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AIDS. The stories that have been written about the virus and the disease, death, and despair that follow in its wake are so numerous that it seems almost fruitless to try to say anything about the subject which has not been said better before. Nonetheless, despite the obvious outpouring of information and analysis about AIDS, it is difficult to find a powerful consensus about the proper response to any of the manifold social problems it creates. The Presidential Commission to study AIDS began its life torn by bitterness and dissension.1 Once reconstituted, it issued a report calling for a massive commitment to extensive enforcement of antidiscrimination laws not only in employment, but also in housing.2 The early responses to the report indicate that the Reagan administration has adopted a cautious stance towards the Commission’s recommendations. As the public debate over AIDS continues, the incidence of the disease continues to rise, and the underlying virus continues to spread.3 It seems, therefore, more imperative than ever to develop some theoretical overview of the challenge that AIDS presents.

Unfortunately, social crises do not produce the theories needed to understand such challenges. Instead they only place greater strains on whatever few general theories are in place. In order to deal with the question of AIDS, we have to step back from the immediate elements of the controversy, and ask how this prob-

†James Parker Hall Distinguished Service Professor of Law, University of Chicago. This paper was delivered at a symposium on Testing in the Workplace organized by the University of Chicago Legal Forum, December 5, 1987. I also presented it as a workshop paper at Chicago-Kent School of Law and at the Center for Medical Ethics at the University of Chicago in January, 1988. Albert Alschuler provided valuable comments on a draft of this paper. Sean Smith provided helpful research assistance.


3The standard number is 1,500,000 persons who are said to carry the virus, but not to exhibit signs of the disease. Recently, the Center for Disease Control reduced its estimates of the number of persons who are AIDS carriers. Phillip M. Boffey, U.S. to Test for AIDS in 30 Cities; Household Sampling Put Off, N.Y. Times sec. I, 20 (Dec. 3, 1987). Making estimates is difficult and the question has become intensely politicized. See generally, Randy Shilts, And the Band Played On: Politics, People and the AIDS Epidemic (1987).
lem should be handled in light of the general theories of social control and private contract that are already available to us. In this paper I propose to take just this approach, and to apply what I know of legal and social theory to the problem of AIDS, focusing on one of the most controversial issues of the present time: Do private employers have the right to test their current and prospective employees to see whether they are infected with the AIDS virus, even if (as is often the case) they manifest no signs of AIDS or any associated disease? The question can be stated alternatively: Do present and prospective employees have the right to be evaluated without AIDS testing and without regard to their antibody status? In order to make the nature of the analytical inquiry more focused I shall assume (as seems to be almost, but not quite, universally the case) that the AIDS virus is spread from person to person only by blood transmissions or intimate sexual contact. Stated otherwise, I shall assume that ordinarily AIDS carriers present no health risk to their co-workers, customers, patients, clients, or pupils, save for exceptional occupations like hospital staff in burn units.

I. Two Models of Contracting

Two models of contracting may be used to approach this question. The first, or common law approach, is a model of freedom of contract. The second, dominant in many legislative areas, holds that general social norms may permit the exercise of contractual power only if sufficient cause can be shown. In general, this theory

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4 I put aside the question of public employment, which raises very different questions, given that the government is conducting "its" own affairs, and not regulating those of its private citizens. Briefly stated, I think that the proper framework for this analysis treats government as maintaining a public trust. Its officers, as trustees, can only enter into contracts that work for the benefit of its citizenry at large. In general, that conclusion precludes, at the very least, any transfer in which government officials know that they will receive for the public's account less value than they will have to pay out. In the employment context it means that they cannot deliberately enter into losing contracts any more than they can sell public property to private parties at below market prices. If, as I argue below, providing insurance for AIDS carriers at ordinary market rates is a losing transaction, then the government must test to avoid the implicit losing transfers. Any subsidy to public workers should be unbundled from the employment decision, as a separate and distinct welfare measure, with explicit funding. See discussion at page 52.

5 Lately there have been some reports of needle-stick and laboratory contamination, and of transmission of the infection between siblings. For a compilation of references, see Deborah Jones Merritt, Communicable Disease and Constitutional Law: Controlling AIDS, 61 N.Y.U. L. Rev. 739, 748-49, 752-53 (1986). See also Marilyn Chase, Lab Worker Is Infected With AIDS Virus; Vigilance in Safety Measures Is Urged, Wall St. J. sec. I, 36 (Jan. 4, 1988).
will allow parties to refuse to enter into certain contracts that present certain health risks, but otherwise the theory imposes a general ban upon those forms of discrimination that make reference to, or depend implicitly upon, certain suspect classifications. The general prohibitions against discrimination on the grounds of race and sex are the two most potent social norms in this area. But the explicit statutory prohibition of discrimination against handicapped people "otherwise qualified" to engage in particular lines of employment is yet another manifestation of the same general approach.  

It should be apparent that these two basic orientations promise very different responses to the question of testing employees for AIDS, especially in the private employment context. What I propose to do is to outline both theories, and to consider their probable social consequences. I will then argue that freedom of contract, while far less fashionable today, offers a better perspective on the question of employee testing for AIDS than the antidiscrimination approach. The issue necessarily takes us far afield, for it becomes important to ask who, if anyone, should be required to provide either health or life insurance benefits to persons excluded from employee benefit plans because they test positive for the AIDS antibody.

* See Rehabilitation Act of 1973, especially Section 504, which provides:
  
  No otherwise qualified individual with handicaps . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 


  Note that the statute does not extend the antidiscrimination norm to those programs and activities that have not received federal financial assistance. In principle, however, it is easy to see how, on the model of the sex and race discrimination provisions, an extension of this sort could be made. Many states and localities have now issued regulations or passed ordinances that prohibit discrimination against individuals carrying the AIDS virus. See, for example, Los Angeles Mun. Code sec. 45.80 et seq. (1987). The statute raises its fair share of interpretive difficulties on matters such as the definition of handicap, the existence of private rights of action, the role of intent, justifications for discrimination and the like. For an exhaustive account of the current legal position, see Judith Welch Wegner, The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973, 69 Cornell L. Rev. 401 (1984). For the most recent judicial interpretation, see School Board of Nassau County v. Arline, 107 S. Ct. 1123 (1987) (discussing the extent to which persons who carry communicable diseases may be excluded from certain forms of employment). Arline did not reach the question of whether asymptomatic carriers of diseases, including AIDS, were "handicapped" persons entitled to the protection of the statute.

7 In the rest of this paper, these persons are called "antibody positive." I do not assume that every person who has the antibody will eventually contract the disease, although there is nothing in the medical evidence that excludes this possibility. It is sufficient for these
A. Freedom of Contract

As a matter of basic theory, the common law principle of freedom of contract applies to all employer and employee relations. The parties here are not strangers to each other, so the tort law need not intervene with protection against the external use of force. Instead the parties may decide to enter into any agreement that suits their joint needs and purposes. The simple argument in favor of freedom of contract is that both parties to the transaction are gainers, while third parties do not suffer any systematic losses: The increased wealth of the two contracting parties creates greater opportunities for strangers to enter into profitable exchanges on their own account. These external gains may seem small and unevenly distributed for any particular transaction. Nonetheless, over huge numbers of private transactions, the expected sum of these external gains will become steadily larger, so that it becomes ever more unlikely that any identifiable group of persons will be systematically worse off than they would be under a regime in which contractual freedom is uniformly restricted.

Consistent with this basic theory, freedom of contract is not a mindless shibboleth that automatically requires that any private contract be ratified by the courts. The limitations on the principle are in line with its social justification of moving goods and services to the owners who value them most. There are thus two basic exceptions to the principle, one that deals with contract formation, and a second that deals with external effects. Both of these exceptions follow from the theory itself.

First, the principle of freedom of contract does not preclude state intervention in circumstances in which the means of contract formation themselves are suspect. In the ordinary case a party is not entitled to keep the benefits of any contract, whether fully executory or partially executed, that has been procured by the use of duress or fraud, or that has been imposed upon an infant or an incompetent. Where one side has used duress or fraud to achieve its end, there is no reason to think that the bargain will yield bene-
fits for both sides; instead it is quite likely that one party will have surrendered something with a higher (subjective) value only to receive something with a lower (subjective) value. If the mutual benefit hypothesis no longer holds, then the agreement itself should be regarded as unfair and hence invalid. Similarly, where persons of full competence take advantage of those with only limited competence, there again the presumption that the contract works to the mutual advantage of both sides is effectively rebutted, so that the legal system must intervene. Whether it does so by making a substantive examination of the fairness of the bargain (i.e., to ask, have both sides gained?), by insisting that the disadvantaged party receive the advice of independent third parties before any agreement is concluded, or by simply invalidating the agreement, raises issues that need not be dealt with here.11

Second, freedom of contract (like freedom of action generally) is also restricted for the protection of third parties not privy to the agreement. Here the limitation on freedom of contract is a necessary supplement to the law of tort. Start with the uncontroversial premise that A cannot murder B. If that is the case, then A cannot escape the tort prohibition by entering into a contract with C for that same end. The gains that A and C share do not take into account the manifest losses to B, so there is the risk, if not the certainty, that the gains to the contracting parties will be dwarfed by the losses that the agreement generates for nonconsenting strangers.

In order to get some sense of the relative magnitudes of gains and losses involved in a prohibition against the use of force, consider the following choice: Under the first alternative you will be faced with a large number of instances in which you, by agreement with a friend, will become the aggressor, but will face an equal number of cases in which others by agreement among themselves can commit aggression against you. Under the second alternative you will have to sacrifice your right to attack others, but gain in the exchange security against the attacks of others. Which do you prefer? The studies of risk of death in employment markets generate very high values for human life, often at several million dol-

10 Compare Clements v. London and North Western Railway Co., 2 Q.B. 482 (1894) (waiver of tort liability found in interest of minor employee), with Flower v. London and North Western Railway Co., 2 Q.B. 65 (1894) (somewhat different agreement not found in interest of minor employee).

11 This is not to say that the questions do not become important in AIDS contexts. Wills signed by AIDS patients often raise delicate issues of competence and undue influence, for which strong counselling and preventive measures are appropriate.
Hit men will not receive that much to kill another. So long as we think that living dominates killing, there is a powerful reason to prevent contracts for taking, or even placing at risk, the life or property of strangers. The importance of making this choice correctly increases given that the number of exploitive contracts will quickly increase if strangers could be so bound without consent. The prohibition upon contracts that bind third parties thus prevents the externalization of harms on those parties who have not surrendered their right to be let alone. It also offers, in a high transaction cost world, a convenient and easily accessible baseline that allows them to enter bargains on their own account. Whatever difficulties might exist in identifying the relevant class of externalities—such as monopolistic practices or competitive injuries—the risk of transmitting a deadly disease to a third party stranger is surely a relevant externality.

The application of this freedom of contract approach to the AIDS question yields relatively clean results in the context of private employment relations—conclusions that are at sharp variance with the dominant view today. Unambiguously, the model says that there is simply nothing special about AIDS testing in fashioning the rules of contract. The issues of duress, fraud, and incompetence are not involved in these cases, for the employer will (or could be made to) disclose in advance that passing the test is a condition precedent for the job. No one forces a worker to take a test against his will, or deceives him about what will be done with the results. The worker has full competence to enter into this transaction, along with any other. If, therefore, the employer wants to test the worker for AIDS, then the worker must agree to the test if he wants to have the job in question. Or he can walk away be-

12 See W. Kip Viscusi, Risk by Choice: Regulating Health and Safety in the Workplace 44 (1983). Viscusi first notes that the average blue-collar worker receives (in 1980 prices) a risk premium of somewhat over $900. He then comments on the significance of that number as follows:

If it is very likely that a worker will be killed or injured, a $900 risk premium can be seen as a signal that the compensating differential process is deficient. The average blue-collar worker, however, faces an annual occupational death risk of only about 1/10,000 and a less than 1/25 risk of an injury severe enough to cause him to miss a day or more of work. Consequently, the observed premium per unit of risk is quite substantial, with the implicit value of life being on the order of $2 million or more for many workers.

The regulatory values attached to life, say by OSHA, are often far higher, ranging over $10 million dollars. See, for example, Donald N. Dewees, Economic Incentives for Controlling Industrial Disease: The Asbestos Case, 15 J. Legal Stud. 289, 306 (1986).

cause the price demanded is too high. The choice yields the same result whether the employee is rich or poor, in good health or in bad. In each case he will make the decision to take the test only if it advances his welfare, and will reject it if it does not.

Whether the test is invasive of privacy, inaccurate in its results, costly in its administration, or destructive of morale, are all issues of overpowering importance for any private evaluation of the contract terms so offered, or in preparing any counter-offer. These issues will normally be resolved by agreement in ways that minimize the costs to both parties, for no party has an incentive to impose by agreement losses upon the other for which he receives no greater offsetting gain. We should expect, for example, that firms that require testing will bind themselves not to voluntarily offer to share their results with strangers, or to disclose them to public authorities. Confidentiality is in all likelihood the private norm. The various horror stories of the ostracism, abuse and firm misconduct that might follow a regime of voluntary testing all depend upon the assumption that firms operate to humiliate job applicants and not to make profits. Discussion of the legal alternatives is better served not by speculating about the types of contracts people will not enter, but by concentrating on those that are likely to emerge through the bargaining process.

On these assumptions, there is no justification for any social decision to countermand or limit the use to which private firms may put the AIDS test. As Hobbes said so long ago, the question of contract terms depends upon the “appetite” for the contracting value. Therefore, so long as the subjective costs of testing are lower to the worker than the subjective gains to the employer from testing, we should expect to observe testing in an unregulated marketplace—even if the costs to the worker run very high. But if the inequality of valuation runs in the opposite direction, then proposals for testing will get a frigid reception. Employers will have to pay more for testing than it is worth to them, and they will not do that, even if permitted to do so by law. One example illustrates the point: If the worker decides to waive any and all health and life insurance benefits, then the employer's interest in AIDS testing will fall dramatically. A regime of freedom of contract in which the private parties may vary any and all terms of their joint relationship need not generate an invariable employer demand for employee testing.

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14 Thomas Hobbes, Leviathan, ch. 15 (1651).
Similarly, there is no reason to prohibit AIDS testing in order to protect third parties. Testing for AIDS is not transmitting AIDS. The administration of an AIDS test by a private employer does not impose any additional health risks upon the population at large. Quite the contrary, if the possibility of being tested is positive, then prospective employees may take some steps to be free of both the disease and the antibody. The external effects may be small, perhaps even negligible, but they should run in the right direction. Testing will tend, however slightly, to reduce the incidence of disease, and hence to reduce its dangers to innocent third parties.

The general model of freedom of contract, and the issue of AIDS testing by private employers, can be resolved in a single sentence. Since there is no duress or fraud, and no risk of harm to third parties, the question of testing should be solely a matter of private contract. AIDS testing by health and life insurers follows exactly the same path once the general principle of freedom of contract is accepted.\[18\]

B. The Antidiscrimination Approach

The alternative antidiscrimination approach calls for sharp restrictions upon the power of private employers (or their insurers) to test for the AIDS virus. These restrictions do not rest upon defects in the process of contract formation or upon the concern with negative externalities. Instead this approach starts from the premise that private preferences should be honored only if they meet some minimum standard of social acceptability about the proper matters for bargaining.\[18\] To be sure, the antidiscrimination approach does not require that no private contracts should be respected. Virtually everyone has something nice to say about contracts and markets, so long as they are kept in their proper place. Accordingly, the case for restricting contractual freedom usually has a more concentrated focus and insists that the normal assumptions of the freedom of contract model do not apply because they do not take into account two of the twin pillars of modern social

\[18\] There is one difference, of some note here. For the employer any loss with respect to the insurance component of the transaction could be offset, at least in part, by gains in other aspects of the contracting arrangement. The insurer, however, contracts only on the health issues, and thus is not able to buffer his losses by selecting employees who are superior in other dimensions. It is not surprising that insurance companies have a larger stake in these questions than do employers. But the issue is enormous for both.

\[18\] See, for example, Cass R. Sunstein, Legal Interference with Private Preferences, 53 U. Chi. L. Rev. 1129 (1986).
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policy: The need to control against mistake, ignorance, and irrational discussion behavior; and the need to prevent invidious discrimination in employment. As will become evident, these two points overlap substantially.

The usual case against employer testing for AIDS starts with the assumption that there are only certain well-defined ends for which an employer would “properly” want to know the antibody status of a present or prospective employee. In this particular instance the proper ends are all related to the health and safety of the workers, customers, and clients of the employer, which are the very risks ruled out by the evidence on AIDS transmission. Since there are only a very few cases—manicurists, physicians, and the like—where the health claim is even plausible, the canonical answer is “no discrimination” against AIDS carriers for the vast range of employment cases. So long as the decision to exclude AIDS carriers from employment is thought to reflect an unthinking prejudice, chiefly against homosexuals and drug users, then the law should refuse to allow employers to take that preference into account. Indeed, the present law does adopt just this antidiscrimination model, especially in the Rehabilitation Act of 1973. In attacking the antidiscrimination model, I should be understood as urging the repeal of that statute, both generally and especially as it applies to AIDS.

II. THE TWO SYSTEMS COMPARED

The key difference between the freedom of contract model and the antidiscrimination model lies in their respect for private preferences in contractual matters. In many cases, the differences between the two systems may be small, if only because there is often a high degree of congruence between private desires and social command. A rule that tells all insurers they must classify their insureds according to the risk they present duplicates (at least on its face) the behavior of an unregulated market. But with AIDS the

17 See, for example, Wegner, 69 Cornell L. Rev. at 403 (cited in note 6). Wegner begins her article as follows: “Prejudice against handicapped persons has deep roots and a long history.”

18 This approach is adopted in part in Merritt, 61 N.Y.U. L. Rev. at 739 (cited in note 5).

19 See id. at 765-66 (citing the Public Health Service Conclusions).

20 See An Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance, Section 4(7)(a), which defines as an unfairly discriminatory practice “[m]aking or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any con-
divergence between social norm and private preference is substantial. If employers continue to act out of ordinary self-interest they will regard the antidiscrimination requirement as very onerous, even if they acknowledge that their primary concern is not with health and safety. Their concern is simply with money—lots of it. Yet courts today are generally hostile to any justification for discrimination that rests upon cost differentials, however large, despite the fact that such justifications are not based on simple prejudice. This divergence between private costs and social command lies at the root of the testing controversy, for with AIDS, the dollar figures are simply too large for anyone to ignore.

In order to understand the source of the tension, it is necessary to examine how long-term employment contracts typically work, even ones “at will.” The minimum condition for contract stability is that both sides want to enter into the contract. To determine whether that condition holds, it is necessary to look at the various contractual components. The most obvious component is the services rendered by the employee. The AIDS carrier, if asymptomatic, can usually do these tasks as well as any other person. So far, the self-interested employer has no reason to prefer
someone who is not a carrier to someone who is.

Other dimensions of the employment relationship will evoke a different employer response. Employers, for example, may make heavy initial investments in recruiting and training, costs that they can recoup only over time. For AIDS carriers the number of years over which that investment can be recovered is, on average, sharply reduced, no matter what assumptions are made about the rate at which AIDS carriers turn into AIDS victims. To offset this lower rate of investment return, the employer must obtain some compensating advantage from some other aspect of the employment relationship. Hiring candidates with better experience or credentials are two ways of doing so. Alternatively, the net return to the employer might be preserved if the worker accepts a lower wage in anticipation of a shorter period or a lower level of future productivity. Finally, both sides could move to some intermediate position, with adjustments both in wage levels and quality of performance. But no matter which way the adjustments go, in equilibrium the expected return to the employer from hiring antibody positive workers should be equal to that received from other employees. That result in turn can only be achieved if the AIDS carrier absorbs all the losses associated with his antibody status. Within a market, unlike cases cannot be treated alike. The rational employer response to an AIDS carrier is to discriminate between AIDS carriers and other workers—the precise response that the antidiscrimination approach forbids.

The situation becomes still more ticklish if the contract contemplates the provision of fringe benefits, most notably health and life insurance. Here the difference between the anticipated costs of the AIDS carrier and the ordinary worker are enormous. One estimate suggests that the mortality risk for AIDS carriers is at least 25 times that for the rest of the population. Similarly, the costs
of caring for AIDS patients are somewhere between $25,000 and $150,000 per case, a number that could easily increase if drugs and other treatments promise prolongation of life but not cure of the underlying condition. Since the employer’s total cost includes both wages and fringe benefits with health and life insurance components, the ordinary contract will impose a net loss upon the employer, even on very modest cost assumptions. For example, if the fringe benefit payments for health and life insurance are, say, five percent of the base salary for the ordinary worker, then they could easily exceed the entire base salary for the AIDS carrier. In an unregulated market, insurance offers no escape, for it only transforms a future uncertain loss (with a high present value) into a certain loss measured by the premiums paid; indeed the rates charged by the insurance firm will be higher as the fraction of AIDS carriers in the work force increases. If other firms have employees with lower health risks, the profitability, and perhaps the survivability, of the firm will be at stake. Again, unlike prospects cannot receive like treatment if the market is to remain in equilibrium. The only question is what differential response will make it most likely that the two parties will be able to form a mutually beneficial bargain.

There are two dimensions along which needed modifications in the employment contract can be made. First, the parties could agree to a lower wage to offset the increased costs of health and life insurance. A priori, however, there is nothing that says that the expected costs of fringe benefits are less than the market wage. As just noted, for some employees it is likely that these costs could be even greater given the frequency and severity of the AIDS risk. If so, then the equilibrium position has the worker taking a negative wage, which is another way of saying that the worker devotes all his resources to the purchase of insurance, paid for part in cash and part in services rendered. It is quite unlikely that this contract will emerge in the marketplace, because no worker will want to invest all of his income in insurance when there are other necessities and pleasures of life.

The only other avenue of adjustment, therefore, is to change percent figure over a ten year period. Id. at 109. There is no evidence today that rules out the possibility of a one hundred percent conversion rate.

the level of fringe benefits. Again this is not necessarily an all or nothing matter. Both life and health coverages could be reduced, or even eliminated, until the employer again obtains net benefits from the contract. The exact contours of the trade-offs are hard to establish in the abstract, but it is a good guess (although not a universal truth) that for AIDS carriers, health insurance counts for more than life insurance. The bequest motive seems weaker than the care motive, especially for AIDS carriers with no dependents. Yet there is nothing that says that even any health coverage will be provided by contract, for with AIDS the anticipated costs of health insurance, taken alone, could easily exceed the wage level. Here the AIDS carrier's best option is to accept the higher wage with little or no insurance coverage, in an effort to put aside some reserves, either as self-insurer or in a pool with other AIDS carriers who are in the same position. The worst option is to be told that the job is not available because the employer refuses to individuate contracts to take into account the special position of the employee. The prospective employee prefers positive wages and no benefits to no wages and no benefits.

We have, of course, no empirical evidence about how much individuation would take place because of the current prohibition on discrimination against the handicapped. Nonetheless, as a matter of theory, the market response to both sides is explicit discrimination between the AIDS carrier and other employees. This discrimination is not driven by ignorance, mistake, prejudice or irrationality. It is a rational response, indeed the only rational response, to an exogenous shock—the antibody positive status, which radically changes cost and benefit calculations for everyone concerned.

III. TESTING: DEMAND AND PROHIBITION

Within this framework, it becomes possible to understand why employee testing becomes useful. It helps parties to decide at low cost what type of contract is appropriate. It prevents misclassifi-
cation of high-risk antibody positive persons, and allows low-risk persons to receive the set of insurance contracts that they want and that their employer can afford. The tests allow individuals to know where they stand at the outset of the relationship (although periodic testing may be necessary with antibody negative persons), so that there is no uncertainty as to where the risks in question lie. The savings that are generated by testing can be divided between employer and employee alike. If a worker does not want to know what his antibody status is, some firms at least will allow him to forego the test if he is willing to forego insurance benefits.

These anticipated market responses are wholly precluded by even the most modest application of the antidiscrimination laws. It is important to examine the range of anticipated responses by both sides, once a prohibition on discrimination is in place. One possible response is for the employer to make no changes in hiring practices or contract terms in response to the anti-discrimination requirement. In this world, there would be only a transfer payment ex post between the two sides, so that the prohibition against discrimination could be attacked only on the grounds that its distributional consequences are unacceptable. This scenario of passive response is, however, wholly unrealistic. In truth all variables will start to move together, for the employer will quickly try to minimize the amount of private losses that it suffers through the heavy transfer payments demanded. If minimum wages influence employment practices, then an antidiscrimination rule must loom still larger. While the prohibitions against duress and fraud are designed to insure that contracts operate for the mutual benefit of both parties, the antidiscrimination laws (at least as applied to AIDS) operate on a very different vision: That the law requires parties to enter contracts that will be winning for the worker and losing for the firm.29

antibody positive status should have incentives to change their primary behavior. Testing here does not only have distributive consequences. The knowledge involved can be used to reduce the risk of illness, even given a viral or genetic predisposition. “Too Much Information” as used in Liebman, 1988 U. Chi. Legal F. 57 (cited in note 22) is, I think, the wrong phrase.

29 Note that sometimes an antidiscrimination provision is not designed to force one contracting party into a losing bargain. With regulated natural monopolies, the seller is often subject to nondiscrimination requirements. While these could be used to make the seller enter into certain loss transactions, they need not be so used. Alternatively, the seller monopolist could be pricing at above marginal cost, so that the nondiscrimination provision is only designed to bring the seller back, however imperfectly, to a competitive rate of return. That solution generates contracts that work for mutual gain, when measured against the original precontractual position. It is just this tension that explains why public utility
The self-interested employer will try to minimize that loss. Several routes are open. One possible response is for the employer to seek to bring the AIDS cases within the class of "for cause" justifications. Employers could argue that AIDS carriers really do pose a health and safety risk to fellow workers or customers, so that they lawfully can be refused employment. Sometimes (as with examining physicians) this claim may be creditable, but often it is not. Therefore, the effect of the antidiscrimination law is to establish incentives that increase the amount of misinformation in the world, a clear negative externality that could be avoided if the antidiscrimination laws were not in place.

In most cases this line of argument will fail, at least today, if only because the medical evidence on AIDS is clear enough to refute it decisively. Nonetheless other strategies are available to the employer. If the employer must hire, and is barred from the market response of differential contracting, then he will cast about for a second-best solution. Many of these will prove unsuccessful, but whether successful or not, all involve substantial social losses that will be visited both upon the shareholders of the firm, the AIDS-free employees and the public at large. Consider the following pattern of evasion, response, and further evasion.

A firm might decide to refuse to hire any single men between the ages of 25-40. With that decision the firm cuts itself off from some AIDS-free workers it would otherwise choose to hire. The size of those losses is hard to estimate in the abstract, especially since no firm will provide the data that is essential to drive the analysis. All that can be said with confidence is that given the enormous losses in fringe benefit and training costs, a firm may be better off even if it loses a very substantial fraction of its most desired workers. But it is highly unlikely that the antidiscrimination norm will tolerate a response manifestly designed to evade its central command.

To overcome this evasion, the law might be construed or amended to attack the facially neutral hiring policy as largely "pretextual," that is, as an effort to evade the social prohibition against discrimination by paying the relatively low price of not hir-

regulation is a constant tightrope walk between state and firm exploitation. See generally Jersey Cent. Power & Light Co. v. Federal Energy Regulatory Commission, 810 F.2d 1168 (D.C. Cir. 1987). As these employment markets are highly competitive, it is extremely unlikely that the nondiscrimination requirement in AIDS cases is designed to keep employers from making the supercompetitive return on investment. Unlike the rate regulation context, the contracts leave the employer (or the insurer) worse off than he would be without the transaction.
ing AIDS-free persons between 25 and 40. To counter that risk, the
law can be extended to scrutinize policies that are neutral on their
face (i.e., do not mention AIDS) but differential in their impact
and motivated by impermissible social concerns. Employers can,
for example, be prohibited not only from testing for AIDS, but also
from asking employees questions about their age, their personal
lives, or their marital status. In more extreme form, it might be
time to have the state review the hiring practices to see if they
meet the appropriate goals and timetables. If that set of remedies
is inadequate, then the law could implement an affirmative action
rule, requiring employers to hire a certain fixed percentage of per-
sons in the high-risk groups, or even antibody positive individuals,
in order to be able to hire at all.

Still the game need not end. The employer may see that the
antidiscrimination law will be interpreted to reach these practices,
so that it becomes futile to try to change the mix of labor at all.
The firm could respond by cutting the level of fringe benefits that
it supplies to all workers, or by redefining the nature and catego-
ries of its jobs so as to reduce its dependence upon high risk work-
ers. In the longer run, the firm could move its factories and offices
into geographical areas that have a low incidence of AIDS, or into
jurisdictions that allow testing, or even go out of business
completely.

For each of these responses, there is of course some public
countermeasure, which cuts deeper and deeper into ordinary man-
agement prerogatives. Fringe benefits could be kept by law at Jan-
uary 1, 1987 levels. Work descriptions and job classifications

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30 See, for example, Prohibition of Discrimination in the Provision of Insurance Act of
that “an insurer may not deny, cancel, or refuse to renew insurance coverage, or alter ben-
efits covered or expenses reimbursable, because an individual has tested positive on any test
to screen for the presence of any probable causative agent of AIDS, ARC, or HTLV-III
infection . . . [nor] because an individual has declined to take such a test.” Id. The prohibi-
tion is in effect for five years, during which time the insurance rates are frozen. After the
five year period, an insurer may petition the Commissioner of Insurance for a rate increase.
The statute was upheld against a due process “takings” challenge in Am. Council of Life
Ins. v. District of Columbia, 645 F. Supp. 84 (D.D.C. 1986), chiefly on the authority of
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), even though it recognized that the
AIDS tests, when repeated, were highly reliable. While the court questioned the wisdom of
the statute, it refused to strike it down under the rational basis standard of review because
“the D.C. Council intended to address the serious problem of securing insurance coverage
for individuals susceptible to the AIDS virus.” Id. at 88.

31 Note that strategies of this sort have been used by Congress in other areas. With
pension law, for example, statutes have provided that certain penalties for withdrawing
from plans be imposed on persons who withdrew after the bill was introduced, but before it
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could be frozen unless prior state approval was obtained. Factories and offices could be prohibited from closing unless large payments were made to existing workers, including AIDS carriers. All of these alterations destroy existing values in the firm and its network of employment and customer contracts. In order to make the enforcement of the antidiscrimination laws more effective, it is always necessary to make their operation ever more costly. Still, no matter how draconian the public response, in the end bankruptcy or withdrawal from the market provides an effective constraint to further regulation. It is an open question whether the skilled legislator knows how to capture the golden eggs, while only wounding the goose that lays them.

The antidiscrimination laws thus transform the locus of decision from the market to the legislature. In some instances the legislature has a useful role to play, because it can prevent destructive private behavior, such as that found in the overexploitation of the common pool of oil and gas, or fish. But here the legislature has done something quite different, to require one person to hire another where the benefits received from hiring that person are lower than the total costs incurred. Each such transaction promises a net loss to the employer and a net gain to the worker. This situation is not politically stable, for the employer will invest resources in order to deflect the liability, while the interested employees will invest a similar amount in order to keep the antidiscrimination laws

was passed into law. The underlying substantive legislation was designed to strip various corporations of their contract right to withdraw from government plans, and the sponsors feared that once the bill was introduced, the withdrawal would take place before it was passed. Hence the earlier date was chosen. The entire scheme was upheld against contract and property challenges in Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984); Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986). The long-term effect is to reduce the ability of the government to do business by voluntary agreement.

Similar strategies have been used with automobile insurance. Massachusetts, for example, has an enormous assigned risk pool which is funded by forced contributions from insurance companies measured by their share of business as it existed in Massachusetts as of 1982. Annot. Laws Mass. ch. 175, sec. 113H. See Walter Olson, Captive Insurance Companies: Massachusetts is Holding an Industry Hostage, Barron's 9 (Nov. 2, 1987).


This has been a consequence of the District of Columbia law. See Am. Council of Life Ins., 645 F. Supp. at 88 (cited in note 30). I have also heard, but have not been able to verify, that moves are afoot in the District to repeal or modify the statute because of the withdrawal of firms. Whether a private firm would return, given the risk of future regulation of a retroactive variety, is far from clear.
in full force and effect. Each side therefore spends money in efforts to obtain transfers and the costs of factional struggles are deadweight social losses, regardless of the outcome of the political struggle.\textsuperscript{34}

Unlike the market system, this particular tension cannot be resolved simply by entrenching the right of AIDS victims to be free of private discrimination, unless there is some way to compel present employers (and their insurers) not to leave the market. There is clearly no way to induce new parties to enter into the marketplace where the losses promise to be huge. At some point the public support for antidiscrimination legislation will diminish as its negative consequences—for example, disruption of all insurance markets—to the population at large become manifest; some discrimination will be allowed. But on any question of this difficulty and emotional sensitivity, there is little reason to think that any political solution will be finely calibrated. It is always uncertain what mix of regulation will emerge. There seems, however, to be little reason to think that the collective solution will be better than the differentials in contract terms that private markets generate.

IV. A MODEST PROPOSAL

It will be said, however, that the market response is wholly inadequate because it ignores the pressing needs of AIDS victims for medical and health services. This problem is all too real. The issue is what, if anything, should be done about it. Here I shall assume that voluntary support for AIDS victims is not only appropriate, but also essential and laudable. Even today, coercive systems alone could not handle the burden that AIDS cases have created. But let us also assume for the sake of argument that these voluntary contributions are insufficient for the task at hand, so that government must exert some coercion to pick up the slack where these private efforts leave off. What type of coercion should be used? Initially it might be urged that once coercion is allowed into the picture, then the case for freedom of contract is dead. After all, if the state can make coerced exactions by general taxation, then it should be able to make parallel exactions under a general antidiscrimination law.

At one level the argument goes to the function of taxation. If

\textsuperscript{34} For a longer discussion of this point, see Richard A. Epstein, Toward a Revitalization of the Contract Clause, 51 U. Chi. L. Rev. 703, 710-17 (1984).
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all taxes must generate some form of a return benefit to the party who paid for them, that is, satisfy some "just-compensation" test, then taxation is a system designed to handle the problems of market failure in reaching some optimal social solution, usually on the question of political order. By that same test, taxes should not be used to achieve redistributive ends. If so, then it is no more possible to justify redistribution under an antidiscrimination statute than under the tax laws. Both strategies will fall before the just-compensation constraint.

Progressive taxation and welfare payments have been around for a long time, and wealth redistribution is a common function of government today, widely accepted as proper, humane, and necessary, with only a few skeptical critics. If coerced state redistributions for the needy are allowable, then there is no hard and fast distinction between redistributive taxes and antidiscrimination laws. Both systems transfer property and wealth from one group to another thought more needy or deserving under some nonmarket standard. If uncompensated takings, as it were, are desirable in the one arena, then they are desirable in the other. Any would-be Maginot line against the antidiscrimination law has been effectively breached by the general acceptance of redistributive policies.

Maginot lines do not, however, offer the only form of defense against the antidiscrimination principle. Even if the government may engage in the systematic redistribution of wealth, it does not follow that all approaches serving that redistributive end are equally attractive. The question of means-end efficiency still remains, for it is possible to ask, which technique of wealth redistribution is superior, and why? That inquiry is by no means an easy one, for at the very least it breaks down into at least two further questions: First, what level of redistribution is socially desirable as a matter of first principle? The question itself recognizes that there can be too much as well as too little redistribution. Second, for any given level of redistribution, which system imposes the smaller costs upon other individuals? On both counts, I believe that the redistribution for the benefit of AIDS victims works better through a system of direct welfare support payments than it does through the antidiscrimination laws.


As regards the first, there is good reason to believe that too many resources will be devoted to the care and treatment of AIDS patients (relative, say, to the care of the very young or elderly, also in subsidized programs) if employers and insurers are not permitted to test for AIDS by contract. Under a perfect system of antidiscrimination laws, an employer cannot change any employment practice or contract terms solely because it is dealing with an AIDS carrier. Accordingly, an AIDS carrier will unilaterally select the maximum available coverage, within the limits set out by the general plan drafted, but without regard to his special risk. If the employee can pick fringe benefits from a predetermined menu of extras (medical expenses, vacation days, etc.), subject only to an overall employee budget constraint, itself set without reference to AIDS, then the employee could check the minimum number of vacation days and the maximum amount of health insurance. In addition, AIDS carriers could migrate to those firms whose past practices are used to bind them to the highest levels of insurance protection. In predictable neo-classical fashion, these workers will take insurance and similar benefits until their private marginal cost equals private marginal benefit. In taking as much as they can get, the large social costs for each additional unit of protection purchased will be ignored by the purchasers as costs borne by someone else. There is no reason to suppose that any public benefit obtained from having employers and their insurers care for AIDS victims will be at some level that matches the additional costs that are imposed.

There is, however, a way to get some imperfect handle on this problem: Use direct public payments to purchase health or life insurance, and not the antidiscrimination laws, to subsidize AIDS carriers. This shift means the subsidy is now explicit instead of implicit. It is a direct charge upon the government's budget. Now major political pressures operate to reduce the level of funding. This proposal of funding insurance payments is not that hard to implement administratively, especially in comparison with the ex-

37 There are difficult questions that arise as the level of government shifts from local to state to national. It seems clear that the support for AIDS legislation may be most powerful at the local level, where there are high concentrations of at risk persons. But the firms regulated or taxed could leave the jurisdiction. The move to a larger jurisdiction prevents exit, and increases the tax base, but it also reduces the likelihood of passage of any redistributive measure, whether of taxation or contract regulation. In this paper I assume that the choice of government level has been fixed, so that its only choice is between alternative liability regimes. Matters in practice are much messier, as there is a welter of local, state and federal programs that affects AIDS cases.
tensive supervision required to police the aggressive use of the antidiscrimination laws. Any given set of insurance benefits will have two prices, one for persons with AIDS and one for persons without AIDS. The state can pick up the difference between the two prices so that the level of coverage for all workers is now equal. There is no danger of dislocation in insurance markets if the state decides to fund the difference for all AIDS carriers up to some predetermined limits. The required differential will of course be quite large, for the vast (10 to 25 fold) increase in cost will not disappear here any more than it does when employer health and life insurance plans are saddled with the antidiscrimination requirement. Employers will have to pay their portion of the premium along with everyone else, by bearing their additional fraction of the tax burden. But they will not be made to absorb all losses themselves. As there is a larger base from which to draw potential revenues, the levels of coverage now demanded by the antidiscrimination laws might be bearable under a system of direct public subsidies made to AIDS carriers for insurance purchases. Such is my modest proposal.

There is, of course, a catch, for in practice the level of insurance provided will be quite different. The insurance model allows the public at large to authorize the AIDS-positive employee to extract a favorable insurance contract from the employer. The difference in the value of the premiums paid and the coverage received equals the amount of that uncompensated exaction. But the public itself does not pay the direct costs, which are borne by the employers and/or their insurers. The taxation model means that the public has to tax itself in order to make up the difference between the cost of insurance to an AIDS carrier and the cost of insurance to a "standard rated" person within the same general classification. The quantity of any good demanded goes down as the price paid for it increases. The amount of insurance protection that the public will demand for AIDS carriers will diminish as it is called to pay a larger and larger fraction of the total bill.

The analysis is in fact more complicated than stated because the "public" includes some percentage of both AIDS carriers and their employers. AIDS carriers can be expected to urge large public expenditures on health and life insurance because of the disproportionate benefits they receive. Employers might also incline somewhat in the same direction if only because they may view their own increased tax payments as a prudent price to pay to ward off the antidiscrimination legislation that leaves the burden on them primarily. Even after these complications are taken into
account, the taxation alternative provides for a decision procedure that should reduce, and reduce substantially, the size of the subsidy provided to AIDS carriers. The differential, moreover, could well become more pronounced at the state level if the choice is between out-of-state employers or insurance companies, and in-state voters. Throwing the question of insurance for AIDS carriers into the taxation arena from the antidiscrimination arena first changes the identity of the payors, and then reduces the willingness to exact the payments.

The choice, then, is between forcing employers to pay the losses or placing those burdens on the community at large. Stated in this way, the funding question for AIDS victims resonates with the disproportionate impact test found in the eminent domain clause, which "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." It is no accident, therefore, that the judicial decisions which have sustained the antidiscrimination norm have steered away from this disproportionate impact test, and have resorted to the infinitely obliging rational basis test in its stead. The difference between the two approaches is, however, dramatic. With the rational basis test, the inquiry ignores all losses sustained by the losers, and demands only that the court find some group of citizens who have benefited from the passage of the statute. That condition is always satisfied in practice because no statute can pass unless someone wants it; otherwise no winning coalition will form. The court must of course identify the winners in its analysis, but that will be an easy enough task, as they will eagerly come forward themselves.

In contrast, the disproportionate basis test looks not to the gains of the winners, but to the distribution of the losses. These losses cannot be concentrated on a small fraction of individuals within society, even if the gains can. As stated, this disproportionate impact test looks as though it is concerned solely with the distributional consequences of government action, where proportionality is regarded solely as a norm of fairness and justice. But the

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38 Indeed, one issue in *Am. Council of Life Ins.*, 645 F. Supp. at 88-89 (cited in note 30), concerned the objection that the regulation in question imposed heavy burdens on out-of-state carriers. The willingness to impose heavy liabilities on out-of-state people is evident, say, in the formulation of product liability laws where most plaintiffs are in-state and most defendants are out-of-state. We get more consumer protection than we would have if both parties were in-state. The same logic applies here.


40 See *Am. Council of Life Ins.*, 645 F. Supp. at 84.
level of the "public burdens" the electorate will support is not independent of the mode of financing them. Making the public at large pay reduces the level of expenditures that will be incurred. The eminent domain approach thus has strong desirable allocative consequences even if one were to assume that all citizens had equal stakes in the business corporations and insurance companies governed by the antidiscrimination laws. The takings clause is not solely (or I have come to think even primarily) a matter of intuitive equity unsupported by functional considerations. Rather, it is a way to discipline the behavior of government and interest groups, here by requiring citizens to make choices about how much they individually are prepared to pay to subsidize AIDS carriers. On this score any requirement, constitutional or otherwise, that directs subsidies for AIDS carriers through the taxation system is superior to one that works through the antidiscrimination laws.  

The antidiscrimination system is also inferior to the taxation model under the second criterion of distributional efficiency. As noted above, the antidiscrimination laws create enormous dislocations in the private markets for employment and insurance, for the contractually massive losses that are demanded of both employers and insurers will trigger the major responses and evasions noted above. The taxation proposals are not without their distortions as well. The total tax burden must be raised, and there will doubtless be some question as to what system of tax should raise the necessary funds. In this context it is critical for the source of tax revenues to be general, for it would hardly do to have a special assessment upon the capital or income of insurance companies or business firms to fund the system. But once the revenues are raised from some general source, such as income, property, or sales taxes, then the "only" distortions are those which are necessarily created by any increase in taxes for redistributive ends. The private rates of return of the persons taxed will be reduced, so that the private levels of investment will be reduced as well. These losses may well prove to be substantial, but they should be far smaller than those losses associated with the widespread tactics of evasion that businesses will otherwise adopt if the antidiscrimination laws disrupt established patterns of business by forcing them systematically to enter into losing contracts. Spread over a broader base, the tax will be less costly, less onerous and more widely ac-

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41 The point here is quite general and applies to all programs of redistribution. See, for example, A. Mitchell Polinsky, An Introduction to Law and Economics 112 (1983).
42 See text at p. 45-50.
cepted. There are no painless solutions to the AIDS question. But taxation causes fewer dislocations.

V. PROSPECTS FOR REFORM

Whatever its merits, I am quite confident that this modest proposal of direct payments for health insurance will not be adopted. The great intellectual strength of the proposal is that it forces government to be explicit about the public level of support it provides for AIDS victims. That is also its great political vice. The antidiscrimination approach allows the government to give a subsidy without having to make any explicit calculations or disclosures about its costs. For politicians, disguised regulations are often preferable to increased taxes precisely because they are kept off the budget line and out of the line of political fire. Individual voters find that information is costly to acquire. They will therefore look less closely at antidiscrimination laws whose motives are laudable and whose effects are hard to detect. Tax burdens are quickly known and quantified, and hence subject to more powerful short-term objections. In the long run the evasions will yield greater costs. As profits go down, taxes collected will be reduced as well, so that some of the financing winds its way back to the public at large. But like the deficit, that is a problem for another day.

Needless to say, my arguments also will be strongly opposed by AIDS victims and their supporters, because they also realize that the maximum level of public expenditures for AIDS victims can only be obtained by exhausting all avenues of regulation and taxation. They will push hard for direct public support, antidiscrimination laws, and restrictions on testing. This perspective takes into account only the gains to the winners, and ignores the losses to losers, which hardly makes it the ideal social posture. Yet it is a voice to be reckoned with, and one that is apt to prove very strong given the low level of constitutional protection that private rights of contract and property enjoy against the political process. Nonetheless matters of politics should not be confused with matters of principle. There are theories of private contract and public finance that do offer some better way to cope with the AIDS crisis. If only we, as a nation, had the will to adopt them.