of sexual intercourse whether contraception will be used, and if conception occurs, whether an abortion will be undertaken. Implicit in the decision to use con-

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sex acts to children, and having no analogy to *private adult* consensual same-sex sexual intercourse. *Id.* at 1202.

As a summary affirmance, the precedential value is limited. No Supreme Court Justice has written an opinion on the issue. No more can be read into it than was necessary to decide the precise issues before the Court. Anderson v. Celebreeze, 460 U.S. 780, 784-85 n.5 (1983). Professor Tribe argues that the precise issue for the Court's summary affirmance may not have been the merits of the claim, but a justiciability issue. He argues plaintiffs brought the suit as a facial challenge and were apparently never threatened with prosecution under the statute. The Court may have affirmed on the basis that the case was not ripe, and that an affirmance instead of an order to vacate the judgment is consistent with denying relief to plaintiffs on jurisdictional grounds. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 943 (1978). Notwithstanding Tribe's strained argument, judges have cited *Doe* as controlling precedent in privacy cases regarding adult consensual same-sex sexual intercourse. *See* Lovisi v. Slayton, 539 F.2d 349, 352 (4th Cir. 1976); De Santis v. Pac. Tel. & Tel. Inc., 608 F.2d 327, 333 (9th Cir. 1979); Gaylord v. Tacoma School Dist., 559 P.2d 1340, 1340 (Wash. 1977); Beller v. Middendorf, 632 F.2d 778, 809 (9th Cir. 1980); Matlovich v. Secretary of Air Force, 591 F.2d 852 (D.C. Cir. 1978) (issue not reached).

82. "The Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults . . . ." Carey v. Population Serv. Int'l., 431 U.S. 678, 689 n.5 (1977). Since *Carey* was a case concerning contraception, the unanswered question may only be with regards to heterosexual private consensual sexual behavior.

83. New York v. Onofre, 424 N.Y.S. 2d 566 (N.Y. Sup. Ct., App. Div. 1980); Beller v. Middendorf, 632 F.2d at 810; Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982).

84. *See* Skinner v. Oklahoma, 316 U.S. 535 (forced sterilization of felons held unconstitutional).

85. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy in the use of contraceptives in marital sexual intercourse); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to privacy in use of contraceptives for non-marital sexual intercourse); Roe v. Wade, 410 U.S. 113 (1973) (right to privacy protects the decision between a woman and her doctor whether to have an abortion in the first trimester of pregnancy).

traception is the decision to engage in sexual intercourse.[86]

The Supreme Court has retained the artificial dichotomy between decisions to have sexual intercourse and decisions whether to bear and beget children, protecting the latter,[87] yet not reaching an answer to the former.[88] Heterosexual women would not see a distinction between the right to decide to have sexual intercourse and the right to decide to use contraception or have an abortion. For the woman, the decision to have sex is, in every instance, a decision whether to bear and beget children. There is no meaningful distinction between the two. From the vantage point of the potentially pregnant woman, both decisions should have fundamental right status.

The idea of privacy protection over choices fundamentally affecting the person was further stressed in *Roe v. Wade*.[89] The fundamental nature of the decision to have an abortion was illustrated by emphasizing the detrimental impact that denying the choice would have on the woman:

> Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[90]

Similarly, denial of sexual preference may be distressful for

86. One court described the privacy right in sexual relations as follows: "It is not the marriage vows which make intimate and highly personal the sexual behavior of human beings. It is, instead, the nature of sexuality itself or something intensely private to the individual that calls for constitutional protection." Lovisi v. Slayton, 363 F. Supp. 620, 625 (E.D. Va. 1973), *rev'd*, 539 F.2d 349 (4th Cir. 1976).

87. Eisenstadt v. Baird, 405 U.S. at 454-55. "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as to the decision whether to bear or beget a child." *Id.*

88. *Carey*, 431 U.S. at 689.

89. *Roe*, 410 U.S. at 152.

90. *Id.* at 153.

the lesbian or gay man. Much study has been devoted to the psychological aspects of homosexuality. The American Psychiatric Association no longer considers homosexuality a disease or disorder, but rather an alternative expression of sexuality.[91] Social and legal biases against adult consensual same-sex sexual activity create pressures on the individual to repress homosexual desires.

Implicit in the denial of the right to choose sexual preference is a moral or psychological judgment that the activity is wrong. This leaves the homosexual the choice of either repressing his/her feelings or renouncing his/her homosexuality, thereby being "saved" or "cured." Repression can lead to emotional and psychological harm, and attempts to cure what is not a disease have proved ludicrous and harmful.[92]

Homosexuals who have not yet "come out"[93] often feel shame, guilt and loneliness because of social judgments condemning homosexuality:

> To grow up in a family where the word 'homosexual' was whispered, to play in a playground and hear the words 'faggot' and 'queer,' to go to church and hear of 'sin' and then to college and hear of 'illness,' and finally to the counseling center that promises to 'cure' is hardly an environment of freedom and voluntary choice.[94]

An environment of freedom of choice for the homosexual has been shown to liberate the person of guilt and shame.[95] The protection that inclusion of same-sex sexual intercourse within privacy would afford the "choice" to be homosexual would un-

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91. 9 PSYCHIATRIC NEWS 1 (Jan. 2, 1974).

92. Gonsiorek, *Social Psychological Concepts in the Understanding of Homosexuality*, HOMOSEXUALITY 118 (1982). Morality as a basis for denying adult same-sex sexual privacy is too large a topic to deal with in this Comment.

93. "Coming out" has been defined as the self-admission and acceptance of ones homosexuality and the communication to others of the fact. Coleman, *Developmental States of the Coming Out Process*, HOMOSEXUALITY 151 (1982).

94. Davidson, *Politics, Ethics and Therapy for Homosexuality*, HOMOSEXUALITY 94 (1982).

95. Coleman, *Developmental Stages of Coming Out Process*, HOMOSEXUALITY, 150, (citing Silverstein, *Behavior Modification and the Gay Community*, (Oct. 1972) paper presented to the Association for the Advancement of Behavior Therapy, Annual Convention).

doubtedly reduce the shame, guilt and maladjustment which results from stigmatization.

Fundamental right status should be extended to adult consensual same-sex sexual intercourse as well. A homosexual's decision whether to follow his or her sexual orientation is a basic decision in his or her life. The choice to engage in adult consensual same-sex sexual intercourse is essential to the self-determination of the individual over matters of intimate concern and great importance. It is basic to significant intimate relations, family relations, friends and associations. The liberty to make this intimate decision has a similar impact on homosexuals as do the decisions to marry, procreate or not to have children impact on heterosexuals.

The California right to privacy[96] also protects an area of intimacy in personal relations. This fundamental right extends its protections to the home, family, thought, emotions and expressions, personality, and freedom of communion and association.[97] It protects the "right to be left alone."[98] The California Supreme Court has included "sex" within the right to privacy.[99]

Private adult consensual same-sex sexual intercourse should be protected by right. Homoeroticism is an innate and intimate aspect of a homosexual's personality, emotions and expressions. Central to any sexual experience is the intimate rapport and sharing protected by the freedom of communion. In many instances, the lesbian or gay relationship is the center of the couple's family and home life.

On equal protection grounds, a strong argument can be made that the denial of fundamental privacy right status for adult consensual same-sex sexual intercourse results in differential treatment between heterosexuals and homosexuals. State

96. "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*." CAL. CONST. art. I § 1 (emphasis added).

97. White v. Davis, 13 Cal. 3d, 757, 774, 120 Cal. Rptr. 94, 105, 533 P.2d 222, 233 (1975).

98. *Id.*

99. People v. Belous, 71 Cal. 2d 954, 963, 80 Cal. Rptr. 354, 359, 458 P.2d 194, 199 (1969).

sodomy statutes either explicitly or implicitly treat homosexuals differently than heterosexuals. Either their terms are limited to same-sex sexual conduct or are discriminatory in effect by forbidding anal and oral intercourse (the primary method of sexual intercourse for homosexuals). Statutes which forbid adult consensual same-sex sexual intercourse but not adult consensual heterosexual intercourse treat homosexuals differently. A determination of fundamental right status for adult consensual heterosexual sexual intercourse[100] but not same-sex sexual intercourse would be a denial of equal protection of a fundamental right and challenges to sodomy statutes would be entitled to strict scrutiny.[101] However, the U.S. Supreme Court has not recognized a fundamental right to adult consensual heterosexual sexual intercourse. Therefore, the government need only show a rational basis why adult consensual same-sex sexual intercourse should be restricted. Because the California Constitution recognizes heterosexual sex as a protected privacy right, California courts would apply strict scrutiny.

A. *A Rational Basis to Restrict Same-Sex Sexual Intercourse*

The present state of federal law appears to afford no fundamental right to privacy in adult consensual same-sex sexual activity although this is not well settled.[102] Restrictions on this activity to prevent the spread of AIDS are limited only in that they be reasonably based and not arbitrary. The rational basis test would be met by a minimal showing that bathhouse patrons engage in sexual activity which is likely to spread AIDS, and that closing them (or restricting the types of sexual activity to those acts not likely to transmit the AIDS agent) is a reasonable means to stop its spread.

The state has a similar case under an equal protection challenge because the classification of gay men as a group to be denied sexual intercourse can be rationally supported by evidence that AIDS is spread by anal and oral sexual intercourse and that it has so far been limited almost entirely to the four risk groups

100. *See supra* notes 73-99 and accompanying text.
101. San Antonio School District v. Rodriquez, 411 U.S. 1, 17 (1973).
102. *See supra* notes 81, 82 and accompanying text.

in which gay men constitute the large majority.[103]

Bathhouse proprietors and some gay attorneys have framed counter-arguments to this basis of rationality. Closing bathhouses is not a rational response to the state's interest in preventing the spread of AIDS if it can be shown that bathhouses are safer places to have sexual intercourse than other environments. They claim that closings will only change the location of the dangerous behavior, not the behavior itself, and that bathhouses have bathing facilities, educational programs, and condom distribution which make the sexual activity safer. They also claim that a rise in public sexual activity in unclean parks and restrooms has occurred since the baths have become unpopular. In sum, the counter-argument is that the closing of the bathhouses will do nothing to stop the spread of the disease.[104]

On the other hand, the truism that closing the bathhouses only restricts the place where the acts occur, not the act itself, is misleading. The state's interest is clearly to limit the spread of the disease by limiting, where it has the power, dangerous sexual activity in the gay population. By closing the bathhouses it is limiting the opportunity to engage in sexual activity, and may do the same in parks or restrooms if it can prove that the danger of AIDS spreading occurs in those places as well. The state need only proceed one step at a time towards its goal. Therefore, under a rational basis standard, a court would uphold limiting the sexual activity which can be shown to spread AIDS.

The consequence of a rational basis standard for sexual privacy extends to other gay rights areas as well. Logical connections between legitimate state interests and statutes which differentially treat homosexuals and subject them to discriminatory burdens appear more anacronistic, irrational and poorly articulated in light of the growth of lesbian and gay liberation movements. To be sure, courts have proved a barrier to the development of gay rights.[105] But the threat of AIDS presents a new

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103. *See supra* note 13 and accompanying text.

104. Kohorn, Achtenberg, Hitchens, Coles, Steel, and McShane, Draft Preliminary Report: AIDS and the Regulation of Bathhouses at 8 (Aug. 9, 1984) (submitted to the Public Protection Committee, Board of Supervisors, City and County of San Francisco) [hereinafter cited as AIDS and the Regulation of Bathhouses].

105. *See* Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual*

basis for state action limiting gay sexual privacy in the bathhouse and bedroom, for discrimination in the workplace, public benefits, and government and military service. Furnished with a rational basis for the criminalization of gay sex, sodomy laws could continue to impose legal disabilities on lesbians and gay men through justifying discrimination against a "criminal" class.

The nature of the privacy interest involved is highly intimate; the bases of decision making concern innate emotional and psychological characteristics in the individual; the denial of the choice fundamentally impacts the individual's sexual and familial expressions as well as social relationships; and the legal consequences from a denial of privacy protection results in disabilities which could extend far beyond the bedroom or bathhouse. Under the Federal and California Constitutions, the fragile character and intensity of the privacy value at stake[106] justifies a stricter level of scrutiny than the rational basis test affords.

B. *Applicability of Strict Scrutiny*

In applying a higher level of scrutiny, a fundamental right can be infringed upon only by an important[107] or compelling[108] public interest. The state's interest in preventing the spread of AIDS is a compelling interest.

The U.S. Supreme Court has held on two separate occasions that the state's interest in preventing the spread of communicable diseases outweighs the individual's interest in free exercise of

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Persons in the United States, 30 HASTINGS L.J. 799, 814 (Federal Civil Service employees), 831 (security clearances), 837, 854-55 (armed forces personnel), 860 (licenses), 860-74 (public school teachers), 874, 878 (marriage), 883 (divorce); but *contra* 924 (universities and other public forums) (1979).

106. "[O]ne might fairly say of the Bill of Rights in general and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials . . . ." Stanley v. Illinois, 405 U.S. 645, 656 (1972). Professor Tribe describes the need for stricter judicial scrutiny in cases where the rights involved are "politically fragile," i.e., highly susceptible to emasculation in the particular case. The "character and intensity" of the right in a particular case determine its political resilience. L. TRIBE, *supra* note 81, at 575.

107. Middle-level scrutiny. Rostger v. Goldberg, 453 U.S. 57, 70 (1981).

108. Strict scrutiny. Roe v. Wade, 410 U.S. 113, 155-56 (1973).

religion.[109] In more recent cases it has held that the state has a compelling interest in protecting viable fetal life,[110] and the health and safety of pregnant mothers.[111] AIDS is a deadly communicable disease for which there is at present no cure.[112] The U.S. Department of Health and Human Services has made it a top priority concern.[113] Thousands have died, and the death toll rises at a logarithmic rate.[114] Stopping its spread is an interest which follows the line of compelling health and safety interests found in the abortion and communicable disease cases. The nature of the threat may be so compelling that most courts would find that closing bathhouses would withstand any degree of scrutiny.

Strict scrutiny is the most appropriate standard of review. It allows for the assertion of the compelling state interest while recognizing the intimate privacy interests of the gay man. It provides for the repression of dangerous sexual intercourse when necessary, while allowing safe sexual intercourse[115] to continue. The number of bathhouses in any one locality is small enough that state or local regulation could be accomplished with relative ease, limiting the necessity for the usual broad tolerance of over-inclusiveness.[116] The state would also have to show that regulating bathhouse sexual intercourse is necessary to limit the spread of AIDS, and that it is as or more likely to spread there than in other areas. Closing those establishments without this proof may give the public a false sense of security that the problem has been corrected when in fact it has not.

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109. Jacobson v. Mass., 197 U.S. 11, 27 (1905) "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. Prince v. Mass., 321 U.S. 158, 166-67 (1944) ("The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.").

110. *Roe*, 410 U.S. at 163 (compelling point is at viability).

111. *Id.* (compelling point is approximately at the end of the first trimester).

112. *See supra* notes 3, 4 and accompanying text.

113. Brandt, *The Concentric Effects of AIDS*, 99 PUB. HEALTH REP. 1, 1 (1984).

114. Selik, Haverkos and Curran, *supra* note 1, at 494.

115. "Safe sex" is sexual intercourse which does not involve the exchange of bodily fluids which may carry the AIDS agent. Safe sex practices include mutual masturbation, anal intercourse with a condom, and "fisting" (inserting the hand in the anus). Dangerous sex includes oral-genital and oral-anal ("rimming"), and anal intercourse without a condom.

116. L. TRIBE, *supra* note 81, at 999.

Proof of the necessity of limiting the type of sexual conduct in bathhouses in order to stop the spread of AIDS is crucial in placing boundaries on an order limiting a certain type of sexual conduct. The extension of such a limitation to other environments, such as the bedroom, by only showing that it is rational, but not necessary, to prevent the spread of AIDS, poses a greater danger to gay sexual privacy rights than the closing of fourteen sex establishments. If the state can show that it is the nature of bathhouse sex, its multiple and anonymous sex contacts, which poses the threat of spread, then by comparison, gay sexual activity in one's bedroom is safer because it lacks these factors. The result could be an order which only limits proven dangerous sexual conduct and restricts its consequence to the bathhouse environment.

Closing bathhouses is an overbroad action which invades the privacy of patrons engaging in safe sex. A less burdensome alternative would be forbidding dangerous sexual intercourse which could spread an AIDS agent. Coupled with condom distribution and education on safe sexual practices, this alternative protects the public from the spread of the disease while allowing the private conduct to continue in a limited way.

V. ENFORCEMENT

Documentation of unsafe sexual intercourse in bathhouses for the purpose of either enforcing a ban on unsafe intercourse or to gather evidence for the closing of establishments where it occurs raises fourth amendment search and seizure issues. Bathhouses are public businesses in that the general public may use them. However, a significant amount of sexual activity occurs behind closed doors in private rooms which are rented by the patrons. Unsafe sexual intercourse which occurs in the common areas would be in plain view of government officers,[117] and would have no justifiable expectation of privacy. Therefore, observation of the activity would not be a "search" subject to fourth

117. Whether the inspection is done by police officers or by Health Department officers, the government is still limited by the strictures of the fourteenth amendment. Camara v. Municipal Court, 387 U.S. 523, 534 (1967) (overruling Frank v. Maryland, 359 U.S. 360 (1959) which exempted quarantine searches from fourth amendment requirements); Parish v. Civil Serv. Comm'n., 66 Cal. 2d 260, 262-63, 57 Cal. Rptr. 623, 628, 425 P.2d 223, 228 (1967).

amendment limitations.[118] Activity behind closed doors in rented rooms occurs with a justifiable expectation of privacy which can only be invaded by a reasonable inspection based on probable cause.[119]

A series of cases involving adult consensual same-sex sexual activity in toilet stalls in California public restrooms sheds light on the nature of a reasonable search in a bathhouse environment. The privacy protection afforded toilet stalls in these cases is analogous to the privacy protections which should be afforded cubicles in bathhouses. Toilet stalls and cubicles are both enclosed areas within public places. The expectation of privacy afforded rented cubicles is at least as high as a toilet stall in a public restroom. The toilet stall cases originally took two different tacks: the *Bielicki-Britt*[120] line of cases held unconstitutional all clandestine surveillance[121] of public restrooms without probable cause that the specific individuals inside were going to commit sex acts;[122] the *Smayda*[123] line of cases held that where the acts were committed in an area of the restroom where the officer could see them if he were present in the room, then there was no justifiable expectation of privacy to protect, and no search subject to fourth amendment strictures.[124]

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118. Katz v. U.S., 389 U.S. 347, 353 (1967).

119. California courts have required probable cause before the state may restrict the individual pursuant to its quarantine powers, *see supra* note 53 and accompanying text, and in searches of public restrooms by police enforcing penal statutes against public sex acts, *infra* notes 120-25 and accompanying text.

120. Bielicki v. Superior Court, 57 Cal. 2d 602, 21 Cal. Rptr. 552, 371 P.2d 288 (1962); Britt v. Superior Court, 58 Cal. 2d 469, 24 Cal. Rptr. 849, 374 P.2d 817 (1962).

121. Clandestine surveillance was that done by officers hidden from view of the restroom patrons, e.g., behind a wall or in a closet.

122. Bielicki v. Superior Court, 57 Cal. 2d 602, 605, 21 Cal. Rptr. 552, 553, 371 P.2d 288, 289 (1962) ("there would appear to be no doubt . . . that the acts of Officer Hetzel constituted a 'search'. . . ."); Britt v. Superior Court, 58 Cal. 2d 469, 472, 24 Cal. Rptr. 849, 851, 374 P.2d 817, 819 (1962) ("The crucial fact . . . [was] the manner in which the police observed a place — and persons in that place — which is ordinarily understood to afford personal privacy to individual occupants."); People v. Metcalf, 22 Cal. App. 3d 20, 23, 98 Cal. Rptr. 925, 927 (1971) ("We believe that the enactment of section 653n enunciates a public policy against clandestine observation of public restrooms and renders it reasonable for users thereof to expect their privacy will not be surreptitiously violated.").

123. Smayda v. U.S., 352 F.2d 251 (1965).

124. *Id.* at 255. ("By using a public place appellants risked observation, and they have no constitutional right to demand that such observation be made only by one whom they could see."); People v. Norton, 209 Cal. App. 2d 173, 174, 25 Cal. Rptr. 676, 678 (1962) ("Their activities were not, as in *Bielicki*, such that no other member of the public could have seen them."); People v. Young, 214 Cal. App. 2d 131, 135, 29 Cal. Rptr.

People v. Triggs resolved the conflict among the cases by affirming the *Bielicki-Britt* line of cases. Clandestine surveillance constituting a general search without probable cause violates the fourth amendment and Article I, §19 of the California Constitution, whether or not the activity could have been viewed from inside the restroom.[125] Any clandestine observation of activities inside bathhouses without probable cause would be unconstitutional, even if the activity could have been viewed by the officer if he were in a common area of the bathhouse.[126]

Clandestine surveillance would require the cooperation of bathhouse proprietors who, given the consequences of discovery of unsafe sexual intercourse, would not likely acquiesce. The more likely method of enforcement would be sending undercover agents into the bathhouses as patrons. Without probable cause those agents could only observe activity in plain view of common areas, and not within closed rooms unless invited inside. A "[m]an's constitutionally protected right of personal privacy not only abides with him while he is the householder. . .but cloaks him when as a member of the public he is temporarily occupying a room — including a toilet stall — to the extent that it is offered to the public for private. . . use.[127] Under the probable cause standard used in the toilet stall cases, in order to justify entry, it would be difficult for the state to show sufficient facts that unsafe sex was probable in a closed cubicle.

Another method for determining the level of cause required to conduct a reasonable bathhouse search is to use the balancing approach articulated in *Camara v. Municipal Court*.[128] The likelihood of achieving the state's goals in preventing the spread of AIDS via "unsafe" sexual conduct is weighed against the privacy invasion to the individual.[129] In *Camara* the Court determined

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492, 494 (1963) ("Merely to observe what is perfectly apparent to any member of the general public who might happen to be on the premises is not a search.") (quoting People v. Norton, 209 Cal. App. 2d at 176-77, 25 Cal. Rptr. at 678 (1962)).

125. People v. Triggs, 8 Cal. 3d 884, 891-92, 106 Cal. Rptr. 408, 412-13, 506 P.2d 232, 236-37 (1973).

126. It might, however, be argued that the very act of rental of such a private room in a bathhouse constitutes probable cause.

127. *Britt*, 58 Cal. 2d at 472, 24 Cal. Rptr. at 851.

128. 387 U.S. 523 (1967).

129. *Id.* at 535-37. "[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Id.* at 536-37. "[R]easonableness is still the ultimate standard. If a valid public

that routine housing code inspections were reasonable when initiated pursuant to a warrant, even without the traditional probable cause requirement of specific knowledge of the conditions inside the particular dwelling.[130] Three factors were stressed in coming to this conclusion: (1) a history of acceptance and acquiescence to the inspections, a fact not present in the bathhouse setting; (2) the public interest in abating dangerous conditions and the inability or any other canvassing technique to achieve acceptable results; and (3) the limited invasion of housing inspections on personal privacy.[131]

For searches into private rooms to be effective in discovering "unsafe" sexual conduct, unannounced entry would seem to be required. No other canvassing technique would be as effective. But as long as there are private rooms in which to have sex, no canvassing technique will be very effective.

The nature of the search involved in bathhouses is very personal and frequent.[132] The intrusion into sexual privacy weighs heavily in favor of a more stringent reasonableness requirement than that required for housing code searches. Although the countervailing state of interest is very strong, it is not demonstrably stronger than its interest in safe housing articulated in *Camara*. Random searches not based on articulable facts intrude on the privacy of patrons who pose no danger of spreading AIDS, as well as the privacy of those who do. The frequency and personal nature of random bathhouse cubicle searches not based on articulable facts, and the lack of historical acceptance of the practice, imposes too great an intrusion on privacy to justify the state's goal of preventing the spread of the disease by methods of questionable effectiveness. Under the *Camara* test, a more stringent reasonableness requirement, based on specific facts of suspected unsafe sex[133] should be required. A reasonable suspi-

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interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539.

130. *Id.* at 538.

131. *Id.* at 537.

132. Employees must patrol every 20 minutes in San Francisco v. Owen. *See supra* note 41.

133. The fact of entering a private room alone should not be used to establish reasonable suspicion. To deduce reasonable suspicion from an individual's exercise of his legitimate privacy right without more creates a vacuous reasonableness requirement. An act creating a reasonable suspicion is required.

cion standard achieves the appropriate balance.

In *San Francisco v. Owen*,[134] the court faced the issue of a fourth amendment right to privacy in the rented rooms of a bathhouse. Its response was to order the doors removed from all private rooms available to patrons, turning them into common areas which can be patroled by employees.[135] Since the order was part of a preliminary injunction issued without opinion, there is no clue as to what authority the court used to base its decision. It appears that the court erred in ordering removal of the doors.

The court has eliminated the fourth amendment protections of the patrons by forbidding their privacy expectations. The fourth amendment applies only when the individual has a justifiable expectation of privacy.[136] The state may not avoid the strictures of the amendment by ordering the elimination of the environment which creates the expectation of privacy. To do so emasculates the amendment and deprives it of all meaning. The private rooms are rented by the patrons specifically for the purpose of affording themselves a private environment under their own control.[137] If a person has a protected privacy expectation in the toilet stall of a public restroom,[138] he should have it in a rented room in a bathhouse. The court's decision to remove that

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134. No. 830-321 (Cal. Super. Ct., S.F. Cal. Nov. 28, 1984) (order granting preliminary injunction).

135. See *supra* note 41.

136. Katz v. U.S., 389 U.S. at 353.

137. Rakas v. Illinois, 439 U.S. 128, 149 (1978); Rawlings v. Kentucky, 448 U.S. 98, 105 (1980).

> Jones not only had permission to use the apartment of his friend, but had a key to the apartment with which he admitted himself on the day of the search and kept possessions in the apartment. Except with respect to his friend, Jones had complete dominion and control over the apartment and could exclude others from it. Likewise in *Katz*, the defendant occupied the telephone booth, shut the door behind him to exclude all others and paid the toll, which "entitled [him] to assume the words he utter[ed] into the mouthpiece [would] not be broadcast to the world." (389 U. S. at 352). Katz and Jones could legitimately expect privacy in the areas which were the subject of the search and seizure each sought to contest.

Rakas, 439 U.S. at 149. "Nor did petitioner have any right to exclude other persons from access to Cox's purse." Rawlings v. Kentucky, 448 U.S. at 105.

138. Britt v. Superior Court, 58 Cal. 2d 469, 472, 24 Cal. Rptr. 849, 851, 374 P.2d 817, 819.

expectation of privacy and thereby avoid the reasonableness requirement of the fourth amendment is unconstitutional.

IV. CONCLUSION

There is a direct conflict between the right to privacy for gay sexual intercourse and the need to protect the public health from the spread of AIDS. This conflict is not unresolvable. The goals of the gay man and the public are not antagonistic, and a sensitive balancing of the competing interests involved could result in a solution benefiting everyone.

Given the traditionally strong position of the state when it asserts interests in protecting the spread of communicable disease and the weak position of adult consensual same-sex sexual intercourse among the field of privacy rights, courts will likely uphold statutes restricting gay sex in bathhouses. But deference to state orders restricting sexual intercourse will not result in a solution to the problem. The evidence that AIDS spreads more rapidly in bathhouses than in other environments is inconclusive. Closing them or limiting the sexual activity inside without proof of the danger they pose may give the public, gay and straight, a false sense that the problem has been solved, if in fact it has not. Deferential treatment under a rational basis standard of scrutiny could result in further restrictions on gay rights in other areas of the law, or an effort to recriminalize sodomy. Efforts to stop the spread of AIDS should not be a sledgehammer to gay rights. The character of sexual intimacy underlying much of the right of privacy is important and should be afforded protection as a fundamental right.

Review under strict scrutiny would allow the state to assert its compelling interest in stopping the spread of AIDS while protecting the sexual privacy interests of the gay man. It would allow intrusions on that interest only when they were necessary and accomplished in the least restrictive manner. It should prevent the use of a bathhouse sex limitation as precedent for further restrictions on gay sexual activity.

Enforcement of any limitation on sexual activity within bathhouses must be achieved through constitutional means. The penumbras of privacy surround the fourth amendment as well.

To ignore its strictures while treating sexual privacy as a fundamental right creates no more than a paper right without protection.

The courts must be sensitive to the impact this conflict has on the gay community. They need to avoid compounding the hysteria, hatred and defensiveness which surrounds the issue. A deeper awareness of the privacy issues involved will help courts fashion remedies which are effective and necessary, not overly intrusive or motivated by bias.

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