AIDS, GAYS, AND STATE COERCION

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For Robert W. Switzer

ALARUMS AND EXCURSIONS

Of those dead and dying from AIDS three-quarters are gay men. Government funding for AIDS research was at best sluggish till the disease appeared to the dominant non-gay culture as a threat. That perceived threat has spawned state-mandated discrimination against groups at risk for AIDS in employment and access to services, allegedly on medical grounds but in pointed contradiction to the judgments of the very medical institutions to which society has entrusted the determination of such grounds (the US Department of Health and Human Services, the Centers for Disease Control, and the National Institutes of Health).2

1 This paper partially overlaps ‘AIDS, Gay Life, State Coercion,’ Raritan: A Quarterly Review VI:1 (Summer 1986) 38–62. It was widely circulated in draft form. I thank the following people for offering comments which prompted revisions or amplifications: the editors and referees of this journal, Jennifer Bremer (Robert Nathan Associates, D.C.), Sandra Panem (The Brookings Institution), Ronald Bayer (The Hastings Center), Doug Mitchell (The University of Chicago Press), Thomas Edwards (Rutgers), James Rachels (University of Alabama), Michael Slote and Fred Suppe (University of Maryland), Joyce Trebilcot (Washington University), Christopher Morris (Bowling Green State University), Timothy Murphy (Boston University), Larry Thomas (Oberlin), Mark Chekola (Moorhead State University), Larry Klein (San Francisco City College), Ferdinand Schoeman (University of South Carolina), Mary Mahowald (Case Western Reserve University), Donald Levy (Brooklyn College-CUNY), David Luban, Bob Fullinwider, Claudia Mills, Judy Lichtenberg, Henry Shue and Doug MacLean of The University of Maryland’s Center for Philosophy and Public Policy, where the paper was written while I was the Rockefeller Foundation Fellow in the Humanities for 1985–86, and my husband, the dedicatee.

2 See particularly the CDC’s guidelines for preventing transmission in the workplace, ‘Recommendations for Preventing Transmission of Infection with Human T-Lymphotrophic Virus Type III/Lymphadenopathy-Associated Virus

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Government's disregard for medical opinion and for the lives of gays strongly suggests that prejudicial forces are at work. There is of course nothing new in this, but the stakes here are high. The armed forces have already established quarantines of those at risk for AIDS on some bases (The Washington Post, 19 October 1985, A12; The Advocate, #442, 18 March 1986, p. 14). With state-mandated discriminations installed and calls for civilian quarantines circulating, it is clear that the AIDS crisis is going to test the country's mettle. Not since the Supreme Court affirmed the internments of Japanese-Americans in World War II has so live a danger existed to America's traditional commitment to civil liberties. And again the danger is created by hysteria and not a reasoned necessity.

The hysteria, when not simply an expression of old anti-gay prejudices, is based on the presumption that the disease is spread indiscriminately. This presumption permitted Jeane Kirkpatrick to begin a syndicated column by using AIDS as a metaphor for international terrorism—'it can affect anyone'—in the serene belief that her audience, educated America, already thought this about AIDS and might even be ready for extreme measures (The Washington Post, 13 October 1985, B8). 3

ALLEGED HARMs TO OTHERS

For public policy purposes, the most important fact about AIDS is not that it is deadly but that it, like hepatitis B, is caused by a blood-transmitted virus. For the disease to spread, bodily fluids of someone with the virus must directly enter the bloodstream of another. 'It appears that, in order to infect, this virus must be virtually injected into the bloodstream.' 4 But not just any bodily fluid will do. Only


3 If a Los Angeles Times poll of twenty-three hundred Americans is to be believed, the country indeed is ready for extreme measures: 51 per cent favored quarantines of people with AIDS, 48 per cent the closing gay bathhouses, 42 per cent closing gay bars and 14 per cent tattooing people with AIDS. Twenty-eight per cent thought AIDS was God's punishment for homosexuals and 23 per cent thought AIDS victims were 'getting what they deserve' (19 December 1985, I:1). For discussions of civil liberties issues raised by the AIDS crisis, see for example 'AIDS and Individual Rights,' The New York Times, 15 December 1985, E6 and 'Quarantines Considered to Combat AIDS,' The Washington Post, 16 December 1985 A1, 26–7.

blood and semen have been implicated in the transmission of the virus (*MMWR* 34:45, p. 682).

That the virus is blood transmitted means first and foremost that, in countries with reasonable sanitation, groups at risk for the disease are clearly definable—more so than for virtually any other disease known—with 96 per cent of cases having clearly demarcated modes of transmission and cause. And now that blood supplies are screened with a test for antibodies to the AIDS virus, the number of these groups is indeed dropping. Hemophiliacs not already exposed and blood transfusion recipients are now no longer groups at risk.

Admittedly, in countries without adequate sanitation, blood transmitted viruses like hepatitis B are rampant. If a population prone to cuts and abrasions bathes in the same water in which it bleeds and urinates, it will have blood-transmitted viruses dispersed widely through its membership. Perhaps a quarter of the Third World suffers from hepatitis B, which in the US infects the same groups that are at risk for AIDS. Though hepatitis B has always been around, it has not been a threat to the general US population and has never caused much social or government concern, even though for high risk groups—basically gays and intervenous drug users—it is occasionally fatal. At the very least it causes weeks or months of debilitating pain and exhaustion, and threatens chronic recurrence and a greatly increased risk of liver cancer. Indeed, the very close epidemiological modelling of AIDS to hepatitis B was what first led medical investigators to hypothesize that AIDS was caused by a blood-transmitted virus, long before the virus itself was discovered. Those who take Zaire as their model of AIDS contagion for the U.S. conveniently fail to weigh these facts or even mention them (e.g. Krim, p. 6). Fear of general, indiscriminate

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5 'Strictly heterosexual adult men and women who cannot be classified as belonging to any high-risk group' constitute but one per cent of AIDS cases and this figure has been constant (Krim, p. 6). See also Norman, Colin. 'AIDS Trends,' *Science* 230, 29 November 1985, 1021.

6 For a comparison of AIDS virus transmission to that of the hepatitis B virus, see *MMWR*, 34:45, 682–3. The close modelling of the two viruses continues to be the chief basis of the CDC's guidelines for AIDS prevention.

7 The much reported finding that AIDS occurs in Zaire in equal numbers between men and women weighs no more in favor of the thesis that heterosexual transmission is the chief cause of African AIDS cases than that lack of sanitation is the chief cause.

Alternatively, the widespread practices in central Africa of female circumcision, excision and infibulation and attendant consequences for sexual behavior may account for the high incidence of AIDS in central African women (see 'AIDS in Africa,' *Science* 231, 17 January 1986, 203). If so, again the circumstances of blood-borne contagion in Africa are strongly disanalogous to those in America.
contagion by AIDS is unwarranted—though it makes for terrific press.

The July 1985 cover of Life informed the nation in three-inch red letters that 'NOW NO ONE IS SAFE FROM AIDS.' The magazine used as its allegedly compelling example a seemingly typical Pennsylvania family all but one of whose members has the disease. But it turns out that all those members with the disease were indeed in high risk groups. The father was a hemophiliac, his wife had sex with him, and she conveyed the virus to a child in the process of giving birth. No one got the disease either mysteriously or through casual contact. The family example in fact was evidence against the article’s generic contagion thesis. Equally irresponsible journalists, lobbyists, and elected officials have compared AIDS to air-borne viral diseases like influenza and the common cold.\(^8\)

The case for general contagion cannot be made. In consequence government policy which is based on that fear is unwarranted. The extraordinary measures—including the suspension of civil liberties — which government might justifiably take, as in war, to prevent wholesale slaughter simply do not apply here. In particular, quarantining the class of AIDS-exposed persons in order to protect society from indiscriminate harm is unwarranted.

HARM TO SELF

The disease’s mode of contagion assures that those at risk are those whose actions contribute to their risk of infection, chiefly through intimate sexual contact and shared hypodermic needles.\(^9\) In the transmission of AIDS, it is the general feature of self-exposure to contagion that makes direct coercive acts by government—like bathhouse closings—particularly inappropriate as efforts to abate the disease.

If independence—the ability to guide one’s life by one’s own

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\(^9\) A small exception is those whose well-being and life chances are already substantially at the mercy of the person who infects them—newborns of infected mothers. For this set of cases social policy should be what ever it already is for cases of parents who pass fatal congenital disease to their children.
lights to an extent compatible with a like ability on the part of others—is, as it is, a major value, one cannot respect that value while preventing people from putting themselves at risk through voluntary associations. Voluntary associations are star cases of people acting in accordance with the principle of independence, for mutual consent guarantees that the ‘compatible extent’ proviso of the principle is fulfilled. But the state and even the courts have not been very sensitive to the distinction between one harming oneself and one harming another—nor has the medical establishment. It appears to all of them that a harm is a harm, a disease a disease, however caused or described. The moral difference, however, is enormous. Preventing a person from harming another is required by the principle of independence, but preventing someone from harming himself is incompatible with it. While no further justification is needed for the state to protect a person from others, a rather powerful justification is needed if the state is to be warranted in protecting a person from himself.

In the absence of such a justification, the state sometimes tries to split the moral difference and argues that state coercion may be used when the harm to others is remote and indirect. Such an argument from indirect harms runs to the effect that state-coerced use of, say, seatbelts and motorcycle helmets is warranted, for helmetless motorcycle crashes and seatbeltless car accidents harm even those not involved in the accidents, by raising everyone’s insurance costs and burdening the public purse when victims end up in county hospitals. Here state coercion comes in through the backdoor.

This line of argument has been used with increasing frequency even by self-described liberals like New York’s Governor Cuomo, and it is beginning to be heard in AIDS discussions. This is not surprising, for the cost of AIDS patient care from diagnosis to death is somewhere between $35,000 and $150,000. Private funds are often quickly exhausted, and the patient ends up on the dole—harming everyone, and so allegedly warranting state coercion of the means of possible AIDS transmission.

J. S. Mill’s rule-of-thumb for appraising such appeals to indirect harms is exactly on target: an indirect harm counts toward justifying state coercion only when the harm grows large enough to be considered a violation of another person’s right. This understanding of harm to others is necessary so that independence is not

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10 For instance, Mervyn F. Silverman, former Director of Health for San Francisco, shows no cognizance of the distinction in his argument for his unsuccessful 1984 attempt to close that city’s bathhouses: Silverman, Mervyn F. and Silverman, Deborah B. ‘AIDS and the Threat to Public Health’ Special Supplement (see n. 4 above), pp. 21–2.
rendered nugatory and, as a right, is only outweighed by something comparable to it. Now, while it is nice if products (like insurance) are cheap and taxes low, the considered opinion of our society is not that one's rights have been violated when taxes or the price of milk goes up. Indeed, in the case of taxes, the considered opinion is cast as a Constitutional provision. So arguments that smuggle coercion in through the backdoor of indirect harms are not successful.\footnote{Whether it is legitimate for the state to condition, for instance, motorcyclists’ access to county hospitals upon the wearing of helmets, cannot be determined independently of an assessment of the arguments for such free health care in the first place. The arguments advanced in ‘AIDS, Gay Life, State Coercion’ (see n. 1 above, pp. 50–8) for AIDS patient funding bar any such conditioning of relief upon cost-reducing conformity.}

In general, heed should be given to Douglas’s warning in his dissent to Wyman that the welfare state is gradually being allowed to buy up rights. In Wyman the Court ruled, among other horribles, that an indigent woman in accepting welfare for her child had simply waived her Fourth Amendment rights.\footnote{A wife who contracts AIDS from a bi-sexual husband does not have a right that has been violated by the bathhouse where he may have been AIDS-exposed. Rather if she has a legitimate plaint, it is against the direct harm caused by the husband or against the institution of marriage itself if it has kept her in a position of enforced ignorance. But, it should be remembered that traditional marriage vows pledge the participants to joint risk taking and place commercial and medical risks on a par. The institution of marriage itself, then, acknowledges what is independently true: it is as little a good reason to shut down bathhouses to protect ‘innocent’ wives as it is to shut down stock-markets to spare them lost spousal income.}

Further, it is wholly unfair to coerce one institution, because of the patent immoralities of another. The immoralities which occur within marriage (lying, cheating, promise-breaking, willful ignorance) or which are endemic to it (enforced ignorance, indenture) cannot ground the coercion of gay bathhouses. For an excellent discussion of the procedural and substantive abuses inherent in traditional marriage contracts, see Ketchum, Sara Ann. 1977. ‘Liberalism and Marriage Law’ in Mary Vetterling-Braggin (ed.), Feminism and Philosophy. Littlefield, Adams, Totowa, NJ, pp. 247–76.

\footnote{Wyman v. James, 400 US 309, 328 (1971) J. Douglas, dissenting: ‘The central question is whether the government by force of its largesse has the power to “buy up” rights guaranteed by the Constitution. But for the assertion of her constitutional right, Barbara James in this case would have received the welfare benefit.’}
by Justice Douglas is part of a wider problem detected in Justice Brandeis' vindicated dissent in Olmstead: 'Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding' (Olmstead v US, 277 US 438, 479).

STATE PATERNALISM CONSIDERED

The important question remains whether AIDS warrants paternalistic state coercion to prevent those not-exposed from harming themselves, through banning or highly regulating the means of possible viral transmission. Usually paternalistic arguments cannot be made sensible and consistent. For example: federal AIDS funding for FY 1986 in the House came with a paternalistic rider giving the surgeon general a power he already has—to close bathhouses, gay social institutions, if they are determined to facilitate the transmission or spread of the disease, which indeed they do. (So do parks and bedrooms.) The sponsor of the rider

\[14\] A directive from New York's Governor Cuomo mandated in late 1985 the closing of public accommodations where oral or anal sex occur. But the distinction between a public accommodation and a private dwelling, given the nature of the disease, is medically irrelevant. So is the distinction between providing for profit a location for sex and providing one for free. Public accommodations, private clubs, parks and bedrooms—even marital ones—are medically all equally suspect. The line of thought that has led to bathhouse closings, if carried out consistently, would require shutting down relator's offices that make a profit from selling homes to gays.

Further, the directive curiously enough omits banning vaginal sex. Though there is some reason to believe that anal sex is extremely risky, there is no evidence that vaginal penetrations are any less likely a mode of transmitting the virus than oral sex. Cuomo's directive disingenuously recriminalizes sodomy in New York (The Washington Post, 31 October 1985, A1). New York City's corporation counsel has argued that restrictions on oral and anal sex do not discriminate against gays because they also apply to non-gays (The New York Times, 15 December 1985, IV 6). One could as well argue that a law against sleeping under bridges does not discriminate against the poor because it also bars the wealthy from sleeping there.

In applying the directive both the Governor and New York City's Mayor Koch claimed that their acts were not to be construed in any way as assaulting the gay community. But instead of showing good faith in this regard by doing something that would be politically unpopular (like first shutting down, say, a marriage with an AIDS-exposed hemophiliac member), they chose instead to shut down as their very first target a central part of gay male mythology—the notorious private membership sex club—The Mineshaft (The Washington Post, 8 November 1985, A7).

Subsequently, New York state's health commissioner reported that 'his
argued that it was 'a small step to help those who are unable or unwilling to help themselves' (*The Washington Blade*, 4 October 1985, p. 1). Cast so boldly, the argument simply denies independence as a value. For it is consistent with the presumption that the majority gets to determine both what the good life is and to enforce it coercively. The argument could as well be used to justify compulsory religious conversion—those who are unable or unwilling to see the light are helped to see it.

**REASON ASSURED**

Occasionally, to be sure, the case for paternalism can be made to work. One legitimate way to justify paternalistic coercion is to claim as warrant a lack of rationality on the part of an agent (say, a child). By 'rationality' here I mean having relevant information and certain mental capacities, including the ability to reason from ends to means, but I do not presume that making the best possible assessment of means to an end is a requirement for rationality—error is compatible with rationality.

A presumption of an agent's rationality is a necessary condition for the very respect which is owed to his making his own decisions and guiding his life by them. Thus, paternalistic interference is warranted when a person is operating at risks which he is unable to assess due to diminished mental skills or lack of information. But education, not coercion, is the solution which is tailored to, and so appropriate for, such incapacities. Coercion in such cases is warranted only temporarily, to permit a check of whether a person indeed knows the risks he is taking. Thus (to borrow an example from Mill) it is justified to forcibly detain someone about to cross a structurally-compromised bridge just long enough to inform him of its condition. Dilated to an extreme, this line of argument permits paternalistic labelling of possibly dangerous products and other means of placing a decision-maker in a reasonable position to make decisions for himself.

But far from justifying major paternalistic coercion of gay institutions, say, closing gay baths, the argument from rationality here indeed suggests that paternalistic arguments surrounding AIDS are not even being advanced in good faith. For though investigators will enter hotel rooms if necessary to stop sexual activities linked to the spread of AIDS' (*The Washington Post*, 18 November 1985, A4). His office has assured gays that the free enterprise system will preclude discrimination against gays in hotel accommodations (*The Washington Blade*, 22 November 1985, p. 12). New York, like forty eight other states, has no legislation that would bar such discrimination against gays.
education is one of government's highest spending priorities, governments have made no serious attempt to educate people about medically-informed risk of AIDS and of safe alternatives to high-risk sexual practices. It took the federal government five years even to put out bids for studies of ways in which programs of AIDS education might be effected (see Federal Register 50:143, 25 July 1985, p. 30298). The government then stalled in releasing the funds and finally barred their use for sexual messages that would be explicit enough to be effective. James Mason, the director of the CDC, which administered the grants, claimed 'We don't think that citizens care to be funding material that encourages gay sex lifestyles' (The Advocate, #437, 7 January 1986, p. 20).

Local governments in many cases have positively hampered private attempts at such education. In Los Angeles and Philadelphia, for instance, government sponsorship of private-sector distribution of safe-sex literature was denied or withdrawn when some officials branded the literature as pornography—neo-feminists take note. Thus one is probably justified in seeing as disingenuous any governmental argument for the coercion of gay institutions on paternalistic grounds. At most the argument from rationality warrants placing warning labels on baths as they are placed on cigarettes, the use of which also threatens death.¹⁵

SELF-INDENTURED GAYS?

The other legitimate argument for paternalistic coercion is that one should be protected from ceding away the very conditions that enable one to be an independent agent. Thus one cannot legitimately contract to become a slave or to sign away rights to the fair administration of the enforcement of contracts or more generally the equitable administration of justice.

When dilated to the extreme, this line of justifying paternalistic coercion is used to support legislation mandating seat-belt use: it's good for you, since it preserves you as an independent agent (though usually politicians cast the argument in terms of indirect harm to others). How does putting oneself at risk for AIDS weigh

¹⁵ Whether warning labels should be placed on bathhouses turns on considerations of consistency: some dangerous products are labelled, others not. What gets labelled should not depend on ideology, prejudice or politics. Getting right on this point is particularly important in the case of bathhouses since such labelling, even when carried out in good faith, will have the side-effect of saying to most people that gay sex is bad. The relevant question, one for which I do not have an answer, is whether bathhouses present the same degree of risk to the user as other products that are already so labelled.
into this conceptual scheme? Does AIDS, invariably fatal in full-blown cases, rise to a level of seriousness to warrant on these paternalistic grounds a state-imposed bar to putting oneself at risk for it?

Admittedly, minimally good health is a central personal concern and its possession a necessary condition for being viewed seriously as an independent agent. So at first blush the AIDS case may seem relevantly similar to the contracting-to-slavery case. It differs, however, in two significant, severally decisive ways.

First, slavery by definition is a condition of lost independence. However, as with other venereal diseases, not every sexual encounter with a virus-exposed person exposes one to the AIDS virus, and even exposure to it is nowhere near a guarantee of actually contracting AIDS, since only some portion of those exposed actually get the disease (Krim, pp. 4, 5). Because the risk is high but the results not invariably catastrophic, putting oneself at risk for AIDS becomes less like contracting into slavery and more like being a race car driver, mountain climber or astronaut. In the absence of inevitability, the assessment of risk should be left to the individual, and indeed, as the examples of space flight, mountaineering and race car driving show, this is the considered standard of society as well. Deviations from the standard in other similar cases are likely to be motivated by something other than honest paternalistic concerns.

Second, it is hard to imagine even dispassionately and impartially that the momentary gain—say, some psychological thrill—from submitting to slavery could be reasonably balanced against the value to the individual of independence permanently lost. This differs significantly from ‘slavery’ in sex play where the thrill to the ‘slave’ lies in continuous voluntary submission. To imagine the pure case, however, is as hard as trying to imagine (Mishima aside) someone seeing suicide as the culmination and chief organizing principle of his life rather than as an exit from a life that has become incapable of significance.

SEX AND LIFE

However an impartial examination of the role of sex in an individual’s life would show that, far from having any imaginable value or at most a trifling one, sex, like health, is in general a central personal concern, and that for those people with a sex drive, addressing sex as central and appropriating it to oneself in some way or another is probably necessary to meaningful life. Or at least the lives of those like priests and nuns who renounce it altogether,
would support a belief that one's sexual choices are as central as any aspect of one's life. For vows of chastity are as central to their religious life—their most meaningful life—as any vows they take.

The centrality of sex as a value is indicated by the very vocabulary, or lack of it that surrounds sex. Sex used to seem so central and yet seemingly frightening that for centuries, as Murray S. Davis has noted, only theologians and pornographers could discuss it. Only the power of considerable and complex institutions was strong enough to preserve this gap in discourse and thought, a power so pervasive as to appear invisible. Thus when one looks at a newspaper's cavalcade of engagement and wedding photos, it never even crosses one's mind to think 'gosh, what a slew of heterosexuals.' When discourse about sex simply could not be avoided, the institutions were strong enough to fill the void with euphemisms so automatic and arcane as not to suggest a present presence—the language of 'to have and to hold' and 'blessed events'. Even so, some 'things' were so powerful and frightening that they had to remain unnamed and unmentionable, to be dealt with not by appeal to and through institutional arrangements but only by extraordinary direct appeal to some allegedly preinstitutional fundament.

When now sex is discussed forthrightly, the terms are not merely those of desire but also those of need, and correctly so for two reasons. First, though sexual activity is not necessary to the continued biological existence of the individual as are some things that are called natural needs, it is a desire (unlike addictions) that is recurrent independently of its satisfaction—a natural object, not a product. Second, (like addictions and desires for the prerequisites of continued biological existence) its frustration tends to sponsor aggression. The pleasures of sex are not mere forgoable pleasures like the quest for sugar. To forgo them would itself have to be a major life commitment.

The centrality of sex to life means that it may have to be balanced with the value of continued independence—all the more so if independence is chiefly, like health, a generalized means to individuals' ends rather than an end in itself. Independence is not the only value of life, nor one prior to all other values. Further, central values are not equally central for all—some people indeed do not find sex very important and yet do not seem repressed. These people seem to be missing something, not to be morally lesser beings but somehow, like Gertrude Stein's Oakland, to have

less there there. It would be silly for them to take high sexual risks, for the balance for them is so clearly tilted in one direction, and little would be lost if the state nudged them that way. But this tilt will in general not be so clear. The balancing in cases of conflicting personally-affecting values is not a decision that the state could reasonably make across the board for all. The state is not capable of the probings of the soul that would be necessary for such a decision. Individuals, not the state, must make the difficult choices where values centrally affecting the self come in conflict.

That such choice falls to the individual is generally recognized where religious commitment and health come in conflict. The state cannot legitimately make the trade-offs that an informed adult will make between religious values and health by, say, coercing a person—for the sake of preserving his own independence—to have a blood transfusion against his belief that a transfusion, even a coerced one, will damn him for all eternity. Sexual attitudes and acts in accord with them are at least as central to a person as religious beliefs and acts, and so they too are not fit subjects of state coercion for the individual’s own good, even when that good is the continued ability to make choices.

Governments that have written off the value of gay sex altogether by having made it illegal, largely on religious or other grounds that do not appeal to the causing of harms to others, should be viewed as especially suspect when they make paternalistic arguments on behalf of gays. For they have already clearly shown that they do not respect gays as independent beings.

PUBLIC HEALTH AND TOTALITARIANISM

Arguments offered so far by the medical community against quarantines and bathhouse closings have largely adopted the terms of mere practicality, appealing to such facts as the large number of people involved, the permanence of the virus in those exposed, and the possibility that the sexual arena may simply shift away from bathhouses where some educational efforts may be possible.\textsuperscript{17} I have suggested to the contrary that quarantines and closings should be opposed, not because they are impractical (though they may be), but because they are immoral.

Doctors tend to hold their unrefined view that health policy is merely a matter of strategy because they, not surprisingly, tend to see health itself as a trumping good, second to none in importance.

\textsuperscript{17} For examples, see Mayer, Kenneth H. ‘The Epidemiological Investigation of AIDS’. Special Supplement (see n. 4 above), p. 15 (against both quarantines and bath closings) and Silverman and Silverman, p. 21(against quarantines).
This is a dangerous view, especially when coupled with their idea that health is an undifferentiated good. They fail to distinguish between my harming my health and my harming your health. Behind this oversight lies the further (sometimes unarticulated) presumption that you and I both are absorbed into and subordinated under something called the public health—a concept that tends to be analyzed in inverse proportion to the frequency with which it is used when trying to justify coercive acts.\(^{18}\)

No literal sense exists in which there could be such thing as a public health. To say the public has a health is like saying the number seven has a color: such a thing cannot have such a property. You have health or you lack it and I have health or lack it, because we each have a body with organs that function or do not function. But the public, an aggregate of persons similarly disposed as persons, has no such body of organs with functions which work or fail. There are, however, two frequently used metaphoric senses of public health that do have a reference: one, is a legitimate use but largely inapplicable to the AIDS crisis; the other, when used normatively, is the pathway to totalitarianism.

The legitimate sense places public health in the same conceptual scheme as national defense and water purification. These are types of public goods in a technical sense—not what most people want and thus what democratic governments give them nor what tend to maximize by state means some type of good (pleasure, happiness, beauty), but what everyone wants but cannot get or get efficiently through voluntary arrangements and which thus require coercive coordinations from the state, so that each person gets what he wants. Thus, the private or voluntary arrangements of the market system do not seem likely to provide adequate national security, because a defense system that protects those who pay for it will also protect those who do not; everyone (reasonably enough) will tend to wait for someone else to pay for it, so that national security ends up not being purchased at all, or at least far less of it is purchased than everyone would agree to pay for if there were some means to manifest that agreement. The coercive actions of the state through taxation are then required to achieve the public good of national defense.

\(^{18}\) For a signal example, see ‘Additional Recommendations to Reduce Sexual and Drug Abuse-Related Transmission of HTLV-III/LAV,’ *MMWR*, 14 March 1986, 35:10, 154, recommending the closing of bathhouses ‘on public health grounds’. No definition, elaboration or analysis is offered of the notion ‘public health’. The recommendation stands in marked contrast to the CDC’s employment recommendations (see n. 2 above), for which elaborate analysis and argumentation are offered.
For exactly the same reason, the state is warranted in using coercive measures to drain swamps and provide vaccines against air-borne viruses. But the state is not warranted by appeal to the public good in coercing people to take the vaccine once it is freely available, for then each person is capable on his own—without further state coercion—of getting the protection from the disease he wants. The mode of AIDS contagion makes it relevantly like this latter case. Each person on his own—without state coercion—can get the protection from the disease that he wants through his own actions, and indeed can get it by doing himself what he might be tempted to try to get the state to force upon others, say, avoiding bathhouses. As far as the good of protection is concerned, it can be achieved with no state coercion.

Is there a public good involved simply in reducing the size of the pool of AIDS-exposed people? I see just one, the one I argued for—the ability to have a robust sex life, without fear of death. But this good does not permit every form of state coercion. Not every public good motivates every form of coercion. The public goods mentioned so far could all be achieved by equitable coercion (e.g., universal conscription, taxation, compensated taking of property). When equitable coercion is the means, the public good can be quite slight and still be justified (as in government support for the arts). But when the coercion is inequitably dispersed, the public good served must be considerably more compelling than the means are intrusive. Thus, dispersed coercion against select individuals that involves restricted motion and physical suffering is warranted only by unqualifiedly necessary ends: when the individuals coerced have harmed others (as in punishment) or when it is necessary to the very existence of the country (as a partial military draft may be for a nation at defensive war). And thus too, the substantial good of civil rights protections is advanced only through the considerably weak intrusion of barring the desire of employers to indulge in whimsical and arbitrary hiring practices. The public good of an unencumbered sex life however fails this weighted ends-to-means test if the means are a dispersedly coerced sex life. For the intrusion and the good are on a par—on the one

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19 The Supreme Court’s leading medical case, Jacobson v. Massachusetts, 197 US 11 (1905) (upholding criminal penalties—a five dollar fine—for refusing a free vaccination), because it leaves the notion public health wholly unanalyzed, contradicts its own declaration that the principle of independence is overridden only by public goods on a par with national defense. The upheld law’s resort to criminal penalties for a person refusing the vaccine rather than to coercing directly the taking of the vaccine shows that the law is incoherent as a measure aimed to protect against indiscriminate harms.
hand encumbered sex, on the other unencumbered sex. And so it appears that only equitably coercive means are available to achieve the end of reducing the pool of AIDS-exposures—taxation for preventive measures like vaccine development, but not coercive measures that affect some but not others, like closing bathhouses or banning or regulating sex practices selectively.

Those who do not find the possibility of carefree sex a public good—probably the bulk of those actually calling for state coercion—will find no legitimate help in the notion of public health for state coercion here. Those who do will find it justifies only equitable measures.

The other metaphorical sense of public health takes the medical model of the healthy body and unwittingly transfers it to society—the body politic. But this transfer (when it has any content at all) bears hidden and extremely dangerous assumptions. Plato in the Republic was the first thinker systematically to press the analogy of the good society to the healthy body. The state stands to the citizenry and its good, as a doctor stands to the body and its health. Society, so it is claimed, is an organism in which people are mere functional parts, ones that are morally good and emotionally well-off only insofar as they act for the sake of the organism. The analogy is alive and well today and calling out for extreme measures now: ‘Much as a physician treating one organ must consider the effects on the entire organism, a public official has the community as the patient and must attend to all factors in seeking the greatest overall good’ (Silverman and Silverman, p. 22). On this view, the individual however harmed cannot fulfill his role. A damaged organ, the spleen for example, can be, to continue the analogy, simply cut out. By comparison, quarantines and coerced sex lives might appear as mild remedies on this analogy. But something has been lost here—persons.

The medical model of society is the conceptual engine of totalitarianism. It presumes not that the goods of individuals are final goods but that individuals are good only as they serve some good beyond themselves, that of the state or body politic. The state exists not for the sake of individuals—to protect and enhance their prospects as rational agents—but rather individuals exist for the state and are subordinated to society as a whole, the worth of which is to be determined only from the perspective of the whole. The individual, thus, is not an end in himself but exists for some social good—whether that good be some hoped-for overall happiness or some social ideal—like, purity, wholesomeness, decency, or ‘traditional values’. Unconscious obedient servicing is dressed up as virtue.
The worst political consequence of the AIDS crisis would not be simply the further degradation of gays. Gay internments would not be anything new to this century. In the European internment camps of World War II, gypsies wore brown triangle identifying badges, Jehovah’s Witnesses purple, political prisoners red, race defilers black, and gays pink triangles. Worse than the further degradation of gays in America would be a general, and not easily reversed, shift in the nation’s center of gravity toward the medical model and away from the position, acknowledged in America’s Constitutional tradition, that individuals have broad yet determinate claims against both general welfare and social ideals. The consequence of such a shift would be that people would come to be treated essentially as resources, sometimes expendable—a determination no less frightening when made by a combined father, colonel, and doctor than by a fearful mob.

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