Civil Liberties in the Crucible: An Essay on AIDS and the Future of Freedom in America

Paul R. Joseph*
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Abstract

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KEYWORDS: AIDS, freedom, America
negative period stretched out to 12 or 14 months. How many of these individuals exist? Not many.

*Question:* Have you noticed any kind of unwillingness in the areas of treatment, CPR, emergency type experiences, and so on?

*Answer:* There are an increasing number of individuals who do not want to care for trauma patients. There is a way to protect these individuals. Because blood is a means of transmission, one needs to train himself/herself to take the following precautions: wear gloves, protect your eyes, and cover any open cuts on your body. One method by which to accomplish this is to wear the standard protective clothes that are used when working in isolation units. This includes a plastic coverall, goggles and gloves. This attire could be implemented as standard garb for medical professionals dealing with any trauma patient whose HIV status is unknown. Remember, however, that the risk of contracting this disease in such a setting is quite low even without these precautions.

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It has been said that, "hard cases make bad law." A similar aphorism could be coined to the effect that "hard times make bad civil liberties law." As we enter the era of AIDS, the danger exists that fundamental freedoms will be eroded as a byproduct of our attempt to control and eradicate this disease.

Every society must consider the proper relation between the individual and the group. To what extent can society demand obedience and sacrifice from an individual? To what extent can an individual refuse the demands of the society? In times of crisis, it becomes much more likely that the normal answers we give to such questions will be swamped in the hysteria of the moment and that individual liberties will suffer as a result.

Although the United States has a history of commitment to individual liberties, our nation is not immune to incidents of crisis-born hysteria which have impacted adversely upon civil liberties. If we can identify the factors which increase the danger that such hysteria will grow, we may be able to head it off before it does.

There are many ways to begin the enquiry. One may be to reflect briefly upon a few of the self-images that Americans have of our national character, of what it means to be "an American." It may be that Americans hold contrasting, and perhaps conflicting, images of these things and that many of them have implications for the relation between the individual and the group. The uneasy integration of our conflicting self-images may, especially during times of crisis, produce conditions in which serious abridgments of freedoms can occur. I do not suggest that the following images are the only ones that could be used.

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B.A., 1973 Goddard College; J.D., 1977 University of California, Davis; LL.M., 1979 Temple University. I wish to thank Professor Stuart Horn of Nova College who made many helpful suggestions. The strengths of this paper are partly due to his wise counsel. The weaknesses are purely my own responsibility. Thanks is also due to my research assistant, Rebecca Lytle, who contributed her research skills and her good ideas to the draft.

Published by NSUWorks, 1988
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One powerful image of the American, which continues to be exalted in popular culture, is that of the pioneer. This rugged individualist braves immense and varied dangers. He is beholden to nobody. Single-handedly, he* carves out a life from the wilderness seemingly without assistance or interference. Individual worth and ability are the only measures of his success. The frontier to which such men go is a place outside the structure of organized society. In what amounts to a


2. "Your image of the pioneer is sexist," said my research assistant after reading this section. She is, of course, correct. The America which formed the image was sexist and, to a somewhat lesser degree, continues to be so. This does not mean, however, that an individualistic image (or the image of the pioneer in particular) must also be gender specific. It is significant, I believe, that as the struggle for women's equality continues we have begun to see scholarship about pioneer women. A similar scholarship has emerged for the Black cowboy. The image seems to be powerful enough that all "is" groups want their part in shaping it to be recognized. In C. HILL, HISTORY OF THE AMERICAN WEST 197-203 (1981), the author, in her "selected bibliography," lists 33 titles dealing with the experiences of various minority groups in the American West during the frontier period. As she says of women [and which would be true of other groups as well] "Mexican-American, black, Chinese, and Anglo women were all a part of the Last Frontier. It has been only in the writing of history that they have become lost. Fortunately, because of the women's movement, the lives of women—including nonwhite women—are now considered suitable for serious study." Id. at 147.

3. It is not suggested that the image is historically complete or accurate. The power of images lies not in their reality but in what they teach us about our beliefs and values. They show us how we think of ourselves. They may lead us to act according to the image, thus helping to create it. In this regard, television programs such as "Have Gun Will Travel," "Rawhide," "Gunsmoke" and "Wanted Dead or Alive," are worthy of note. "Half the time the town tamers were worse than the gunmen they were hired to tame," explains Macdonnell [associate producer]. "And they were constantly suspect, no matter what good guys they were. And Matt Dillon is no exception. If you look closely, you will see that there are only three in the world who care at all whether Matt lives or dies. One is Doc, who digs the bullets out of him; another is Chester, who admires him and calls him Master Dellow; and the other is Kitty, the dance-hall girl, who loves him." D. Whitmore, Why "Gunsmoke" Keeps Blazing Away, TV GUIDE, December 6, 1958, reprinted in TV GUIDE, THE FIRST TWENTY-FIVE YEARS 42 (J. Harris ed. 1978).

4. [After describing the geographical make-up of what was called the "Last Frontier"]/  

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state of nature, each man is free and equal to every other, making his own way, fighting his own battles, and living by his own rules. It is a place where each man is equal to every other largely because of his self-sufficiency and independence.

Contrasting sharply with the image of the Pioneer is the image of the small town and the Americans who live there.* Whether celebrated in Disney's "Main Street U.S.A." or the television life of Beaver Cleaver, what is portrayed is a small homogeneous group with shared, fixed values and cultural norms. In this community of baseball games and Fourth of July picnics, there is the safety and security of the herd.

In small town U.S.A., group norms are perceived as clearly "right" and go largely unchallenged. The non-conformist is not perceived as providing alternatives to the group for consideration, but rather as being clearly "wrong." That is, he is one who does not act in accordance with norms which are "known" by the group to be correct. Seldom is a rebel or dissident portrayed as part of this image (that is, a character who defies group norms because he believes them to be wrong) and such a character, were he to be portrayed at all, would almost certainly be shown to be "wrong" and might even be seen to be a danger or threat to the group. In sharp contrast to our image of the frontier pioneer, the small community dweller is submerged in a self-satisfied group experience.

The image of the small community is comforting for those sharing

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5. The images of the pioneer and the small town dweller are, of course, only particular manifestations of the larger issue of the proper relationship between the individual and the group. See generally T. CAPLOW, H. BAHN, B. CHADWICK, R. HILL AND M. WILLIAMSON, MIDDLETOWN FAMILIES 3-37 (1982).

6. Besides "Leave It To Beaver," other examples of this image seen on television include "My Three Sons," "The Andy Griffith Show," "Ozzie And Harriet" and "Father Knows Best." As Cleveland Amory wrote in his review of "Ozzie and Harriet," "If you don't like it, it is perhaps less a reflection on the show than it is on the mirror itself..." The American Way of Life." C. Amory, Review, "Ozzie and Harriet," TV GUIDE, June 6, 1964, reprinted in TV GUIDE, THE FIRST TWENTY-FIVE YEARS 100 (J. Harris ed. 1978).
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One powerful image of the American, which continues to be exalted in popular culture, is that of the pioneer.1 This rugged individualist braves immense and varied dangers. He is beholden to nobody. Single-handedly, he2 carves out a life from the wilderness seemingly without assistance or interference. Individual worth and ability are the only measures of his success.3 The frontier to which such men go is a place outside the structure of organized society.4 In what amounts to a


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However, the Anglo-American concept of civilization was decidedly missing. This embraced the cultivation of the soil and the building of small towns with schools and Christian churches. Many predicted that this would never come to the Last Frontier. Up to the Civil War some imagined that civilized people could not live in this area. Residents would turn into barbarous outlaws, they thought, or, at best, semicivilized nomadic herders.


5. The images of the pioneer and the small town dweller are, of course, only particular manifestations of the larger issue of the proper relationship between the individual and the group, See generally T. Caplow, H. Bahr, B. Chadwick, R. Hill and M. Williamson, MIDDLETOWN FAMILIES 3-37 (1982).

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its values, assumptions, and make-up. A darker side of this image, however, is the exclusion from the benefits of community membership (including political power and participation) of those who do not conform to and exemplify its norms. Non-conformists may be perceived by the majority not as members of the group with views different from their own, but as "non-members," as outlaws, as outcasts, as external threats to group safety, security, and previously determined unchallengeable values. The Salem witch trials typify this aspect of the small community experience.7

In part, the Massachusetts witchcraft trials grew out of the frustrations of colonial life. People who believed society should be static and well-ordered and thought of the New World as God's chosen land found the pace of change and the prevalence of 'sin' deeply disturbing. For example, the Salem witch hunters seem to have been people who clung to traditional religious and social values and wanted to maintain the stable rural life of a precommercial age. The signs of social change—roads leading to thriving towns nearby, taverns filled with strangers, ambitious men of commerce prospering at the expense of others—appeared all around the small village. Turning to their church for solace, the people of Salem found a minister ready to lead them into battle for the Lord—and for the old social and moral-religious order.

Soto & Schwartz, supra note 1, at 89.

Why—always excepting Salem—were witchcraft executions so rare in colonial New England? To begin to answer this question, a look at the broader context of European (especially English) witch hunts may be helpful. As a large-scale problem requiring massive legal attention, "witchcraft" was not a constant pre-occupation of early European society: it had a life span of only about a century and a half, from about 1500 to about 1650. Before and after those dates, witch scares were rare. This same 150-year period, as it happened, was an era of profound social and economic changes in much of Europe—changes that transformed a commanal "peasant" society still essentially medieval in structure and values into the more recognizably modern world of early commercial capitalism . . . . . But in most areas of New England, the communal mode of behavior survived well past 1650—thanks in large measure to the region's Puritan system of government . . . . . What, then, went wrong in Salem? Here, the factors that had previously served to preserve America from the full force of the witch craze briefly but tragically failed to be effective. For if there was one place in late seventeenth-century America that was witnessing in an extremely intense form the clash between the vanishing older order and the emerging modern order, it was the two Salems: Village and Town. Founded as a Puritan Utopia, Salem Town had emerged over the years, thanks to its location and its excellent harbor, as a major commercial and shipping center—the most important town in Massachusetts after Boston.

Marvin Harris explains the witchcraft from a socioeconomic point of view. As medieval society broke down, the Church was increasingly threatened by heretical sects and peasant rebellions. In order to keep its control over the populace, the Church shifted the blame for bad economic and social conditions from itself (and the nobility) to women who flew through the air, bit night riding, killed babies, brought plague against animals, and generally wreaked havoc on the body politic. The witchcraft became a means of relieving the ruling class and the Church of blame and making scapegoats instead of the poor, the disenchanted, the female. The church thus established itself as the seeming guardian of the people against the forces of evil—just at a time when people were beginning to doubt the Church's magic and perhaps to wonder why they needed the Church at all.


Many of the accused witches of 1692—poor and defenseless women like Sara Good, for example—seem to fit the standard pattern of European witchcraft prosecutions described by Keith Thomas and others, where the "witches" were the impoverished victims of economic change. But a significant number of accused witches in Salem, especially those named in the later stages of the outbreak, do not fit this mold. In these instances, the accusation represented a different kind of assault: not against the victims of economic change, but against their shapers and beneficiaries.

Boyer & Nissenbaum, supra note 16.

3. See generally, U.S. CONST. Amends. I-X. Of course, these limits on governmental power also serve to protect the majority against a government which has lost support and might attempt to oppress the majority. Turner, supra note 1 at 320.

9. A majority is no more than a number of individuals. An individual in the majority on one issue may be in the minority on another. The principle of majority rule assumes that whenever a sufficient aggregate of individuals form on a particular issue, their view should predominate irrespective of which individuals happen to make up the
its values, assumptions, and make-up. A darker side of this image, however, is the exclusion from the benefits of community membership (including political power and participation) of those who do not conform to and exemplify its norms. Non-conformists may be perceived by the majority not as members of the group with views different from their own, but as non-members, as outlaws, as outcasts, as external threats to group safety, security, and previously determined unchallenged values. The Salem witch trials typify this aspect of the small community experience. 7

7. In part, the Massachusetts witchcraft trials grew out of the frustrations of colonial life. People who believed society should be static and well-ordered and thought of the New World as God’s chosen land found the pace of change and the prevalence of ‘sin’ deeply disturbing. For example, the Salem witch hunters seemed to have been people who clung to traditional religious and social values and wanted to maintain the stable rural life of a precommercial age. The signs of social change—roads leading to thriving towns nearby, taverns filled with strangers, ambitious men of commerce prospering at the expense of others—appeared all around the small village. Turning to their church for solace, the people of Salem found a minister ready to lead them into battle for the Lord—and for the old social and moral-religious order.

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cherished image of the town meeting, recognize that each member of the group retains individual worth and equality with other group members. Each is entitled to an equal say about the decisions that will bind the group. This principle is in sharp contrast to earlier political theories which suggested that certain people, merely because of their birth status, were entitled to rule the rest.18

The concept of majority rule is what I call the "political mind set." It assumes that the majority has not only the power, but the right to rule merely because it is the majority. This is not an appeal to the demonstrated correctness of particular decisions or to a claim of moral superiority for the particular people constituting the majority, rather it is a claim that majority qua majority rules.

As a shorthand way of understanding the political process, the concept of majority rules has much to recommend it. In order to live together, many decisions must be made and enforced in a uniform manner. In the normal course of events, when the issues to be decided do not implicate fundamental individual rights, there may be no one obviously correct solution. Yet, the issue must be decided. About such issues, it can often be truly said that it is more important that the issue be settled than that it be settled right.11 When a group must make such decisions, and when they must be binding on the entire group, there is a strong argument to be made that the decision made by the majority of those to be bound should carry the day.12 This struggle to "get the votes" is both the heart of our political process and the method of decision in many every day situations.

Majority rule, however, if made absolute, can result in the destruction of the individual.13 In its cruelest form, majority rule would allow

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10. Of the English monarchy it has been said, "The grand fundamental rule upon which the jus coronae or right of succession to the throne of these kingdoms, depends, I take to be this: 'that the crown is, by common law and constitutional custom, hereditary.'" W. Blackstone, Commentaries on the Laws of England 184 (1765) (University of Chicago Press Facsimile of the First Edition, 1979).

11. Or, more correctly, that there is no clear "right" answer. Whether we drive on the right or the left side of the road, for example, does not matter, but it does matter that one or the other side be used uniformly by us all.

12. Because such decisions involve our preferences and desires but do not implicate any fundamental right, the preferences and desires of the many should predominate over those of the few.

13. If an individual is no more than a subordinate component part of a group without independent worth, then the group can decide even such fundamental things as the life and death of the individual. Such a position led Socrates to refuse to escape from prison and to submit to and participate in his own destruction. Well then, [the state says] since you were brought into the world and nurtured and educated by us, can you deny in the first place that you are our child and slave, as your fathers were before you? and if this is true you are not on equal terms with us; nor can you think you have a right to do to us what we are doing to you. Would you have any right to strike or revile or do any other evil to your father or your master, if you had one, because you have been struck or reviled by him, or received some other evil at his hands—you would not say this? And because we think right to destroy you, do you think that you have any right to destroy us in return, and your country as far as in you lies? Plato, Crito, From The Dialogues of Plato (B. Jowett trns.) reprinted in W. Reed and A. Schreiber, Jurisprudence: Understanding and Shaping Law 87 (1987).

14. "[I]t is fatally easy to confuse the democratic principle that power should be in the hands of the majority with the utterly different claim that the majority with power in their hands need respect no limits." Hart, Immorality and Trespass, The Listener, July 30, 1959 at 162-63. Reprinted in The Philosophy of Law (R. Dworkin ed. 1977).

15. We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these, are life, liberty, and the pursuit of happiness. That, to secure
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15. We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these, are life, liberty, and the pursuit of happiness. That, to secure
nized by the Constitution to exist and to be held by each individual. They are protected by forbidding others (even if they constitute a majority) to negate them. A clear understanding of this principle might be termed a "civil liberties mind set." It stands in sharp contradistinction to the "political mind set" with which we operate most often.

The concept of civil liberties, as enshrined in our Bill of Rights, is, in some ways, a non-democratic one. It recognizes that there are things the individual may do whether or not the majority approves. It recognizes that each individual carries some "trump" cards (rights) which defeat the opposing hand of others even if bound together in a majority.

There is, in our society, a continual tension between the regular workaday, almost universally perceived right of the majority to govern,

these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

The Declaration of Independence para. 2 (U.S. 1776).

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Virginia Bill of Rights § 1 (1776).

16. My use of the term "trump" is intentional. The American political theory is based upon the notion that rights exist within each individual and are acknowledged as they must be by the limited government we create to serve our political needs. If fundamental human rights are "created" by the Constitution, then they may also be extinguished by it. The former theory means that rights come from the individual who makes up the people. The latter theory means that rights come from the government. The difference is fundamental.


18. A particularly clear expression of this is the following: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const.

19. "Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying what they want, as individuals, to have or to do, or are a sufficient justification for ensuring the injury or death of such a person or injury upon them." R. Dworkin, Taking Rights Seriously (1977).

and the playing of "trump" cards by individuals to defeat actions of the majority which infringe upon fundamental individual rights. The majority may not completely understand the reasons why it is being thwarted from working its will and may even feel that a minority is somehow running the show, a principle counter to the ingrained sense of the "rightness" of majority rule.

At times, the majority may respect the exercise of minority rights because the issue involved is not perceived as being of great importance by the majority. Often, however, the majority respects minority rights because the majority accepts the need for debate and diversity even on issues which are perceived to be important. Further, a person might be in the majority on one occasion and the minority on another. If the minority is protected even when it is "wrong," then I will be protected when, I, although "right," find myself in the minority. Because, however, we understand that dissent can inflame passions and that our better judgment (for tolerance) may be overridden in the heat of the moment, the majority itself has established institutions charged specifically with the protection of these rights. Courts, for example, are empowered to strike down actions of government, whether or not supported by the majority, which improperly enter the sphere of rights retained by individuals.

If minority rights are protected as one part of a more complex balance between the individual and the community, some might argue that only those who are defined or perceived as part of the community may exercise those rights. Political equality would be reserved for...
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19. “Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.” R. Dworkin, Taking Rights Seriously at XI (1977).

...and the playing of “trump” cards by individuals to defeat actions of the majority which infringe upon fundamental individual rights. The majority may not completely understand the reasons why it is being thwarted from working its will and may even feel that a minority is somehow running the show, a principle counter to the ingrained sense of the “rightness” of majority rule.

At times, the majority may respect the exercise of minority rights because the issue involved is not perceived as being of great importance by the majority. Often, however, the majority respects minority rights because the majority accepts the need for debate and diversity even on issues which are perceived to be important. Further, a person might be in the majority on one occasion and the minority on another. If the minority is protected even when it is “wrong,” then it will be protected when, I, although “right,” find myself in the minority. Because, however, we understand that dissent can inflame passions and that our better judgment (for tolerance) may be overridden in the heat of the moment, the majority itself has established institutions charged specifically with the protection of these rights. Courts, for example, are empowered to strike down actions of government, whether or not supported by the majority, which improperly enter the sphere of rights retained by individuals.

If minority rights are protected as one part of a more complex balance between the individual and the community, some might argue that only those who are defined or perceived as part of the community may exercise those rights. Political equality would be reserved for...
those who are part of the political community (part of "us"). An "outsider" would not be entitled to participate equally in the group and would not be recognized as having the same "rights" as those who are in the group."

If our concept of "in the group" is based merely upon the fact that an individual is a human being and is present among us, then the views of all and the fundamental rights of all would have to be respected. Unfortunately, we have too often defined "insideness" and "outside-ness" not with reference to geography (although sometimes this is a factor) but more often by factors such as sex, race, religion, national origin, life-style, morals, and cultural values. This is the often unstated but arguably present corollary to the image of the small town. Those whose views diverge to a point are minority members of the group but those who diverge too much may be viewed as non-member threats to the stability of the group. The right of such non-members to exercise the normal rights reserved for community members may not be acknowledged even by those societal structures which are established to protect minority interests within the political community. When understood in this way, it can be seen that struggles by racial, ethnic, religious, and other minorities to gain equality can be explained as an ongoing attempt to be perceived and recognized as full members of the community and so entitled to political equality and the "trump" cards which our system gives to each community member to prevent abuse of majority rule.** It is a struggle of fundamental importance.

rights, this does not mean that rights have no independent existence. The statement that "We use Oxygen in order to live" does not mean that "we create oxygen." Rather, I argue that merely because someone is a human being he has certain fundamental rights. He would, then, take those rights with him into whatever group he might enter and the group would be bound to respect them. This prevents a majority from "defining out" human beings from the group and negating the exercise of fundamental rights by those individuals.

23. Who can forget the bitter denunciation of the civil rights workers who traveled south to aid in desegregation and voter registration projects. The segregated power structure failed that they were "outside agitators."

24. At times, this point has been made with stark and shocking clarity. In Dred Scott v. Sanford, 60 U.S. (19 How.) 393, (1856), the Court stated, 

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the

cases specified in the Constitution.

Id. at 403.
The Court elaborated on this point stating,

[The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty.

The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subdued by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Id. at 404-405.

Similarly, in United States v. Thind, 261 U.S. 204 (1923), the question was whether Bhagat Singh Thind could be naturalized as a citizen under the statute which limited that right to "free white persons." The Court held that he could not.

It does not seem necessary to pursue the matter of scientific classification further. We are unable to agree with the District Court, or with other lower federal courts, in the conclusion that a native Hindu is eligible for naturalization under §2169. The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white... . What we now hold is that the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs. It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white.

Id. at 213-15.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of

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as we have seen in so many other countries, a group controlling the majority of power (not always a majority in numbers) may, by force, completely obliterate the protection of all law including the most basic governing document of the society.

Arguably, this should not be. If rights exist in each individual, then there is no right of others to extinguish them. There is, in fact, a duty not to do so. Yet, there is another aspect to the problem which cannot be discounted, the aspect of raw power and fear. While rights exist within each person and duties bind us all, the minority is usually not strong enough to enforce them and relies upon a system of persuasion, education, and laws passed with the consent of the majority. That is, the entire society is willing, in general, to acknowledge the rights and duties of its members and to use the coercive power of the majority to protect minority interests.

When the threat to the majority is perceived as being unusually great, however, or the challenge is to the most basic of the majority's beliefs, fear may overrides normal restraint. At its most extreme this may lead to unstoppable demands that drastic measures be taken to meet the danger. When this happens, the institutions which are charged with protecting minority interests may lose the will to do so and may instead acquiesce to the exercise of majority power. When the threat is perceived as very immediate and serious, the majority may refuse to acknowledge the attempt by the minority to exercise their "trump" cards, relying not so much on rights as on raw power. When

the legislatures of two thirds of the several States, shall call a Convention for proposing Amendments which, in either Case shall be valid to all intents and Purposes, as Part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any manner affect the first and fourth Clauses in the Ninth Section of the first Article: and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. Art. V. There would be nothing to prevent the complete elimination of the Bill of Rights, by amendment, under this article.

26. "Duty" and "rights" are correlative terms. When a right is invaded, a duty is violated. W. N. Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING, 50-64 reprinted in LORD LLOYD OF HEMPSTead, INTRODUCTION TO JURISPRUDENCE 260-66 (4th ed. 1979).

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27. Attitudes which are intolerant, unjust, and anti-libertarian may be learned.
Particularly dangerous is the situation in which the acts of a minority group are perceived as posing a very great threat or danger to the community, and when the minority group itself is not perceived as being fully a part of the community. Here, the attempt by the minority to use its trump is perceived as posing a danger to the community and also taps previously existing deep seated prejudice or hatred against the very group which is believed to be the source of the danger. These are circumstances which make it less likely that the majority will be willing to recognize the limitations imposed upon it. At these times, the chance of cataclysmic extra-legal action increases. Also increased is the chance that the institutions of government which are charged with enforcing the limits on majority power (in particular the courts) will bow to popular pressure and will fail to protect minority rights from the encroaching majority. The doctrines which are supposed to protect minority interests may be re-interpreted so as to permit the actions which the majority demands. Thus, hard times make bad civil liberties law.

Even with its strong lattice-work of protection for minority rights, the United States has not been immune to episodes of such hysteria. During World War I, Americans of German descent became targets of suspicion and hatred. Almost anyone openly opposing the war was perceived as disloyal. Then, the Russian Revolution produced a "red scare" in America.

30. The plaintiff began in the autumn of 1919 to give a series of operatic performances in German in New York City. Riotous hostile crowds surrounded the opera house at the opening performances and came into active collision with the large body of police called out by the city. The mayor then forbade further German operas. The court refused to prevent the enforcement of this order.


In some Americans, the spirit of patriotism turned into a frenzied search for consonus. Vigilante organizations sprang up to deal in their own way with dissenters and aliens. In some instances, people were intimidated into buying bonds, denied the opportunity to learn the German language in schools, and abused merely for having a name that sounded Germanic. Some German dishes were renamed; sauerkraut, for example, became "liberty cabbage." A few radicals found themselves the victim of lynching mobs or tar-and-feather parties organized by zealous patriots. "There is no time to waste on hair-splitting over infringement of liberty," remarked a Washington Post editor.

Id. at 544.

29. Von Jhering, in his discussion of The Merchant of Venice, makes this point. "I crave the law." In these four words, the poet has described the relation of law in the subjective to law in the objective sense of the term and the meaning of the struggle for law, in a manner better than any philosopher of the law could have done it. These four words change Shylock's claim into a question of the law of Venice. To what mighty, giant dimensions does not the weak man grow, when he speaks these words? Is it no longer the Jew demanding his pound of flesh; it is the law of Venice itself knocking at the door of Justice; for his rights and the law of Venice are one and the same; they both stand or fall together. And when he finally succumbs under the weight of the judge's decision, who wields out his rights by a shocking piece of pleasantry, when we see him pursued by bitter scorn, bowed, broken, tottering on his way, who can help feeling that in him the law of Venice is humbled; that it is not the Jew, Shylock, who moves painlessly away, but the typical figure of the Jew in the middle ages, that patriarch of society who cried in vain for justice? His fate is eminently tragic, not because his rights are denied him, but because, a Jew of the middle ages, has faith in the law—we might say just as if he were a Christian—a faith in the law firm as a rock which nothing can shake and which the judge himself feeds until the catastrophe breaks upon him like a thunderclap, dispels the illusion and teaches him that he is only the despised medieval Jew to whom justice is done by defrauding him. V. JHERING, THE STRUGGLE FOR LAW, EXCERPTS (J. Lalar trans. 2d ed 1915) [Reprinted in part in W. REEDMAN AND A. SCHEIBEIR, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW 244 (1987)].

31. Debs v. United States, 249 U.S. 211 (1919). Debs was tried, convicted, and sentenced to two concurrent ten year prison terms under the "Espionage Act of June 15, 1917," for giving a speech in opposition to the war and to military recruitment. The Court held that it was enough if "a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service and if in passages such encouragement was directly given, the immunity of the general theme [socialism] may not be enough to protect the speech." Id. at 213. See also, Schneck v. United States, 249 U.S. 47 (1919) and Abrams v. United States, 250 U.S. 616 (1919).

32. Their [lawyers'] exuberant nationalism, reinforced by xenophobia and anti-radicalism, remained potent after the armistice. But the target changed: the Hun yielded to the radical; the enemy abroad became the enemy within. The Bolshevik Revolution, labor-management conflict (including the menacing strike by Boston policemen), race riots, and a series of bombings contributed to the Red Scare of 1919. J. AUBREY, EQUALITY UNDER THE LAW 106 (1976).

In 1919 a great Red scare began, inspired by Communist successes in Russia and central Europe. This fear was aggravated by the activities of a few bomb-throwing anarchists and of the Industrial Workers of the World, a small but lawless organization. The hysteria increased when, in the follow-
particularly dangerous is the situation in which the acts of a minority group are perceived as posing a very great threat or danger to the community, and when the minority group itself is not perceived as being fully a part of the community. Here, the attempt by the minority to use its trump is perceived as posing a danger to the community and also taps previously existing deep seated prejudice or hatred against the very group which is believed to be the source of the danger. These circumstances which make it less likely that the majority will be willing to recognize the limitations imposed upon it. At these times, the chance of cataclysmic extra-legal action increases. Also increased is the chance that the institutions of government which are charged with enforcing the limits on majority power (in particular the courts) will bow to popular pressure and will fail to protect minority rights from the encroaching majority. The doctrines which are supposed to protect minority interests may be re-interpreted so as to permit the actions which the majority demands. Thus, hard times make bad civil liberties law.

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A particularly bleak episode occurred at the outset of World War II when thousands of Americans of Japanese descent were interned in concentration camps. Not only was this government policy supported by the majority, it was actually upheld by the United States Supreme Court. Yet, today, in times more removed from the passions of that day, it is easier to evaluate those actions objectively and to condemn them and the decision which approved them, as a shameful episode in our history.ing year, 900,000 votes were polled by Eugene V. Debs, Socialist candidate for the presidency who was then in a federal penitentiary. In January 1919, Attorney-General A. Mitchell Palmer launched a gigantic two-year Red hunt, highlighted by mass arrests without benefit of habeas corpus, by hasty prosecutions, and by mass deportation of Communists and other radicals.


On the night of December 21, 1919, together with two hundred and forty-eight other political prisoners, I was deported from America. Although it was generally known that we were to be deported, few really believed that the United States would so completely deny her past as an asylum for political refugees, some of whom had lived and worked in America for more than thirty years.


Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

Id. at 220.

This exclusion of all persons of Japanese ancestry, both alien and non-

Id. at 233 (Murphy, J., dissenting).

Although unique in American history, the evacuation of the West Coast Japanese in 1942 resembled some of the epic banishments of more primitive times. The war dramatized the story, even as it distorted the issues. We now see what happened twenty-five years ago as a confrontation between expediency and liberty, prejudice and tolerance, and the individual and the state. Then, only a few voices of conscience insisted, "This is wrong!" Today the actions of the nation betraying its traditions and its constitutional guarantees appear, as more than one commentator predicted they would, as a black page in our history.


"The whole sorry episode of internment and persecution remains a somber warn-


37. On February 14, 1942, Robert Bendiner wrote in The Nation: "If the nerves of the Western Congressional bloc can be soothed, if inflammatory comment on the 'enemy-alien menace' can be diverted to more harmless pursuits, and if the press now working on Martin Dies' 'Yellow Book' happily breaks down, we may yet be spared a disaster on the West Coast."

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38. See, for example, FLA. STAT § 800.02 (1985) and Bowers v. Hardwick, 478 U.S. 186 (1986).
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Joseph: Civil Liberties in the Crucible: An Essay on AIDS and the Future

Published by NSUWorks, 1988

During the 1950's, in the era of McCarthy, a fear about subversion of America by Communists led to jailings, firings, informing, and blacklisting, still characterized by the name "witch hunts." The importance of these examples must not be lost upon us. It is always too easy, after the fact, to recognize how irrational fear combined with prejudice resulted in an overblown and destructive exercise of governmental power. What is not as easy is to recognize such a situation in advance and to practice restraint.

The current health crisis, caused by the disease AIDS, has all the makings of just such a time: First, the disease was early mischaracterized as a "gay plague." It is probably not necessary to belabor the point that homosexuality is not accepted by the majority in America, that gay people have been the subject of widespread discrimination but are not generally protected under civil rights laws, and that sodomy laws continue in effect in many states. Thus, AIDS continues, in the minds of many, to be linked to a group for which there was and continues constitutional guarantees appear, as more than one commentator predicted they would, as a black page in our history.


37. On February 14, 1942, Robert Beninder wrote in The Nation: "If the nerves of the Western Congressional bloc can be soothed, if inflammatory comment on the 'enemy-alien menace' can be diverted to more harmless pursuits, and if the press now working on Martin Diez's 'Yellow Book' happily breaks down, we may yet be spared a disaster on the West Coast." On February 19, Chester Rowell began a column on the demand for evacuation with the quotation, "Come now; let us reason together." The results of removing American citizens of Japanese ancestry "would be indubitably disastrous . . . not only against all law, morals and justice, but against our own interests. Those of us who still have functioning beads should keep them."

GIRDNER & LOFTIS, supra note 34 at 100.
38. See, for example, FLA. STAT. § 800.02 (1985) and Bowers v. Hardwick, 478 U.S. 186 (1986).
ues to be prejudice and hatred.**

Second, the disease is generally fatal.** It poses a direct and real threat to us all. In the beginning, there was often confusion and misunderstanding about the methods of transmission. People worried that they would catch AIDS from toilet seats, handshakes, kisses, or mere proximity to an infected person. It is likely that significant numbers of people continue to misunderstand how AIDS is and is not spread.* Thus, the level of irrational fear (fear not based upon demonstrated medical facts) is high.

A high level of irrational fear coupled with a perceived direct threat, linked, at least in part, to one of the least accepted minorities in the land, will provide fertile ground for hysteria to grow.** Unless checked, increasing calls for drastic curtailment of the liberties of AIDS sufferers and perhaps those in “high risk” groups will increase. Already some demands for quarantines have been heard.** Attempts have been made to exclude AIDS sufferers from schools, work-

39. More recently, intravenous drug users have also come to be identified with AIDS. This is not likely to reduce the level of antagonism in the minds of most people to those with the disease.


41. See generally, Id., at 849-71.

42. It was recently reported that AIDS cases are being under or misreported by doctors out of fear that their patients will suffer discrimination if their condition becomes known. “The primary reason some doctors go to such lengths to protect privacy is an overriding fear that their patients will suffer discrimination if word of their condition leaks out.” Goudreau, Fear Keeps Many AIDS Cases Under Wraps, THE MIAMI HERALD, February 21, 1988, at 20A, col. 1.

43. “Every time a doctor orders a blood test for anything, it should include a screen for HIV and the results given to the state,” said Sen. Don Childers (D-West Palm Beach). He believes infected teachers should be fired and infected students segregated. Goudreau, The State’s Need to Know Vs. Patients’ Privacy, THE MIAMI HERALD, February 21, 1988, at 20A col. 4. [hereinafter Patients’ Privacy]. “[C]ourts must remain vigilant to the possibilities that prejudice and fear may combine to turn the quarantine power from an instrument of public health to one of public bigotry and hatred.” Parmet, AIDS and Quarantine: The Revival of an Archaic Doctrine, 14 HOT STAIR. L. REV. 53, 90 (1985). Florida’s Governor has called for a quarantine of sexually active AIDS victims. Silva and Anderson, Martinez Wants Schools, Jails, No Tax Hike, THE MIAMI HERALD April 6, 1988 at 8A, col. 1.


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places,* and the like. Universal testing is debated.

At present, a combination of litigation and/or education efforts by groups such as the ACLU and Lambda Legal Defense Fund, some government officials such as the Surgeon General, and some helpful media coverage seems to be having some effect. It is probably true that more people know more about AIDS than they did two years ago. Yet, it is also true that the problem is still in its infancy. With all of the talk about AIDS, there are not yet many cases. This will change shortly, as those infected over the last few years begin to develop the disease.** If no new persons are infected, a cure is not found, and AIDS proves to be generally fatal,* there eventually still could be between one and two million deaths from AIDS. If the spread of infection continues, the numbers could be much higher. The reaction to this number of sick people and the continuing spread of the disease is likely to be serious.

It is true that the AIDS virus has no civil liberties, but those who carry it and suffer from it do. Now is the time when medical personnel, government, lawyers, the press, and others must unite to fashion a reasonable response to AIDS which will not result in the destruction of civil liberties. Crucial to the success of this effort is an education campaign. The public must understand AIDS well. They must know how it is and how it is not transmitted. They must understand which protective measures and behavioral changes are required and which are not. They must understand that the disease is not caused by or the responsibility of any one group. They must understand that although AIDS is fatal, it is not easy to catch. In short, knowledge about the true level of risk must be so widely known that there is no room for irrational fear.


46. The Centers for Disease Control (CDC) AIDS Weekly Surveillance Report of Cases Reported to the CDC for February 15, 1988, lists the cumulative total of reported cases as 53,814. The Coolfront Report: A Public Health Service (PHS) Plan for Prevention and Control of AIDS and the AIDS Virus, PUBLIC HEALTH REPORTS, July-August 1986, 341, 342, states that by 1991, there will have been a total number of cases in excess of 270,000. The same report estimates that there were, at that time, between one and one and one-half million people in the United States infected with the virus.

47. Although only 5% of those with AIDS are known to have died to date, the figures rise dramatically with the length of time since diagnosis. 93% of those persons diagnosed with AIDS between January and June of 1981 are known to be dead. CDC, AIDS Weekly Surveillance Report—United States, AIDS Program, Center for Infectious Diseases, Centers for Disease Control, February 15, 1988.
uses to be prejudice and hatred.39

Second, the disease is generally fatal.40 It poses a direct and real threat to us all. In the beginning, there was often confusion and misunderstanding about the methods of transmission. People worried that they would catch AIDS from toilet seats, handshake, kisses, or mere proximity to an infected person. It is likely that significant numbers of people continue to misunderstand how AIDS is and is not spread.41 Thus, the level of irrational fear (fear not based upon demonstrated medical facts) is high.

A high level of irrational fear coupled with a perceived direct threat, linked, at least in part, to one of the least accepted minorities in the land, will provide fertile ground for hysteria to grow.42 Unless checked, increasing calls for drastic curtailment of the liberties of AIDS sufferers and perhaps those in "high risk" groups will increase. Already some demands for quarantines have been heard.43 Attempts have been made to exclude AIDS sufferers from schools, work-

39. More recently, intravenous drug users have also come to be identified with AIDS. This is not likely to reduce the level of antagonism in the minds of most people to those with the disease.
41. See generally, Id., at 849-71.
42. It was recently reported that AIDS cases are being under or misreported by doctors out of fear that their patients will suffer discrimination if their condition becomes known. "The primary reason some doctors go such lengths to protect their privacy is an overriding fear that their patients will suffer discrimination if word of their condition leaks out." Goudreau, Fear Keeps Many AIDS Cases Under Wraps, The Miami Herald, February 21, 1988, at 20A, col. 1.

46. The Centers for Disease Control (CDC) AIDS Weekly Surveillance Report of Cases Reported to the CDC for February 15, 1988, lists the cumulative total of reported cases as 53,914. The Coonfont Report: A Public Health Service (PHS) Plan for Prevention and Control of AIDS and the AIDS Virus, PUBLIC HEALTH REPORTS, July-August 1986, 341, 342, states that by 1991, there will have been a total number of cases in excess of 270,000. The same report estimates that there were, at that time, between one and one and one-half million people in the United States infected with the virus.
47. Although only 56% of those with AIDS are known to have died to date, the figures rise dramatically with the length of time since diagnosis. 93% of those persons diagnosed with AIDS between January and June of 1981 are known to be dead. CDC, AIDS Weekly Surveillance Report - United States, AIDS Program, Center for Infectious Diseases, Centers for Disease Control, February 15, 1988.
to grow.\textsuperscript{48}  
AIDS must be treated as a medical, rather than as a moral issue. The reactions to it must be narrowly focused on medical necessity.\textsuperscript{49} Such a policy is rational and poses only a limited threat to individual freedoms. It is when law and policy move beyond the limits of the actual provable medical threat that the greatest danger to individual freedom arises.\textsuperscript{46}

\textsuperscript{48} "Since the modes of transmission have been medically identified as limited in exchanges of blood and semen, any discrimination based on misinformation or conjecture must be eliminated or prohibited. No one has the right to make another person the victim of his or her ignorance." See, Testing Democracy, supra note 40, at 927.

\textsuperscript{49} For example, since the best medical information tells us that AIDS is not transmitted through casual contact, any attempt to prevent casual contacts with AIDS sufferers is irrational.

40. Calls for draconian measures have sometimes been made because "we don't know, without a doubt, that the only way you're going to catch AIDS is through needle injection, sexual contact or transmitting blood." Florida State Senator Don Childs, quoted in Patients' Privacy, supra note 43, at 20A, col. 4. Even if true, this would not be a rational basis for quarantines or other measures aimed at preventing casual contact with AIDS sufferers. While the medical people do not know how to cure the disease, they do know quite a bit about its transmission. None of that evidence suggests that casual contact poses realistic dangers of transmission. A rational AIDS policy must be built on what medical science can tell us with reasonable certainty. As the state of our knowledge grows and changes, some adjustments to our policies may be made. But to demand a total and absolute guarantee of safety is irrational because it requires something that can never be and which we do not demand in any other area of life. Society allows airplanes to fly and autos to drive even though some crash and cause deaths. In all areas of life we live with some level of risk. Useful, yet dangerous, kitchen appliances cause injury and death on a regular basis. Medications that our many cause allergic reactions in a few. In the same way, an AIDS policy, to be rational, must be constructed based upon the best information that medical science can give us and not on our unfounded fears.

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FDA's AIDS Program

John A. Norris, J.D., M.B.A.*

The Challenge of AIDS

The Conquest of AIDS — under the leadership of President Reagan — is the Nation's number one public health priority. Because of this, the Federal Government, and in particular the Public Health Service (PHS), is committed to fighting an unceasing battle against this deadly disease. For the PHS, of which FDA is a part, this has meant mounting a coordinated strategy involving research, and the development of ways to prevent, cure and treat AIDS.

FDA's special role in this battle is largely based on its general responsibilities of overseeing the safety and effectiveness of the nation's drugs and the implementation of devices to ensure the safety of the nation's blood supply. Annual sales of FDA-regulated products account for approximately 550 billion consumer dollars annually. Much progress has been made; and FDA's accomplishments to date will be detailed later in this article. However, until a safe and effective drug that cures AIDS is found, as well as a safe and effective vaccine that prevents the disease, our job will not be done and we will not rest.

Understandably, the public demands that FDA expedite its review and the approval of new products that will offer even a small measure of hope to AIDS patients and their families. FDA is taking steps to ensure the timely review and approval of AIDS-related products, as well as new drugs for other life-threatening and serious diseases. Careful FDA review is necessary and mandated by law to minimize the risk of allowing potentially unsafe and ineffective products from coming onto the market. Unsafe products cause unnecessary suffering. Ineffective ones raise false hopes, cause the patient to defer the use of other more effective measures, and are burdensome and economically costly.

* As Chief Operating Officer of the Food and Drug Administration, Deputy Commissioner John A. Norris shares responsibility with the Commissioner for managing FDA's programs to assure industry compliance with the legal safety and effectiveness standards affecting foods, drugs, many veterinary products, cosmetics, and medical and radiological devices.

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