1. Introduction

Most normative moral theories embrace something like the following:

(A) It is morally wrong to discriminate against a moral being (or class of moral beings) unless that being (or class of beings) possesses a morally relevant differentiating property.

where

A differentiating property is a property possessed by an individual (or class of individuals) and not possessed by the other members of the relevant population.

(A) appears to be a corollary of some principle of universalisability: Moral beings which possess the same morally relevant properties should be treated in a morally equivalent manner. But in this paper we shall not be concerned with the origin of (A), or even its justification. Nor are we concerned with extending (A) to cover positive discrimination in addition to the common negative discrimination to which (A) is relevant.

In this paper the focus of our concern is the morality of discriminatory treatment of persons with the HTLV III (or AIDS) virus, or, more specifically, with the circumstances in which

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discriminatory treatment of such persons is justified. But as an important preliminary we need to sort out what constitutes a morally relevant differentiating property. This we do in Section 2. In Section 3 we shall look at the question of whether being infected with the HTLV III virus is such a morally relevant differentiating property, or whether some other AIDS related property constitutes such a morally relevant difference. In Section 4 we shall look at some cases which illustrate the kinds of moral obligations those infected with the HTLV III virus (or likely to be so infected) have if they are to avoid discrimination, while in Section 5 we look at some cases where discrimination does seem to be morally justified.

2. Morally Relevant Differentiating Properties

How do we justify the claim that a differentiating property \( P \) is morally relevant in the manner required in (A)? Here is a rough suggestion:

(B) If to treat the members of a moral population which have a differentiating property \( P \) in the same manner as the members of the population which do not have \( P \) would have morally undesirable consequences for the population as a whole, then \( P \) is a morally relevant differentiating property.

(B) is consequentialist in nature, but is neutral as to what features of the consequences are relevant. Utilitarians will obviously be interested in those consequences which are pleasurable or painful, but other moral theories may consider additional features of the consequences.

We take it as essential that discrimination involves consideration of consequences, even within the context of a moral theory which is not wholly or generally consequentialist. For surely, when we consider discriminating because of \( P \), we must be concerned with the effects that allowing those with \( P \) unrestricted equal membership of the population will have upon the
population as a whole. And if we are interested in such effects, surely we are considering consequences.

Of course it is possible to take into account things other than the consequences, but we find it difficult to think this really happens. It may be urged that we should be concerned with (say) the justice of some piece of discrimination. But then we believe that it is a consideration of justice that led us to our general principle (A). Obviously justice considerations will be outweighed in some cases, and it is these cases where discrimination is justified. These are the cases where the consequences of non-discrimination are bad enough. So considerations of justice lead us again to concentrate on consequences, and similarly with considerations of freedom, privacy, respect for persons, and so on. We realise that some will say that our notions of justice and the like are too restricted and formal and that richer notions with more genuine content will resolve the question of discrimination without an independent consideration of consequences. But it is our view that these richer notions have really subsumed the consequentialist considerations.

Some may still maintain that matters other than consequences should be considered. But then it seems that we would not find enough general agreement on this "extra" for it to provide any significant influence on the content of a social policy.

It should not be unexpected that the consequences with which we are here concerned are those that can reasonably be predicted, and to which some appropriate level of probability can be attached. Furthermore all such consequences must be considered: short term and long term, and also the consequences of the discriminatory practice itself (especially if the discrimination is to be unfair or unjust). Also the nature of the discriminatory practice proposed will be of the utmost importance when considering the morality of the nature of the proposal.

(B) cannot stand alone as determining morally relevant differentiating properties. There are further restrictions on $P$. Here are at least some of these additional requirements we must take together with (B).
(i) The consequences must be bad *enough*. For example, slightly unpleasant consequences may not do, but life threatening ones may. Of course it is more complicated than this. Also relevant is how widespread the consequences will be. Mildly bad consequences for all members of the population may well be enough, while mildly bad consequences for a small sub-population may not be.

(ii) (B) must be read probabilistically. It is not required that the population must actually experience the consequences, or that it be certain that it would unless the discrimination is enforced. What is required is that it can be predicted with an appropriate level of probability that the consequences would occur unless discrimination is effected. There are two elements here: one is that there be sufficient level of probability, and the other that this probability have sufficient weight.

The sufficient weight requirement means that the probability is based on both a suitable and sufficient body of evidence to make it rational to act on the probability estimate. The sufficient level of probability requirement is that the chance of the bad consequences occurring, given no discrimination, is significant. Of course there is the difficult question of what level of probability constitutes a significant probability. Obviously this will not be determined independently of the nature of the consequences. What is clear is that a mere *possibility* of bad consequences is not sufficient.

If we take life threatening consequences for all the population, we would tolerate only a very small probability before discriminating (unless the discrimination itself carries with it a higher probability of equally bad consequences), but for mildly unpleasant consequences for a sub-population the probability tolerable would obviously be higher.

(iii) $P$ must be maximally specific. Suppose $P$ is a differentiating property, and for those with property $P$ there is a
significantly high probability that they will produce undesirable consequences for the population as a whole. But now suppose those who have property \( Q \) in addition to \( P \) have an even higher probability of producing those same bad consequences, while those who have not got \( Q \) but have \( P \) (that is they have the compound property \( P \) and not \( Q \)) have a probability which is below the threshold significance level. It seems that we should discriminate with respect to the differentiating property \( P \) and \( Q \), but not with respect to the differentiating property \( P \).

(iv) There are certain epistemic and pragmatic requirements on \( P \). It must be discernible (in a practical and realistic manner) whether or not \( P \) obtains. If ascertaining whether or not \( P \) obtains itself produces bad consequences, then it might not be appropriate to discriminate with respect to \( P \). That will depend on the nature of those consequences, and the level of the probability that those consequences will be actualised. What level of certainty is required will depend upon the consequences for the population as a whole, the probability that those consequences will be actualised, and also upon the consequences for those with property \( P \) of the proposed discrimination.

(v) There may be moral restraints on which properties may be appropriately used as the basis for morally justifiable discrimination, but this depends on the normative moral theory from which one is operating more than do the other requirements. Suppose a life threatening disease can be inflicted on both sexes, but only transmitted by one sex. It could be argued on grounds of justice or fairness that only discrimination on the basis of having the disease should be allowed, and discrimination on the basis of having the disease and being of a particular sex is unacceptable. A more extreme example is where one component of a maximally specific differentiating property could only be present if the individual fails to act in an immoral manner, for instance,
perhaps you could only avoid the property by harming another person. And what if the property is picked out using
definite descriptions of a set of identified individuals which
in fact make up a high risk group? And what if the conse-
quences of discrimination change markedly if one uses one
differentiating property rather than another (as, for example,
use of the property of being of a particular race)?

Again, suppose the differentiating property picks out a mi-
nority group already identified in the population and already
subject to unfavourable treatment. At least there is a question
of whether we should (morally) use such a property for dis-
crimination even if it is agreed that it might be "good for the
population as a whole" in simple consequentialist terms. More
argument may be required.

Consequentialists will feel this moral requirement is ade-
quately met by taking the total consequences into account.
But those not of a consequentialist persuasion may well believe
that there are additional moral restraints pertaining to the ac-
ceptance of a differentiating property as a morally relevant dif-
ferentiating property.

We have argued that property $P$ satisfying (B) does not in it-
self establish that we are justified in discriminating against
those with property $P$. Satisfaction of the list (i) - (v) of addi-
tional requirements is necessary for the specification of a
morally relevant differentiating property. We believe that
some such list of requirements ultimately will adequately re-
fine (B) and indirectly our principle (A). Undoubtedly (B) will
need to take still more on board, but we think we have now
done enough for our purposes here.

So from now on we will use (A) on the understanding that a
morally relevant differentiating property must satisfy (B) to-
gether with requirements (i) to (v) above, plus any relatives
that we should need to add. We will call such a differentiating
property a proper morally relevant differentiating property.
This is obviously a fairly complex matter, but at this point it is
sufficiently clear for us to proceed.
Undoubtedly some will object to the whole tenor of this discussion of discrimination. The objection we anticipate is the charge that our entire argument is essentially consequentialist despite its billing as being normative theory neutral, and thus some will reject our contention that for matters of discrimination at least, consequences are determinate of morality. They will say we are too reductionist on matters of justice, and so forth, and such reductionism is not acceptable to the non-consequentialist. While we maintain our view that our argument is largely normative theory neutral, we offer a sketch of an alternative route to what we take to be, at least in all important respects, the same position. Most people agree that "harm to others" gives prima facie grounds for the state to interfere with the actions of the individual, although the reasons offered for such a view can vary enormously. Now this gives only prima facie grounds. Whether actual interference is justified will depend, finally, on other matters. So when asking whether the state should interfere with those with property $P$ because they may harm others in virtue of having $P$, we have to consider such questions as: how bad is the harm; how likely is it that the harm will come about; is $P$ the kind of property which will make it feasible for the state to be able to interfere, and is it morally acceptable to interfere with individuals because they have $P$? And these are exactly the same questions we posed when asking if $P$ is properly morally relevant. So although what follows is couched in terms of discrimination, the essential features could be made in terms of morally acceptable interference with the individual by the state.

3. AIDS and Discrimination

We are concerned with the question of discrimination against those who have been infected with the HTLV III (or AIDS) virus. Let us briefly review the medical picture of this virus, and of those who have been infected with it.

The most serious cases of infection are those where the individuals have AIDS proper. Such individuals paradigmatically
have severe, life-threatening, opportunistic infections, such as certain kinds of pneumonia and cancer, due to deficiencies in their immune systems. This is frequently referred to as AIDS category A or (just) AIDS. AIDS category B includes individuals with Lymphadenopathy Syndrome (LAS) and those with other symptoms which constitute what is referred to as the AIDS Related Complex or ARC. These individuals are not in immediate likelihood of losing their lives, but are in very poor health and great discomfort. Finally, AIDS category C includes those individuals who have a confirmed antibody positive test result for the HTLV III virus, or would have if tested, but have no symptoms (that is, they are quite healthy). Persons of all categories are potentially contagious.

The AIDS virus has now been found in all bodily fluids: blood, urine, semen, saliva, and even tear drops. This is at first sight alarming. But there is, as yet, no evidence of the virus being transmitted via saliva or tear drops in casual contacts.

What the evidence does point to is that AIDS is transmitted through (a) sexual contact involving exchanges of bodily fluids and (b) through contact with contaminated blood/blood products/hypodermics. As such, the HTLV III virus is importantly different from the various flu viruses which are frequently transmitted via aerosols of infected saliva. Also important is the fact that a virus (any virus) can infect a person only by first entering the cells of his or her body, because a virus is entirely dependent upon the enzymes in living cells for its own reproduction. In the case of the HTLV III virus, entry into the bloodstream seems to be necessary.

The prognosis for individuals infected with the HTLV III virus is far from rosy. As the disease has been monitored only since 1981 definitive pronouncements are still not possible. However using mathematical models it has been predicted that the mean incubation period of the disease is six to eight years, and the range from one to fifteen.

Using the data acquired during the last three years it has been estimated that within three years of infection, 5 percent to 15 percent of people will develop AIDS, and another 25 percent to
35 percent will develop LAS. These figures may well increase with time.4

Because AIDS is (a) serious and undesirable, (b) non-curable, and (c) contagious, it has very serious consequences for the community. It is most prevalent in male homosexuals and intravenous drugs users, but is by no means restricted to these groups. Prostitutes, those who have had involvement with a bisexual (even via an intermediate step), and those who are dependent on blood products are also at risk.

Highly reliable tests to screen for the HTLV III virus have been developed. Those currently used within Australia are the ELISA and the Western Blot. The procedure employed is to first use an ELISA. If the result is positive a second ELISA is used. If the result is still positive the blood is then subjected to the Western Blot which is both a more complex and more expensive procedure for looking at the same reaction, but is also more reliable.

Since no antibody test is perfect there will be some individuals whose results are positive, while they do not actually have any HTLV III virus within their blood. Such results are referred to as false positives. A false positive is not much fun for the individual who has tested positive. However, with respect to securing the purity of the blood supply and generally identifying high risk groups, these false positives are unproblematic. It is rather the false negatives--individuals who test antibody negative but who have been infected with the HTLV III virus--that are the problem.

The incidence of false negatives using the ELISA is believed to be quite low. However, it may be as high as three percent.5 The most probable cause of a false negative is the failure of the development of antibodies to the HTLV III virus. The development of such antibodies may take up to nine weeks. This gives us another category of AIDS--call it Category D--and such persons are contagious. If a category D individual donates blood or has interaction conducive to contagion between the time of infection with the HTLV III virus and the development of antibodies he (or she) will be putting others at serious
risk, and this will be undetectable by testing as he (or she) will test negative.

Is having AIDS (category A, B, C or D) a proper morally relevant differentiating property? More simply, since being HTLV III antibody positive is reliably detectable and means that one may pass the virus on, is being HTLV III antibody positive a proper morally relevant differentiating property?

*Prima facie*, it is. Close personal interaction can spread AIDS and clearly having AIDS or ARC has highly undesirable (life threatening) consequences. Also the probabilities are of a sufficient level, in the appropriate circumstances, of the undesirable consequences being brought about. But while we believe that being antibody positive is clearly a differentiating property of moral relevance, we do not think it is a property that measures up as a proper morally relevant differentiating property. It fails some of those *extra* requirements that mark off the properly morally relevant.

There are indeed three ways in which it fails to meet the requirements. It fails to meet the epistemic and pragmatic requirement in two different ways, and it fails to be maximally specific.

Consider then its failure to meet the epistemic and pragmatic requirement:

(1) It is difficult to identify the group that is antibody positive and, because of category D, even more difficult to identify the group that has been infected by the HTLV III virus. There are of course the tests mentioned above. But realistically, the tests can only be used at the request of a member of a high risk group. It is not practical to require regular universal testing, and those who are merely HTLV III antibody positive may have no symptoms and therefore be unaware that they are antibody positive. And Category D could not be identified even if there was regular universal testing. It is not even clear that the related property of being at high risk of being infected is any better. While promiscuous male homosexuals and intravenous drug users may know they are at high risk, the wives of bisex-
ual men and other such persons are also at high risk and yet may have no idea that they are at risk.

(2) To require that people be tested may itself have very bad consequences for some individuals. It is not easy to live with the news that you are antibody positive when the prognosis is so bad, and this consequence is fairly likely for those who test positively. Some have even argued that it may outweigh the supposedly good consequences of the testing program, and hence some advisory services advise individuals against being tested. This is not surprising given the connection between AIDS and homosexuality, and the discrimination which homosexuals already suffer within our society. And it is not clear that the entire high risk group could be adequately identified in practical terms for a testing program.

Consider now the failure of the property of being infected by the HTLV III virus, or the property of being HTLV III antibody positive, to meet the requirement of maximal specificity. The epistemic and practical considerations mentioned above may lead us to consider the property of believing that one is at risk of being antibody positive or being infected, rather than being antibody positive or being infected by the HTLV III virus. But now consider the more specific property of believing that one is at high risk of being HTLV III infected and being morally responsible. It seems that this group has a much lower probability of causing undesirable consequences for the population, in fact a probability lower than the threshold significance level (though, of course, there is always the chance of an accident). Being HTLV III antibody positive or even believing that one is at risk of being HTLV III infected is not a sufficiently specific differentiating property.

These kinds of considerations, together with further epistemic considerations push us in the following direction. We should only discriminate in those cases where it is reasonable to believe that there is a high risk that a person is infected by the HTLV III virus and will not act responsibly.
This may seem very weak. For we are suggesting that discrimination should not be automatic for those in a high risk group, or even for those who are antibody positive, but only where it is probable both that a person has been infected and will not behave responsibly. But we have found that "stronger" properties do not measure up as properly morally relevant.

We should note here that one very desirable feature of this differentiating property is that most of those at high risk will have reason to believe that they are. If they act responsibly (and thus avoid discriminatory treatment), this will reduce the chance of creating other people at risk who are unaware that they are at risk—for example, the wives of bisexual men and those sexually involved with intravenous drug users.

We shall, in what follows, concentrate on this differentiating property. In Section 4 we will discuss what constitutes morally responsible behaviour for a person who believes he (or she) may be infected with the HTLV III virus, and in Section 5 we shall look at cases where discrimination is justified on the grounds that there is good reason to believe that persons cannot, or will not, behave responsibly.

4. Morally Responsible Behaviour For Those Who Are Infected With The HTLV III Virus

Let us look at three cases to elucidate what constitutes morally responsible behaviour for those who believe they are at high risk of having been infected with the HTLV III virus.

(a) **HTLV III Infected Persons In The Workplace.** While it is true that the probability that an individual will pass on the HTLV III virus in an office environment is very low, it is clearly possible for him to do so. It is possible, though not at all probable, that he could maliciously set about to infect another at his workplace by contaminating food, or by some other action (such cases have been reported). It is even possible that he could do this non-maliciously if his behaviour was excep-
tionally unusual. If he did, he would be behaving in a morally irresponsible manner. To behave morally responsibly in this kind of work environment is very easy—an individual would have to go to some lengths to be able to behave irresponsibly. Sharing office, coffee room, and bathroom facilities in a normal fashion involves only an infinitesimal risk.

An individual who works in a blood bank, on the other hand, would be in a very different position. Since blood is one medium in which the HTLV III virus thrives, an individual could, even while behaving cautiously, infect blood or blood products—maybe by a small cut or a needlestick. A morally responsible individual who knows or believes himself to be HTLV III virus infected therefore should either inform the blood bank of this fact or find another job.

When it comes to the question of policies with respect to employment it is our view that the Australian Public Service decision not to discriminate against antibody positive individuals is correct. It is morally correct because it is reasonable to believe that individuals who are antibody positive will behave in a responsible manner (at least in a minimally responsible manner), and the probability of the virus being passed on in any other manner in an office situation is infinitesimal. Admittedly individuals (even individuals belonging to selectively similar groups) do behave in a variety of ways. It is possible that there is a malicious contaminator. But this behaviour is sufficiently improbable that it would be unjust to discriminate against the whole class of individuals in question given the fact that the vast majority of individuals can be expected to behave responsibly, and given the other kinds of risk which our society tolerates. Of course if, for whatever reason, we believe that some infected individual is not responsible, that individual should be subject to some appropriate form of discrimination.

(b) The Bisexual Husband. Suppose Pat and Chris have been married for many years. Pat is a traditional housewife with conservative values. She believes that she is living within a monogamous relationship and her husband has encouraged this
belief. But Chris, who is bisexual, also has casual homosexual relationships.

Chris becomes aware of the fact that he may be HTLV III infected. What is he to do? Confession to his wife could result in the collapse of their relationship. If he says nothing and continues to have sexual relations with her she may be further exposed to the risk of infection.

At this point there seem to be at least two ethically acceptable courses of action open to him. On the one hand he could tell her he is at risk and that she may be too. On the other he could have the antibody test, find an excuse not to have sex for six months, and then have a second antibody test.

Suppose Chris chooses the latter alternative. If both results are clear he will know Pat is not infected (or at least not by him). He then has a second choice. Either he can resume sexual relations with Pat, and not resume his other sexual relations, or he can tell her about his other sexual relations, explain the risks and let her make her own decision. Now suppose that Chris is antibody positive. In this case he should tell Pat his antibody status and let her decide what to do about their relationship. For to continue sexual relations is to further expose Pat to risk. If Pat is a woman of child-bearing age she may become pregnant and a large percentage of babies born to antibody positive women go on to develop AIDS. Finally, if Pat does not know she is at risk she may donate blood (remember tests are not completely effective) and so place yet more individuals at risk.

We should make it quite clear at this point that we are not saying that there exists any absolute obligation for a person, like Chris, at risk of being infected with HTLV III virus to be tested. Nor is there any absolute obligation to inform the spouse that she may also be at risk. There are alternative ways in which one may initially handle the situation. But the bottom line (morally speaking) is that it is irresponsible to continue to expose to risk a non-consenting spouse. And it is also irresponsible to fail to provide information that may prevent the
spouse being the cause of another individual’s suffering or death.

(c) The One-Night Stand. A more difficult case is that of the one-night stand. Is there here an obligation to reveal one’s antibody status to one’s prospective partner? Of obvious relevance here is what one intends to do, or what it is reasonable to believe will happen. Also of the utmost relevance are what dangers adhere to the activities in question, and the probability that such dangers will be actualised.

It is here extremely plausible to argue that the information in question is vital if the individual is to be able to make an informed decision. It is one thing to consent to have sex where there is a belief that there is no incipient danger to health and life that will flow from that action. It is quite another thing to consent believing such a danger is present. If the matter of HTLV III is not explicitly raised what exactly is one consenting to? Is one consenting to HTLV III-free sex? Is one consenting to taking a risk that the other individual is infected with the HTLV III virus?

The notion of consent includes a legal factor and its interpretation is a legally complex issue. But there is certainly a social/moral issue here too. In a community where the dangers of HTLV III have been widely publicised and discussed, if an individual is not coerced into non-safe sex is it reasonable to charge his (or her) antibody positive partner with socially irresponsible behaviour? Suppose the individual asks; is the respondent obliged to give a straight answer? Suppose the individual does not ask; is the other party obliged to volunteer the information?

At this point we will construct an analogous situation. Suppose I own a grocery store and stock just one, very popular, brand of baby food--Brand X. Suppose also that recently there have been a few "strange" infant deaths and it is suspected that some cans of Brand X baby food with the 007 serial number are responsible. But (for whatever reason) no government action has yet been taken to prohibit the sale of Brand X baby
food with the 007 serial number. Perhaps it is because the probability is very low. However there has been a lot of publicity implicating it.

Suppose I am approached by a customer who is well informed about the infant deaths but she still wishes to buy some Brand X from me. I have some in stock but it is all of the 007 serial number. Do I have an obligation to tell her that it has the suspect serial number? More specifically, do I have an obligation to answer her truthfully if she asks me explicitly, and do I have an obligation to volunteer the information if she does not ask?

It is our view that moral responsibility dictates an affirmative answer to all these questions, even if the probability of a particular can being contaminated is low (even very low). And insofar as the risks are of a similar magnitude, and the consequences of similar severity, one's answers to these questions, and those raised by the one-night stand case, should be consistent.

When the consequence of a course of action is very serious and the risk that this consequence will be actualised non-negligible, then the conclusion one is forced toward is one in which the relevant information is supplied whether (or not) a request for such information is tendered. This then is a requirement for morally responsible behaviour in such a situation. We note that is also the basis of the legal response to AIDS in the Australian state of New South Wales.

In summary, we have taken the view that it would of course be generally desirable not to discriminate (socially or legally) against those who are HTLV III infected or against those who have a high probability of being so infected. But this view rests on the presumption that such persons will accept certain responsibilities and obligations in their interactions with others. And of course if there is failure to be responsible, or if it is reasonable to believe that some persons will not be responsible, then there will be a strong case for discriminatory treatment. We shall consider some of these cases in the next section.

We have earlier discussed the difficulty in deciding whether a person is HTLV III virus infected, or at high risk of being so
infected. It might be thought these epistemic concerns are small change compared to those required in making the judgment of a person’s propensity to act responsibly. We can offer no insight into how this is to be done. Rather we rely on the undeniable truth that it is a judgement that we commonly make in a whole range of personal and public situations, and the epistemic status of such judgements is not thereby taken to be automatically impugned.

5. Cases Where Discrimination May Be Justified

To behave in a morally responsible manner is to behave in a way that minimises the probability that (morally) bad consequences will be brought about. We have no intention of embarking upon the difficult and lengthy task of attempting to set up necessary and sufficient conditions for an individual to be morally responsible. The cases in which we are here interested are ones where some piece of behaviour carries with it a significant probability of bringing about a bad consequence. What is obvious here is that a necessary condition of an individual being able to behave responsibly is that he or she has the capacity to act freely, that is to choose, and that there is not compulsion, mental abnormality or mental incapacity, that renders this impossible.

We have argued that discrimination is justified in cases where it is reasonable to believe that an individual (or group of individuals) is at high risk of having been infected with the HTLV III virus and will not act responsibly. We shall here consider three such cases to see why discriminatory treatment is justified in the circumstances depicted. We leave aside the extra, difficult question of the exact nature of the discriminatory treatment which is needed. To some extent this is determined by what is needed to avoid the harmful consequences in question. But more is needed to determine the morally best discriminatory treatment, and the morally best legislation to underpin such treatment.
(a) The Psychotic AIDS Sufferer. Certain kinds of psychosis render an agent not responsible for his actions, or at least not responsible while he is undergoing a psychotic episode.

One example of a psychosis which would render an agent likely to engage in actions that may lead to the infection of other individuals with the HTLV III virus, and simultaneously render him not responsible for those actions, is Manic Depression. While in the manic phase an individual, typically, is subject to overpowering libidinal urges. He also is deluded with respect to his own powers and abilities and becomes prone to gross recklessness. (Manic depressives, typically, find it difficult to sustain personal relations because during a manic phase they are prone to do things like spend all the family savings or give away the family car.) These days many manic depressives are successfully managed with drugs. Some, however, do not respond to this treatment, and others cannot be relied upon to take their medications. Both these latter groups therefore would seem to be proper objects of a general discriminatory treatment, since they cannot be relied upon not to engage in activities which impose non-negligible risks upon others.

In a situation where we have reason to believe a psychotic has been infected by the HTLV III virus, and the probable behavior of the psychotic places others at high risk of very bad consequences, restriction of his freedom of interaction is justified.

A special case is that of the malicious psychotic infected with the HTLV III virus, who knows he is infected and who uses this in his malicious activities. The case for discrimination remains, but the kind of discrimination that is appropriate will clearly be different.6

(b) Intravenous Drug Users. Intravenous drug users may place at risk themselves, other IV drug users with whom they share their fits, and their sexual partners. But there seems to be no reason to suppose that they will be markedly less sexually responsible than other members of the community, except per-
haps if they turn to prostitution to support their habit. Here then we will be concerned only with transmission via syringes.

In the case of sexual transmission of the HTLV III virus we typically are concerned with sane, adult individuals. But in the case of intravenous drug users, it is not so clear that they do have real control over their actions (and most specifically actions that could lead to infection with the HTLV III virus). An intravenous drug user who is addicted to his (or her) drug may, in its absence, be compelled to behave in reckless ways. Both petty and non-petty crime occurs so that drug users can supply their habits. This in itself is some evidence that drugs make individuals more risk-loving, though there is, of course, also the sheer desperation of dependency. The fact that there is some risk of being infected by the HTLV III virus when one injects an intravenous drug will in many cases be given little weight by an individual whose body is in a state of craving for the drug.

Intravenous drug users who are addicted cannot be seen in the same category as the typical sexual adventurer. For the judgement of the IV drug user will often be seriously impaired because of drug addiction. Using a Millian framework we may therefore place him (or her) with children and lunatics when assessing the appropriateness of paternalistic legislation aimed at protecting the IV drug users from contracting the HTLV III virus. Using the argument of the preceding sections, it also justifies discrimination against him (or her) to protect others whom he (or she) would otherwise be likely to infect.

This of course leaves without an answer the practical question of what it would be possible to do. Criminalising the sharing of hypodermics would be utterly pointless for the reasons already given. If the risk of contracting the HTLV III virus is impotent with respect of curtailing the practice of sharing needles, then we might expect that so would be the threat of a criminal action. (And IV drug users already face the threat of a criminal action in virtue of the fact that they are users!) Nonetheless it is clear that to restrict such a person, if an ade-
quate mode of restriction could be specified, would be justi-
fied.

(c) HTLV III Antibody Positive Children. The recent case of
Eve Van Grafhorst raises the question of what is to be done
with children who have been infected with the HTLV III
virus. For instance, should they or should they not be able to
attend regular school? In the case of circumstances surround-
ing infected children, we can concentrate on children who are
proven HTLV III antibody positive.

The HTLV III antibody positive child will, like any other
child, have much to gain from both the educational and social
aspects of the school situation. Each of the other children the
infected child comes in contact with will, on the other hand, be
at some (at this time still unquantified and perhaps very small)
risk of contracting the virus.

Obviously the problem is greater with respect to younger
children, who in the normal run of things will suffer from mi-
nor cuts and abrasions, may bite each other, and do not always
consistently follow the highest standards of hygiene. We be-
lieve, on reliable medical assessment, that the probability of in-
fection of a child by contact with an infected child, in an unsup-
ervised situation, is significant, though quite low.

Children, like all of us, are constantly at risk of injury from
many sources. These risks may not be high but they do exist.
We all risk injury and death, and impose risks of injury and
death upon others each time one of us takes out the car. Activ-
ities like riding horses or playing football involve certain risks.
Adults who engage in these activities voluntarily undertake
these risks. Parents who allow their children to engage in these
activities allow those children to be exposed to those risks.

We do not brand such parents irresponsible. It is the general
view within our society that if a sporting activity is properly
supervised and adequate care taken, the advantages—both
physical and psychological—which accrue to those children
participating in them outweigh the minor risks they simultane-
ously undertake. Similarly with the risks associated with being a passenger in a car.

There are of course other activities that parents or schools will not allow children to engage in because they are considered too dangerous (or at least too dangerous in certain circumstances). For example, classes using pools are usually not allowed unrestricted use of the high diving board. And children, generally, are not permitted to sky dive.

For parents of children mixing with an HTLV III antibody positive child the situation is one where whatever the risk the children are exposed to, there is, unlike swimming or football, no obvious countervailing gain to the exposed children. So why should parents let their children be exposed? The only advantage, it would seem, is to the infected child.

We noted earlier that the right to non-discriminatory treatment carried with it the responsibility not to put others at risk. What is so hard about cases involving children is that we cannot always hold children to be so responsible. The reasons are obvious: they may not possess all the relevant information, and even if they did we do not believe they would be responsible just because they are children. So, it may be argued, the right to non-discriminatory treatment is lost.

There are two retorts here. First, children can to some degree—perhaps to the degree they approximate responsible adults—be held responsible for their actions. To this extent at least, antibody positive children should be treated like other children. But while this will be relevant with older children, it will not be relevant to the very young.

Second, since it is usual to transfer the responsibilities of children to their parents or supervisory adults, why not do the same here? But it seems that while we can agree that there generally exists a transferral of responsibility to parents or supervisors, it is not clear that they can adequately discharge this responsibility if the children are treated in a totally non-discriminatory fashion.

How can a parent act responsibly and the child simultaneously be treated in a non-discriminatory way at school?
Teachers are not usually informed of the HTLV III antibody status of children, and even if they were they might be unwilling to take on the special responsibility. Children are usually unaware of their status or at least of its implications. Schooling usually involves a large number of physical interactions, some of which may carry with them the risk of passing on the virus. Finally, the parents of the other children may not be in possession of all the relevant information, and even if they were they could do nothing, or little, about it.

The one thing that does seem clear is that a parent cannot act responsibly for a child if the parent is unsure about the child’s HTLV III antibody status. So it is the responsibility of the parent(s) of any child who has a background that could make the child at risk to clarify the situation. It also seems clear that some degree of discriminatory treatment for such children will be required at least at some stage.

Clearly such discriminatory practices, however they are presented and whatever attempts are made to make them appear more palatable, will have serious consequences for the child and the family of the child. And of course we find such consequences particularly distressing because they seem so unfair and unjust. It could well be that the near certainty of these bad consequences will outweigh the highly improbable very bad consequences that go with non-discrimination. Our view is that that decision should finally be determined by the relevant empirical information on the effects of discrimination on the child, and reliable medical estimates of the probability of infection of other children by an antibody positive child (at a particular time, in particular circumstances). As yet there is great vagueness and uncertainty about these empirical matters. What complicates this balancing is that even without discrimination the prognosis for the HTLV III infected child is extremely bad (worse even than for infected adults), so that the choice of the infected child is between a high probability of dreadful consequences, and a marginally higher probability of marginally worse consequences. But our view is that, at least
in some circumstances, the balance will probably fall in favour of some discrimination.

There will be hardliners who maintain no risk is acceptable, and that antibody positive children (and perhaps all people infected with the HTLV III virus) should be subject to strict discrimination. But then the question must be raised: why be so intolerant of this risk and simultaneously accept other risks of the same magnitude. Put another way, why discriminate against one particular kind of risk? While determining an acceptable level of risk is a difficult matter, it certainly is related to the consequences that are being risked, and the consequences for a number of kinds of risk may be the same or very similar. Also, while it is hard to be precise as to what level of risk is acceptable, some level will be clearly too high, especially for risks with very bad consequences.

Every year a number of children drown in private swimming pools despite stringent safety requirements. One way to prevent these deaths would be to prohibit backyard pools. This is not done, though the existence of these pools constitutes a risk to small children. So some risks to life, and more specifically in this case, risks to the lives of children, are taken to be acceptable risks.

If the risk of a seven year old passing on the HTLV III virus turns out to be of the same order of magnitude as that of a seven-year-old drowning in a pool then it would be unacceptable to exclude the HTLV III antibody positive child from school. The argument that some parents may not be prepared to accept these risks is beside the point. After all the fact that a parent does not accept the risk imposed by other people having pools gives him no leverage. So why should the former non-acceptance? The irrational attitudes of parents provide no moral justification for discrimination.9

It should be noted here that the risk that a child will drown in a private pool can be lessened if parents are more vigilant and pool owners fence their pools. Responsible pool owners and responsible parents should act to lessen the risk of any child drowning in a pool. Similarly the parents of antibody positive
children and government legislators may be able to implement procedures that lower the risk of one school child passing the HTLV III virus on to another: for example, having someone at the school taking some kind of special supervisory role for such a child.

6. Conclusion

AIDS has confronted our community with a new life threatening risk. It is clear that strict discriminatory practices would help allay those risks. But such practices would not completely remove the risk, and in fact would produce further undesirable consequences for the community. If, instead, those who are at risk of being HTLV III infected are encouraged to behave in a socially responsible manner, and given the information and support they need to make such responsible behaviour acceptable, achievable, and practical, we can minimize, though not completely eliminate, the need for discrimination. It will also, in turn, lower the risk of infection to a level even lower then that which might be expected from more draconian forms of discrimination, since it will lower the probability of a person unknowingly being infected.10

Notes

2. We thank John Campbell whose comments led us to add this sketch of an alternative route.
3. An opportunistic infection is one where the infection occurs while the patient is undergoing some treatment where that treatment predisposes the patient toward the acquiring of the infection.
5. The "new" AIDS virus HIV II could be expected to augment this figure.
6. Maliciousness poses a general problem which is certainly not limited to those mental illnesses. There may be grounds for discriminating against HTLV III infected persons where malicious intent can be established.

7. If the risk-loving claim were established this would pose particular problems. Free syringes might then do little to help. Doubt would also be cast on the claim that IV drug users are no more sexually irresponsible than the population at large.

8. Eve Van Graffhorst was an HTLV III antibody child whose mother wished for her to be able to attend pre-school in the state of New South Wales, Australia. Initially she was allowed to attend, but after a parental protest she was excluded.

9. The likely irrationality of the parents of other children poses additional problems for those framing policies concerning HTLV III infected children.

10. We wish to thank John Campbell and Robert Young for their responses to earlier versions of this paper. We also acknowledge the useful comments made on the paper in discussion when it was read at the 1986 conference of the Australasian Association of Philosophy.

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