AIDS AND MR. KOREMATSU: MINORITIES AT TIMES OF CRISIS

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AIDS has already claimed 28,000 American lives, most of them young people, and signs are that it will claim many times that number over the next few years.¹ The threat is international in scope and increases daily, in tandem with public demands for legal and political solutions to the epidemic. New York Governor Mario Cuomo has suggested that the knowing transmission of AIDS be made a crime.² Secretary of Education William Bennett has sought broad programs of mandatory screening for the Human Immunodeficiency Virus (HIV) that is the apparent cause of AIDS.³ Presidential candidate Pat Robertson and Senator Jesse Helms have mentioned quarantine of all those exposed to HIV as an "eventual solution" to the epidemic.⁴ Meanwhile, Patrick Buchanan, friend and confidante of the Reagans, has described AIDS as nature's retribution on homosexuals, and has proposed that homosexuals be barred from the food handling business.⁵ Attorney General Edwin Meese has proposed mandatory HIV screening of all federal prisoners,⁶ and the Department of Health and Human Services has adopted HIV screening for immigrants, and for illegal aliens who apply for amnesty under last year's immigration act. Those aliens who test positive will be denied entry to the United States as immigrants, and those aliens already illegally present in the United States will be

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denied amnesty under the 1986 Immigration Reform and Control Act.\footnote{52 Fed. Reg. 32540-03, Aug. 28, 1987, amending 42 C.F.R. 34.2(b). See also American Civil Liberties Union, Comments on Proposed Regulation for Adding HIV Infection to the List of Dangerous Contagious Diseases of the Immigration and Nationality Act, August 6, 1987 (available from the American Civil Liberties Union, New York).} But in these many, and often severe proposals, there has been little discussion of consequences for people with AIDS, for those exposed to HIV, for gay, black, and Hispanic Americans, and for our political traditions. In judging these proposed measures and in weighing their wisdom, it is instructive to recall another national emergency which, like the present AIDS crisis, implicated a despised, feared, and greatly disadvantaged minority. The implications of that crisis for our civic life remain terrifying almost half a century later.

In 1942, acting under the authority of a Presidential directive and a Congressional act, General John L. DeWitt, Military Commander of the Western Defense Command, ordered that all Americans of Japanese ancestry in his command area be placed into detention camps,\footnote{Morris, Justice, War, and the Japanese-American Evacuation and Internment, 59 WASH. L. REV. 843, 849 (1984).} which were more accurately described by President Roosevelt himself as concentration camps.\footnote{Nash, Moving for Redress, 94 YALE L.J. 743 n.2 (1985).} The stated purpose of the detentions was to prevent acts of sabotage and espionage of Japanese sympathizers on the West Coast; the justification cited for the detentions was national wartime emergency and the alleged loyalty of Americans of Japanese descent to the Japanese empire.\footnote{Morris, supra note 8, at 848-49. See also Rostow, The Japanese-American Cases—A Disaster, 54 YALE L.J. 489, 490-502 (1945).} Within the past few years, historians, particularly Peter Irons, have discovered substantial evidence that General DeWitt, President Roosevelt, and the Department of Justice had known that much more limited measures were readily available to prevent espionage in the Western Command.\footnote{P. IRONS, JUSTICE AT WAR (1983).} These same men had also known that a great majority of those removed from their homes and relocated in camps throughout the country were in fact loyal and patriotic Americans.

This discovery was much too late for the victims of the deep prejudices of the American government and the American public. It is not easy to understand how these internments could have been allowed in a nation whose highest court, only four years before General DeWitt’s order, had declared its special role in protecting “discrete and insular minorities” in a legendary footnote in the Carolene Products case.\footnote{United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).} It was, however, a time of national crisis. As part of the wartime effort, those officials responsible for the creation of the detention
camps ignored standards of common decency and constitutional guarantees of due process. Today, forty years later, far from being regarded as heroes, those officials are the villains of an episode that would be ridiculous, were it not for the human suffering the detention orders caused. Litigation involving the internments continues to this day, and the costs—both in dollars and in social divisiveness—still are increasing. What was then a popular, widely accepted policy now appears to have been a mistake of gigantic proportion.

The detention orders and the public support they received were largely the results of wartime panic and of a racism that equated Japanese ancestry with espionage. Asian Americans had long been the object of much officially-sanctioned prejudice in America, particularly in the West where their numbers were concentrated. Just so, in his final report on the detentions, General DeWitt was able to label all Americans of Japanese ancestry members of "an enemy race." Just so, President Roosevelt, the Congress, and even the national ACLU approved the detention policy. And just so, despite their expression of concern for minority groups in Carolene Products, a majority of the Supreme Court upheld the detentions in the notorious case that bears the name of a Japanese American who defied the order: Fred Toyosaburo Korematsu. Writing for the Court, Justice Black relied heavily on an alleged "pressing public necessity," and on judicial deference to the government's exercise of its power to wage war and protect the public. In impassioned dissents, Justice Murphy decried "this legalization of racism," and Justice Jackson wrote that Korematsu would be "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

The third dissenting vote in Korematsu was that of Justice Roberts, who in his dissent, explicitly analogized the detention orders to emergency government action to protect public health and welfare:

The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended. The drawing of fire lines in the case of a conflagration, the removal of persons from the area where a pestilence has broken out, are familiar examples.

Justice Roberts was quite right on this point and remains so today: if

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14. Morris, supra note 8, at 847.
15. Id. at 845-46.
17. Id. at 216.
18. Id. at 216.
19. Id. at 242 (Murphy, J., dissenting).
20. Id. at 246 (Jackson, J., dissenting).
21. Id. at 231 (Roberts, J., dissenting).
adopted amidst emergencies in public health or safety, legislative actions and legislatively-imposed restrictions will be given great deference by courts and likely will be upheld. Korematsu is the paradigmatic example of the dangers of such judicial deference, because the restrictions in the case were so severe, because they affected such a large number of citizens, because they burdened a specific racial and ethnic group, and because the policy itself was so irrational as to preclude any explanations other than prejudice and hysteria.

In the area of public health and safety, judicial deference to legislative and executive action began, of course, long before Korematsu. In Jacobson v. Massachusetts, 22 perhaps the most famous case in the history of American public health law, the Supreme Court rejected a Massachusetts man's challenge to that state's compulsory smallpox vaccination program. The Court based its decision on the "police power" of every state "‘to enact quarantine laws and ‘health laws of every description;’" 23 it found that the police power included "‘at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.’" 24 In another famed case, the Illinois Supreme Court boldly declared that compulsory public health measures were "‘legislative questions’ and were ‘not subject to judicial review.’" 25

Despite this tradition of judicial deference, one hopes that Korematsu would be decided differently today, and it might well be, given the still-recent development of public and judicial disapproval of racial discrimination. Still very much alive, however, is the tradition of deference toward governmental authority from which Korematsu sprang and to which it, in turn, contributed. The internments of innocent Japanese Americans demonstrate that governmental powers, being nearly unlimited in perceived or real emergencies and largely insulated from judicial review, ought to be exercised with extreme care and caution, especially when exercised over disadvantaged and heavily stigmatized minorities. In 1944, when Korematsu was decided, Asian Americans were such a minority, and lacked the protection of any widespread public disapproval of racial discrimination, the cause of the Civil War having been largely forgotten during the era of Jim Crow. Today, similarly, when government powers may be exercised to identify publicly, to fire, to punish, to segregate, or to quarantine individuals with AIDS or those who have been exposed to HIV, there has been little condemnation, either by legislators, by the American judiciary, or by the public, of the historic discrimination against one group that would be the most affected by such measures: homosexual Americans. Likewise, there is lit-

22. 197 U.S. 11 (1905).
23. Id. at 25.
24. Id.
tle evidence of widespread empathy for other groups at risk for AIDS: IV drug users, prostitutes, hemophiliacs, and increasingly, blacks and Hispanics, whose percentage of the AIDS cases diagnosed far exceeds their representation in the general population.\(^26\)

Although it is now six years since the first AIDS case was diagnosed,\(^27\) there has yet to be substantial interest by the President or by Congress in federal antidiscrimination protection for people with AIDS. One should at least expect that the advocates of mandatory HIV testing would feel obliged to advocate new, tough antidiscrimination laws to protect those whom their testing program identifies. They have not done so. Instead, while Secretary Bennett has advocated widespread mandatory testing,\(^28\) Solicitor General Charles Fried has argued before the Supreme Court, albeit unsuccessfully, that people with AIDS have no antidiscrimination protection under the federal Rehabilitation Act.\(^29\) Meese and Bennett themselves have suggested that parole dates should perhaps be delayed for inmates who test positive in an HIV testing program for federal prisoners.\(^30\) Hardly reassuring is Meese's suggestion that these blatantly unconstitutional delays of parole can be handled on a "case-by-case basis."\(^31\) Similarly, while President Reagan and Vice-President Bush have recently stated that they generally oppose discrimination against people with AIDS and people exposed to HIV,\(^32\) they have authorized dragnet HIV screenings in the armed services, the Foreign Service, the Peace Corps, and the Job Corps.\(^33\) Those who test positive are then discriminated against, either by refusal to hire, by receiving restricted assignments, or by being dis-

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26. & \text{Altman, } \textit{Spread of AIDS Virus is Unabated Among Intravenous Drug Takers,} \textit{ N.Y. Times, June 4, 1987, at A1, col. 5.} \\
28. & \text{See supra note 3.} \\
29. & \text{School Bd. of Nassau County v. Arline, 107 S.Ct 1123 (1987); Application of Section 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex, or Infection with the AIDS Virus, Memorandum for Ronald E. Robertson, General Counsel, Department of Health and Human Services, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, United States Department of Justice (June 20, 1986).} \\
31. & \text{Pasztor, Administration May Seek Legal Authority To Deport Illegal Aliens With AIDS, Wall St. J., June 9, 1987, at 70, col. 1.} \\
33. & \text{Meyer and Pauker, Screening for HIV: Can We Afford the False Positive Rate?, 317 NEW ENG. J. MED. 238 (1987); Barnes, Weigh the Value of Testing for AIDS, Wall St. J., June 12, 1987, at 15, col. 1.}
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charged. In yet another example of arrogance toward the victims of AIDS, and blindness to long-term social consequences, the Administration attempted to form a presidential advisory panel on AIDS policy and HIV testing without any representatives of the homosexual community or homosexual health groups.

Constitutional scholar Charles Black has spoken of the great challenge in individual lives and in public policy of the "humane imagination," which he defines as feeling and believing the "inwardnesses of others."86 Black has written that without such an imagination, or with a flawed one, "efforts, however well intended, are then of only chance effectiveness, and the chances are poor."87 Forty years ago, in the detentions and forced relocations of innocent Japanese Americans, there was a massive failure of such an imagination. General DeWitt, national leaders, and a majority of the Supreme Court imagined very wrongly the inwardnesses, loyalties, and lives of thousands of innocent Americans. Racist fears, disguised as a policy of national defense, then justified a massive deprivation of liberty. Today, hatred of homosexuals and distaste for drug abusers masquerade as purportedly necessary public health proposals for coercive HIV testing and the inevitable terminus of the logic of mandatory testing, quarantine. A potentially disastrous failure of imagination is again occurring. It is difficult to find in the AIDS-related proposals of public leaders any recognition that the effects of most proposed AIDS policies will not be simply sanitary and value-neutral and that this crisis is qualitatively different from other issues, because of the precarious position of the groups involved.

Our political tradition and the structure of our polity have long mandated the inclusion of disadvantaged groups in civil life. Although the largest inclusion required a civil war, the relative peacefulness of other inclusions has been a proud achievement. Just as the detentions during World War Two occurred before Japanese Americans enjoyed the full protection of civil rights laws the AIDS crisis arrived just as our society, legislatures, and courts had begun to recognize that discrimination against homosexuals is cruel, unnecessary, and violative of


37. Id. at 11.
the principles of equality. State legislatures had begun to repeal, and state courts had begun to strike down, sodomy laws, which in subtle ways have long prevented the formation of a self-identified homosexual community and have served as the cornerstones of anti-gay discrimination. Some municipalities and one state, Wisconsin, had passed antidiscrimination laws protecting homosexuals.38 With the exception of New York City's 1986 adoption of such a law,39 those gains have largely been halted by AIDS. In a poorly penned decision, the Supreme Court in 1986 held that consensual homosexual sex enjoys no constitutional protection.40 Declining to address the issue of equal protection, the Court found homosexual sex different in legally cognizable and legislatively-controllable ways from heterosexual intercourse. Writing for the Court, Justice Byron White dismissed the arguments of the attorneys for Michael Hardwick as "facetious."41 White's opinion serves as the capstone for the federal judiciary's almost unanimous rejection of equality for gay Americans. White's opinion has influenced more than the fate of civil rights litigation in the federal courts; in some states where sodomy laws had been repealed by legislatures or overturned by state courts, legislators have proposed reinstating such laws.42 They have cited the prevention of AIDS as a rationale;43 and indeed, given Justice White's opinion, homosexual behavior would enjoy little constitutional protection against such "public health" measures. That AIDS is also being spread by heterosexual contact seems to have eluded those officials who wish to recriminalize consensual sexual acts.

Intravenous drug users, another group greatly affected by AIDS, must wait months for drug abuse treatment in many metropolitan areas. They enjoy little antidiscrimination protection.44 To deal with the national problem of drug abuse, the Reagan Administration has offered random urine-screening campaigns with threats of firing and the advice to "just say no" to drugs.

It ought to be, therefore, no surprise that groups victimized by AIDS are hesitant about any exercise of government power to deal

41. Id. at 2846.
43. Id. at 317.
with the crisis. These groups have been failed by legislators, who usually have found homosexuality and drug abuse to be issues too sensitive to address (except in derogatory terms) and for whom antidiscrimination bills remain too controversial.

Groups most at risk for AIDS have also been failed by federal and state judges, who consistently have refused to require equal legal treatment for gay men and women despite overwhelming evidence that sexual orientation is an immutable characteristic and one which need not impair a person's membership in or contribution to society. This refusal of legislators, of judges, and of the American public to protect gay Americans (and to extend help to Americans who use IV drugs) has been the primary reason that AIDS has been such a heavily stigmatized disease and such a vexing social problem. If we or our leaders had summoned courage and compassion earlier and had acted then to include gay Americans, and no less, IV drug users, in our civic life, AIDS would now be much more a health concern than an issue around which all fears of sexuality, of drugs, and of "otherness" must be acted out.

Where, then, do these insights and regrets leave us, as we seek to halt the spread of AIDS? Perhaps mandatory HIV testing or other coercive measures at some point may be necessary, although arguments for them are not now convincing and likely will not be convincing until some medical treatment for AIDS or HIV infection is available. More appropriate to the current AIDS crisis and more consonant with an exercise of "humane imagination" would be campaigns for public education about AIDS, creative solutions to the drug abuse epidemic, widespread voluntary HIV testing coupled with tough confidentiality laws, and the long overdue enactment of legal equality for gay Americans, including antidiscrimination protection and the repeal of sodomy laws. AIDS can be avoided, and through education, anyone can be taught to avoid it. Through aggressive and more widespread substance abuse programs, the spread of AIDS among IV drug users can be slowed, and help extended to them. Through voluntary HIV testing with confidentiality safeguards, we can encourage those already infected to come forward, while counseling them about their own health and about ways to avoid infecting others. By enacting legal equality for gay Americans and by removing legally-sanctioned stereotypes of gays and drug users, we can offer solace to a suffering population and prove our willingness to include its members in society. Finally, by granting legal recognition to long-term homosexual relationships, we can promote stability within the gay community and provide a powerful incentive for sexual monogamy. But whatever the exercise of governmental

power in the AIDS crisis, we must demand of public leaders that every deprivation of liberty be accompanied by corresponding measures of compassion and rehabilitation. Correspondingly, we should expect of judges an end to the sort of prejudice that would lead one of their number to dismiss as “facetious” serious arguments on behalf of gay Americans—arguments that have been the subject of strenuous Anglo-American jurisprudential debate for at least the last two centuries. Except for the public health, medical, and civil rights communities, empathy and solicitude for the objects of AIDS-related regulations have to date been sadly lacking.

History, especially the experience of Mr. Korematsu and other Japanese Americans during World War Two, teaches that victims do not forget and that memories of cruel and needless action last long after the excuses for the action have been forgotten. Today, similarly, if undertaken without Charles Black’s “humane imagination,” any measures to deal with the AIDS crisis will either fail, or will so humiliate and antagonize already disadvantaged people that the likely result will be yet another painful and lasting social division. Because of the marginal status of many individuals at risk for AIDS, policies such as widespread HIV testing without antidiscrimination laws, quarantining HIV-exposed people, extending their parole dates, or reenacting sodomy laws will only exacerbate the crisis. The legacy of such policies will not be an America that is healthier, purer, or cleaner. Instead, long after the exigencies of electoral politics have faded, another paroxysm of intolerance will have become part of our history and tradition. The quality of that tradition is the momentous burden our public leaders, our judiciary, and we ourselves, bear. Therein lies the risk of prejudice and the promise of moral action in this national emergency.