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The Making of a Nightmare: Aids Storms Hollywood

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THE MAKING OF A NIGHTMARE: AIDS STORMS HOLLYWOOD

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> *[T]his side of the grave, John Merrick has no hope nor expectation of relief. In every sense his situation is desperate. His physical agony is exceeded only by his mental anguish, a despised creature without consolation . . . . To live with his physical hideousness, incapacitating deformities and unremitting pain is trial enough, but to be exposed to the cruelly lacerating expressions of horror and disgust by all who behold him is even more difficult to bear. . . .*
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> —Bernard Pomerance, *The Elephant Man*, scene 2

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The author dedicates this article to the hundreds of thousands of individuals who have suffered from AIDS and HIV-positive discrimination, and to the doctors and scientists who are desperately seeking a cure. The author thanks Professor Richard Gordon for the opportunity to write the article, Chris Floyd for his support, and her parents for their guidance.

ACT I: INTRODUCTION

Scene 1: The Setting

The Elephant Man was destined to die alone, with neither company nor dignity. Dr. Treves changed that destiny and provided an atmosphere where Merrick could thrive to the best of his ability in his final days. Dr. Treves was able to provide this environment because he was aware of the most current medical information regarding deformities. Furthermore, he was a compassionate individual who believed men should not be treated as freaks because of the fear and misunderstanding of others.

Acquired Immune Deficiency Syndrome ("AIDS"), which is preceded by the acquisition of the associated Human Immunodeficiency Virus ("HIV"), strikes a more intense fear in Hollywood today than the Elephant Man did in nineteenth-century London. Although an image of varied lifestyles has always prevailed in the entertainment industry, tolerance of these lifestyles has not always accompanied this image. Hollywood remembers well the McCarthy era of false accusations and baseless paranoia. In 1985, film and television producer Barry Krost noted that not too long ago, people with AIDS were treated like lepers.[1] When Joan Rivers gave a benefit at West Hollywood's Studio One Discotheque in the early 1980's, she was denied help and support by many Hollywood entertainers.

The fact that homosexual men account for the largest percentage of AIDS cases makes the entertainment industry "ripe for paranoia."[2] Homosexuals populate the industry not only in large numbers, but at every level. Homosexuals are employed by studios as gate guards and sound technicians, as well as board chairmen and star headliners.

Hollywood is in the business of selling dreams. It exists only to entertain. It prospers and thrives by taking people away from their problems and fears. Screenwriter William Goldman suggests that "[t]he [AIDS] panic is because all of Hollywood is based on fantasy. . . . These men and women are supposed to be perfect.[3] Rocky beat Apollo Creed and E.T. got to phone home. In La La Land, no one is ever sick or abandoned and when someone dies, it is always with much fanfare and in pursuit of a just cause. One writer reports that "Los Angeles is the senior prom: everyone is clean and pretty . . . and nothing destroys that

1. David Fox, *Hollywood Powers Help AIDS Victims*, L.A. TIMES, Aug. 11, 1985, at F3.

2. Carla Hall, *Hollywood & AIDS; The Rumors and Alarms on the Set*, WASH. POST, Aug. 15, 1985, at B1.

3. Aljean Harmetz, *Hollywood in Conflict over AIDS*, N.Y. TIMES, Nov. 7, 1985, at C19.

like the [HIV] disease."[4] Hollywood, the dream factory, is now faced with the task of coming up with a way to create dreams of romance without conjuring up nightmares of death.

Art imitates life, and Hollywood is certainly no exception. The challenge that movie-makers face in shooting romantic scenes for the screen spills over into reality when a director has cast an actor with AIDS. Although many movies and television shows have depicted AIDS carriers, and many characters have been portrayed practicing safe sex, the public is still unaware of how real-life AIDS victims are faring in the world's fantasy land.

One commentator has remarked, "Despite the freedom and acceptance that the Hollywood community is reputed to offer its members, homophobia rages on here like anywhere else in America, and gay members of the industry worry about 'hunts for witches that don't exist.' "[5] Sheldon Andelson, chairman of the board and founder of the Bank of Los Angeles, and a regent of the University of California, says that the entertainment industry is probably the most homophobic of any industry he knows.[6] An unnamed gay actor[7] in Los Angeles admits that some of the worst homophobes are gay people.[8]

Fortunately, there are as many signs of compassion as there are of fear. As early as 1985, stars began using their fame to educate the public and raise funds. In the summer of 1985, Paramount Pictures provided its studios as the start and finish line for a walk-a-thon which raised more than $600,000.[9] Last year, the AIDS Project Los Angeles ("APLA") walk-a-thon raised more than $2.5 million, with the help of Richard Dreyfuss, Rhea Perlman of *Cheers*, and Amanda Donohoe and John Spencer of *L.A. Law*.[10] APLA also organizes dance-a-thons, the most recent of which was held at the Los Angeles Sports Arena on March 29, 1992.[11]

On September 19, 1985, the *Celebration for Life* benefit, launched by Elizabeth Taylor, raised over one million dollars by providing a $500-

4. Hall, *supra* note 2, at B6.

5. *Id.*

6. *Id.*

7. The term "actor" in this article refers to both male and female entertainers.

8. Carla Hall, *Hollywood & AIDS: The Stab of Fear, Double Lives and Damaged Careers*, WASH. POST, Aug. 15, 1985, at B4.

9. Fox, *supra* note 1, at F3.

10. *$2.5 Million Raised in AIDS Walk*, L.A. TIMES, Sept. 23, 1991, at A19.

11. Bea Maxwell, *Charity Scorecard: Burns' 'Superdinner' Raises $1.5 Million*, L.A. TIMES, Apr. 19, 1992, at E10. APLA raised $1 million from this fourth annual dance-a-thon. *Id.*

per-ticket benefit at the Bonaventure Hotel.[12] The organization's honorary committee boasted a membership of over 300 celebrities.[13] In 1988, all the show business unions and guilds banned together to form Hollywood Helps, which provides funds for people with AIDS at all levels of the entertainment industry.[14] The 1991 "Commitment to Life V" benefit honored singer/actress Bette Midler, MCA Inc. President Sid Sheinberg, and personal manager Barry Krost for their work in AIDS fundraising, education, and support.[15] At the same benefit, Sheinberg and Barry Diller, the former chairman of Fox Inc., announced the formation of Hollywood Supports, a project designed to address issues of AIDS-phobia and homophobia in the entertainment industry.[16] Barbara Streisand, Sylvester Stallone and Kevin Costner serve on the founding board. The group's first project is an AIDS-in-the-workplace training seminar for guilds, unions and studios. One of the many issues included in the training is the use of the same make-up materials and tools on more than one actor.[17]

The Los Angeles AIDS Health Care Foundation raised over $1.4 million in its first AIDS CableThon held in late 1991.[18] Guests included Joan Rivers, Marlee Matlin, Sharon Gless, Gregory Harrison, Phil Donohue and Edward James Olmos. The Bravo cable channel also ran its third annual AIDS telethon four Sundays in December of 1991.[19] The show included comedy, dance, and music highlighting the music video, *Red Hot and Blue*, based on the music of Cole Porter. The profits from the compilation and its accompanying television special are being donated to AIDS research and relief. The compilation includes an informational booklet about AIDS and a booklet describing the life of Cole Porter and the pressure he faced as a homosexual living in the 1920's.

Despite successful fundraising and educational efforts, the industry provides little support on an individual basis to HIV carriers. Most of Hollywood's affirmative action regarding the AIDS epidemic has come from the work of actors, either through the aforementioned charity fun-

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12. Scot Haller, *Fighting for Life*, PEOPLE, Sept. 23, 1985, at 28.

13. *Id.*

14. David J. Fox, *How Much Does Hollywood Really Care About AIDS?*, L.A. TIMES, Sept. 22, 1991, at 55 (Calendar).

15. Victor F. Zonana, *AIDS Plea Planned for Benefit*, L.A. TIMES, Sept. 15, 1991, at B1.

16. Fox, *supra* note 14, at 55.

17. Telephone Interview with Richard Jennings, Executive Director of Hollywood Supports (Mar. 20, 1992).

18. *See* Scott Harris, *Johnson Brings New Stature to AIDS Funding*, L.A. TIMES, Nov. 13, 1991, at A1; David Fox, *Cable TV to Air AIDS Fund-Raiser*, L.A. TIMES, Nov. 8, 1991, at F3.

19. Lynne Heffley, *Confronting AIDS with an Arsenal of Education*, L.A. TIMES, Nov. 30, 1991, at F1.

draisers, or by statements made at events surrounded by heavy media attention. At this year's Academy Awards ceremony on March 30, 1992, many actors wore red ribbons as a reminder of the ravages of the disease.[20] Actor Richard Gere expressed the opinion that money from defense cuts should be used to fight AIDS.[21] A real-life glimpse of the effect of AIDS was highlighted at the Oscars when Bill Lauch, the companion of lyricist Howard Ashman, who, along with composer Alan Menken, won Oscars for best original score and best original song, accepted the latter award and lamented the loss of Ashman to AIDS in March, 1991.[22]

The first influential actor to publicize the HIV fight was also the first famous actor to die from AIDS, Rock Hudson. Hudson's disclosure forced Hollywood to face a nightmarish reality: AIDS was no longer a disease limited to anonymous homosexuals who frequented public bathhouses or homeless intravenous drug users. Judy Spiegel, a Los Angeles AIDS health educator, commented, "People are willing to listen because it's Rock Hudson. Regardless of how he came down with it, I think the publicity will make people take notice that this disease is, in its way, killing us all."[23] Producer Howard Roseman agreed: "The Rock Hudson thing kind of galvanized the industry . . . . Suddenly everybody said 'He's one of our own.' You support them, they're showbiz—they're family."[24]

When Hudson first announced that he had AIDS, the community turned its focus to Linda Evans.[25] Although medical evidence shows that AIDS cannot be spread through casual contact, Evans and Hudson had a lengthy kissing scene in one of Hudson's six episodes on *Dynasty*.[26] Rumors abounded that she would sue him.[27] Joan Rivers asserted that an actor has an obligation to inform fellow performers if he has AIDS.[28] Cher added, "I strongly believe that Rock Hudson should have been more responsible toward Linda Evans. I mean here was an unsuspecting working actress doing her job. Why should she be put at risk?"[29]

Although medical experts insisted that Evans was not at risk, the

20. Terry Pristin, *'Silence of the Lambs' Sweeps 5 Major Oscars*, L.A. TIMES, Mar. 31, 1992, at A1, A22.
21. *Id.*
22. *Id.*
23. David Gelman, *AIDS Strikes a Star*, NEWSWEEK, Aug. 5, 1985, at 54.
24. Eloise Salholz, *AIDS: Hollywood Jitters*, NEWSWEEK, Aug. 26, 1985, at 47.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. Haller, *supra* note 12, at 28.

Screen Actor's Guild ("SAG") added fuel to the fire by announcing that open-mouthed kissing is a possible health hazard and required actors to be told in advance if they will be asked to play such scenes.[30] It should be noted, however, that the standard SAG contract prohibits discrimination based on HIV status.[31] Nonetheless, actors are still scared. Donna Mills has refused to kiss anyone new on her show.[32] Morgan Fairchild admitted that she has friends who refuse to play opposite certain actors because they are gay and her friends fear getting AIDS.[33]

Many secretly hoped that Hudson's disclosure in 1985 would open the closet doors for many HIV-positive entertainers. However, it took seven years before another industry celebrity, Brad Davis—Golden Globe award winner for his role in *Midnight Express*—admitted that he had contracted the disease.[34] It was not until the day after Davis died that his wife, Susan Bluestein, went public with the information by contacting the *Los Angeles Times*.[35] Davis had kept his condition a well-guarded secret since 1985 when he tested positive for HIV.[36] This secrecy denied him early intervention, emotional support, and financial benefits which may have accrued to him had he disclosed his condition. Davis did not come forth in 1985 or in the six years he carried the virus because he was convinced that an actor known to be HIV-positive could not get work. Davis, during his life, was more concerned about providing for his wife and daughter than about being a hero for infected actors.[37] Producer Rick Rosenberg believes Davis' fears were justified, claiming that "[t]his town would be terrified to have an HIV[-]positive actor in a leading role . . . . [A]n educated producer or director might do it, but would the insurance company say OK? Would the money people? No. And on television, the advertisers might panic."[38]

Rodger McFarlane, Executive Director of Broadway Cares, an organization providing AIDS care and fundraising in New York, provided a doctor for Davis from New York because Davis feared media exposure if he sought medical treatment in Los Angeles.[39] McFarlane contends that there are more HIV carriers in the industry, including several recog-

30. Harmetz, *supra* note 3, at C19.
31. *Id.*
32. Haller, *supra* note 12, at 28.
33. *Id.*
34. Victor F. Zonana, *Profile in Courage, Anger,* L.A. TIMES, Sept. 11, 1991, at F1.
35. *Id.*
36. *Id.*
37. *Id.* at F8.
38. *Id.*
39. *Id.*

nizable names.[40] Dr. Joel Weisman, who treated Davis, adds that his Sherman Oaks practice treats many HIV-positive entertainers who all agree that "if you are perceived to have AIDS, you are unhirable. You don't get a picture."[41] John Levey, director of casting for Warner Brothers Television, refuses to concede that an HIV-positive actor would be blackballed, but allows that "his opportunities would, no doubt, be greatly limited."[42]

Similarly, in the music industry, Queen's lead singer Freddie Mercury, announced to the media that he had AIDS just a few hours before his death on November 24, 1991.[43] Mercury claimed that he kept his condition secret in order to protect the privacy of those around him.[44] Was he protecting his social acquaintances from speculation that they are gay, that they are intravenous drug users, or that they too have AIDS? Another musician known to have died from AIDS was B-52's guitarist Ricky Wilson. Wilson died in 1985; however, AIDS was not acknowledged as the cause of his death until a year later.[45]

Despite the risk involved, two celebrities have admitted to testing HIV-positive soon after they discovered it themselves: actor Dack Rambo and athlete Earvin "Magic" Johnson. Unfortunately, the public cannot take this as a sign of societal enlightenment because neither Rambo nor Johnson are continuing to fully participate in their chosen careers. Rambo quit acting in order to announce his condition and to devote the rest of his life to AIDS fundraising and education. Rambo, who tested positive in September, 1991, believes that it is "pretty doubtful" that an HIV-positive actor could get work in Hollywood.[46] It should be noted that the television show, *Life Goes On,* recently held a casting call for HIV-positive actors to portray a character with the virus. Michael Kerns, who has portrayed several characters with AIDS on the stage, got the part. Although Mr. Kerns is fortunate to be able to continue acting despite his immune status, his parts have been limited to

40. Victor F. Zonana, *Profile in Courage, Anger,* L.A. TIMES, Sept. 11, 1991, at F8.

41. *Id.*

42. Fox, *supra* note 14, at 55.

43. Edward J. Boyer, *British Rock Star Mercury Dies of AIDS,* L.A. TIMES, Nov. 25, 1991, at A4. The "Freddie Mercury Tribute: Concert for AIDS Awareness" was held on April 20, 1992, at Wembley Stadium in London. It drew a crowd of 72,000 and was televised in 70 countries. All profits will be donated to AIDS charities worldwide. Jeff Kaye, *(Safe) Sex, (No) Drugs and Rock 'N' Roll; A Star-filled Send Off to Freddie Mercury,* L.A. TIMES, Apr. 22, 1992, at F1.

44. *Id.*

45. Steve Hochman, *Sex, Drugs, Rock . . . and AIDS; Some Rockers Opt for Change in Lifestyle,* L.A. TIMES, Nov. 26, 1991, at F9.

46. J. Walters, *Dack Rambo's Quest,* OPTIMIST, Spring 1992, at 9.

HIV-positive characters, thereby narrowing his opportunities in his chosen field.

Magic Johnson, the individual who may have had the greatest impact on public awareness, announced his HIV-positive status on November 7, 1991. However, Johnson is an anomaly among those who have acknowledged having the virus. Johnson does not have the financial necessity to work that Brad Davis had. In addition to Johnson's $3.1 million salary from playing basketball,[47] he earned approximately $9 million off the court through various business investments and endorsement contracts in 1991.[48]

Yet, aside from his financial security, Johnson has the same problem as many actors; he would like to continue working in his chosen career, but is faced with a dilemma. Although Johnson's representatives claim that he has retired from basketball for his own protection and health, AIDS experts claim that intense exercise and exertion are not in themselves harmful to the immune system.[49] It is the National Basketball Association, the team owners and the other players who are keeping Johnson off the court. As more athletes publicly disclose their HIV status, the sports arena will be forced to develop a working policy or lose many of its finest athletes.

Johnson's announcement sent shock waves through society much as had the announcement of Rock Hudson. While Hudson's disclosure made the public realize that AIDS was not some faceless disease, Johnson's disclosure made people admit that AIDS is not just a homosexual disease. The middle class heterosexual population—to whom Johnson is a tremendous hero—does not want to accept that Johnson contracted the virus through heterosexual contact because that admission means they too are susceptible.

Unlike Johnson, who likely could not have explained away an early retirement from basketball without disclosing his HIV-positive status, at least one celebrity who has moved out of the direct media spotlight chose to keep the unhappy news to himself as long as he could. Arthur Ashe, who learned in 1988 that he had contracted the virus during 1983 heart surgery, knew that the media deluge would make living a discreet life for him and his family impossible.[50] The former U.S. Open and Wimbledon

47. Mark Heisler, *Magic Johnson's Career Ended by HIV-Positive Test*, L.A. TIMES, Nov. 8, 1991, at A33.

48. Thomas S. Mulligan, *The Magic Touch: What Now?*, L.A. TIMES, Nov. 8, 1991, at D1.

49. Janny Scott, *The Day the Magic Stopped; Medical Prognosis Is Unclear*, L.A. TIMES, Nov. 8, 1991, at C4.

50. John J. Goldman, *Tennis Great Ashe Reveals He Has AIDS*, L.A. TIMES, Apr. 9, 1992, at A1.

tennis champion was forced to break the news on April 8, 1992, after reports of his condition were obtained by *USA Today*.[51]

Society is attempting to keep AIDS a "gay" disease. Before Dack Rambo tested HIV-positive he was suspected of being gay and consequently suspected of having AIDS.[52] When Disney senior vice president Gary Barton was hospitalized for aseptic meningitis four years ago, it was assumed that because he was gay, he had been hospitalized with AIDS.[53] Even educated and liberal people do not go to supermarkets where gay people shop, do not swim where gay people swim, and do not go to fitness facilities where gay people exercise.[54] In 1990, a hot-line counselor at the AIDS Project Los Angeles reported that he still knew people who refuse to eat at restaurants frequented by homosexuals.[55] A doctor's testimony from one AIDS case is illustrative:

> [Y]ou learn early in medical school that one of the best ways out of an argument or out of a jam, an intellectual jam or an academic jam, is to suggest if you don't really have hard evidence to support what you are recommending in a particular case, the easiest way out is to say well, there's no medical evidence to suggest otherwise. But in this case we're dealing with a potentially fatal illness and because of the absence of information, not the presence of information, the requirement is that we err on the side of caution . . . . There [are] also . . . anecdotal reports which suggest the possibility of transmissibility by other that [sic] sexual contact or direct blood-to-blood contact.[56]

This fear may be understandable in light of the destruction wrought by AIDS to date. However, just like society's fear of John Merrick, the fear of AIDS is medically unfounded and unnecessary. Other signs of fear are evident as well. At least two actors have started their own bloodbanks.[57] People have started air-kissing at social functions. Although the atmosphere is still light and giddy, there is an undercurrent of fear and seriousness. People are very careful about whom they touch and even whom they air-kiss.

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51. *Id.*

52. Walters, *supra* note 46, at 9.

53. Fox, *supra* note 14, at 56.

54. Hall, *supra* note 2, at B1.

55. Telephone Interview with AIDS Project Los Angeles (Apr. 7, 1990).

56. Martinez v. School Board, 692 F. Supp. 1293, 1301 (M.D. Fla. 1988) (quoting trial testimony of Dr. Donald Russell).

57. *Id.*

Scene 2: Medical Information

As mentioned above, AIDS is an acronym for Acquired Immune Deficiency Syndrome. "Acquired" indicates that AIDS is neither inherited nor explained by an underlying illness. "Immune Deficiency" expresses how the disease attacks the human body—by rendering it unable to defend itself against infections. "Syndrome" indicates that a variety of scientific diseases can occur.[58] The most common of these so-called opportunistic infections are: 1) a type of cancer known as Kaposi's sarcoma; and 2) a parasitic infection of the lungs known as *Pneumocystis carinii* pneumonia. Neither of these afflictions is contagious. In fact, the rarity of these sicknesses indicated to medical professionals as early as 1980 that an unusual disease which attacked the immune system was on the horizon.[59]

AIDS is the term used when a person shows both a weakened immune system and symptoms of one of the opportunistic infections. When a person tests positive for AIDS antibodies, but does not yet show signs of AIDS, she[60] is said to be HIV-positive. The author has chosen to use the less cumbersome term Human Immunodeficiency Virus ("HIV") instead of the original dual terminology of human T-cell lymphotropic virus type III/lymphadenopathy-associated virus ("HTLV-III/LAV"). It takes two to twelve weeks from exposure for the body to seroconvert (produce antibodies to the HTLV-III virus).[61] It takes anywhere from six months to an unknown period of time for an HIV-positive person to show signs of "full-blown AIDS."[62] At this time, it is believed that all HIV carriers will develop AIDS.[63] A person may transmit HIV from the moment he has seroconverted.

AIDS affects the body when the HTLV-III virus attacks white blood cells which regulate the body's immune system. The HTLV-III virus turns a white blood cell, commonly known as a "helper T-cell," into a virus-factory which exponentially replicates the HTLV-III cells until it dies. When the HTLV-III virus has killed all the helper T-cells, it dies out itself and disappears. However, it leaves the body without an immune system and thus totally defenseless against infection.

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58. *See* West, *One Step Behind a Killer*, 4 SCI. 33, 37 (1983).

59. RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC 18-20 (1988).

60. In an effort to fight gender discrimination, the author will alternate the gender of general pronouns throughout the paper.

61. Telephone Interview with Center for Disease Control (Apr. 19, 1990).

62. *Id.*

63. *Id.*

HIV is transmitted through the exchange of body fluids such as blood and semen. The virus cannot survive for more than a few minutes outside the human body.[64] Researchers emphatically repeat that HIV cannot be transmitted through casual contact such as shaking hands, sharing facilities, or hugging. However, researchers have also found the virus in human saliva and tears.[65] Although there is no evidence linking tears or saliva with the transmission of AIDS, the Surgeon General refuses to announce that HIV cannot be transmitted through open-mouthed kissing.[66]

Currently, it is believed that all HIV carriers will develop AIDS.[67] AIDS is 100 percent fatal.[68] Neither a vaccine nor a cure exists. The disease has already reached pandemic proportions. Nationally, there are 124,984 cases of AIDS, including 76,031 deaths from AIDS.[69] The Center for Disease Control estimates that by the end of 1992 there will be 365,000 cumulative AIDS cases and 263,000 deaths. In California, there are currently 24,264 cumulative cases of AIDS, including 8,545 cases in Los Angeles.[70] Los Angeles is second only to New York City in the number of deaths due to AIDS.[71] For this reason, people all over the country, especially in Hollywood, are suffering from an emotional affliction known as "afrAIDS." The following two sections of this article examine the current laws which HIV-positive actors may use as a shield to protect against discrimination and some legal arguments that studios may use as a sword against HIV-positive actors.

ACT II: FEDERAL AND LOCAL LAW

Scene 1: The Federal Statute and Its Interpretation

In 1973, Congress passed the Rehabilitation Act ("The Act").[72] Section 504 of the Act provides in pertinent part:

No otherwise qualified handicapped individual . . . shall, solely

64. *But see* Marwick, *AIDS-Associated Virus Yields Data to Intensifying Scientific Study*, 254 JAMA 2865, 2866 (1985) (French scientists report HTLV-III virus survives 10 days at room temperature when left in petri dish).

65. Curran, Morgan, Hardy, Jaffe, Darrow & Dowdle, *The Epidemiology of AIDS: Current Status and Future Prospects*, 229 SCI. 1352, 1355 (1985).

66. *Id. See also* C. Everett Koop, *Surgeon General's Report on AIDS*, U.S. Dep't of Health and Human Services, Oct. 22, 1986, at 25.

67. Telephone Interview, *supra* note 55.

68. *Id.*

69. *Id.*

70. Telephone Interview, *supra* note 55.

71. *Id.*

72. For relevant text of the Rehabilitation Act, see 29 U.S.C. §§ 701-796i (1988).

> by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .[73]

Section 504 has repeatedly been interpreted to protect AIDS victims.[74]

Any discussion of AIDS in the employment arena must begin with *Arline v. School Board*[75] which involved a school teacher with tuberculosis. Gene Arline contracted tuberculosis in 1957 at the age of fourteen.[76] The disease went into remission shortly thereafter and did not resurface for twenty years.[77] Arline had been teaching for thirteen years when she suffered three relapses within eighteen months.[78] In 1978, the school board fired her "not because she had done anything wrong, but because of the continued reoccurrence [sic] of tuberculosis."[79]

Arline brought suit in federal court claiming that her dismissal violated section 504 of the Rehabilitation Act of 1973. She claimed to be a handicapped individual who had been fired, despite the fact that she was otherwise qualified to teach.[80] Additionally, Arline claimed that tuberculosis did not affect her continued employment because the risk that she would infect her students was so minimal.[81]

In its analysis, the Eleventh Circuit first examined whether the school was sufficiently funded with federal monies to be considered under the Rehabilitation Act. Because federal funding is not relevant to the reasoning that AIDS is a handicap, that part of the case will not be examined here.

The court next determined whether tuberculosis constituted a handicap within the meaning of the Rehabilitation Act. The court turned to the language of the statute to determine that tuberculosis is a handicap. Section 706(7)(B) states that:

> [T]he term "handicapped individual" means . . . any individual who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as hav-

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73. 29 U.S.C. § 794 (1991).
74. *See, e.g.*, Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988).
75. 772 F.2d 759 (11th Cir. 1985).
76. *Id.* at 760.
77. *Id.*
78. *Id.*
79. School Bd. v. Arline, 480 U.S. 273, 276 (1986).
80. *Arline*, 772 F.2d at 761.
81. *Id.*

ing such an impairment.[82]

The court then went on to examine the definitions proffered by the Department of Health and Human Services.

> (i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
>
> (ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
>
> (iii) "Has a record of such impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
>
> (iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairment defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.[83]

The court concluded on the basis of this language, that persons with *contagious diseases* are within the coverage of section 504.[84] It is this language that employees point to for support of the claim that the Rehabilitation Act protects AIDS carriers. It should be noted, however, that on appeal, the Supreme Court of the United States specifically stated that the *Arline* case did not present, and therefore the Court did not reach, the question of whether a carrier of AIDS could be considered to have a physical impairment, or whether such a person could be considered, on

82. 29 U.S.C. § 706(7)(B) (1985) (current version at 29 U.S.C. § 706(8)(B) (1989)).

83. 45 C.F.R. § 84.3(j)(2) (1977).

84. *Arline*, 772 F.2d at 764 (emphasis added).

the basis of contagiousness, a handicapped person under the Act.[85]

Significantly, the Eleventh Circuit emphasized that even when Arline was not directly affected by tuberculosis, she fell within the coverage of section 504 because she "has a record of such impairment"[86] and "is regarded as having such an impairment"[87] by her employer. The same reasoning applies directly to AIDS and HIV carriers. They will not always show outward signs of the disease, but they will always be considered as having AIDS. In its review of legislative intent, the court found no reason or indication that chronic contagious diseases are to be excluded from the definition of "handicap."[88]

The court then went on to examine whether Arline was "otherwise qualified" to perform her job if given "reasonable accommodation." The court concluded that certain legitimate qualifications may be essential to the performance of some jobs.[89] However, the determination of what qualifications are essential and whether specific accommodation is possible are fact-specific issues.[90] The court therefore remanded the case to the district court for further findings as to whether the risks of infection precluded Arline from being "otherwise qualified" for her job and if so, whether it was possible to make some reasonable accommodations for her either in a teaching position or in an administrative position.[91]

On remand, the district court held that Arline was otherwise qualified to teach in 1978 when she was fired, and that she remained qualified in 1988 at the time the case was decided.[92] In reaching this conclusion, the court stated that an otherwise qualified person is one who is "able to meet all of a program's requirements in spite of [a] handicap."[93] The court followed the standard inquiry suggested by the Supreme Court to determine if Arline was able to meet all the requirements of her teaching position. This inquiry included:

> "[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the

85. *Arline*, 480 U.S. at 282 n.7.
86. 45 C.F.R. § 84.3(j)(2)(iii) (1977).
87. 45 C.F.R. § 84.4(j)(2)(iv) (1977).
88. *Arline*, 772 F.2d at 764.
89. *See* Southeastern Community College v. Davis, 442 U.S. 397, 406-07 (1979).
90. *Arline*, 772 F.2d at 764.
91. *Id.* at 765.
92. Arline v. School Bd., 692 F. Supp. 1286 (M.D. Fla. 1988).
93. *Id.* (quoting Southeastern Community College v. Davis, 442 U.S. at 406 (1979)).

> probabilities the disease will be transmitted and will cause the varying degrees of harm."[94]

The court found that tuberculosis is not easily communicated[95] and may only be transmitted when a person's smear test is positive (when the person is diseased).[96] The court concluded that the severity of the risk was minimal both in 1978 and 1988. In 1988, the treatment for tuberculosis was 98.6 percent effective in eliminating the progression of infection to disease. Even if a person did develop tuberculosis, a cure was available in 1978 as well as in 1988.[97] Finally, the court found that Arline had posed no threat of communicating tuberculosis to her students either in 1978 or in 1988.[98]

After balancing all of these factors, the court concluded that Arline was otherwise qualified to teach elementary school children, and ordered her reinstated. The court offered the school board the alternative option of paying Arline $768,724, which represented the amount Arline would have earned from the 1988-1989 school year until retirement at age sixty-five.[99]

Scene 2: Application of Arline *to AIDS*

Those affected by AIDS may be divided into four categories: (1) those who test HIV-positive but have no physical symptoms; (2) those who suffer from AIDS Related Complex ("ARC") with warning symptoms of AIDS such as diarrhea, swollen lymph nodes, night sweats, etc.; (3) those with AIDS who have an opportunistic infection but do not require hospitalization and are able to work; and (4) those with an infection who require hospitalization or are physically unable to work.[100] The Rehabilitation Act clearly does not cover those in group four because although they have a contagious disease, they are not otherwise qualified to work. The Act should cover those in groups one, two, and three because they have a contagious disease. Those in groups one and two should also be protected under the Act because they are regarded as hav-

94. *Arline*, 480 U.S. at 288 (quoting brief for American Medical Association as *amicus curiae*, at 19).

95. *Arline*, 692 F. Supp. at 1291.

96. *Id.*

97. *Id.* at 1291-92.

98. *Id.* at 1292.

99. *Id.* at 1293. Despite the language of the appellate court in remanding the case, the district court did not consider whether it was possible to make some reasonable accommodation for Arline. Presumably, the court did not reach this question because it found her qualified to teach without accommodations.

100. *See* Arthur S. Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681, 687 (1985).

ing a serious physical impairment (AIDS) which has not yet stricken or disabled them.[101] Similarly, people in high risk groups—homosexuals, intravenous drug users, hemophiliacs, Haitians, and prostitutes—may be able to claim protection under the Act because they are perceived as having AIDS.

Despite the clear message of *Arline*, on June 20, 1986, shortly after the case was decided by the Eleventh Circuit, the United States Department of Justice issued a memorandum concluding that an individual's *real or perceived* ability to transmit HIV to others is not a handicap within the meaning of the Act.[102] The author of the memorandum, then Assistant Attorney General Charles J. Cooper, claimed that the Act prohibited discrimination only on the basis of the *disabling effects* that AIDS or ARC may have on their victims.[103] Mr. Cooper thus excluded from protection healthy people who had seroconverted. These are precisely the people in Hollywood who need protection. Since AIDS was discovered in 1981, Congress has not attempted to limit the scope of the Act or exclude AIDS, ARC, or seropositivity from its protection. The clear language of the Act and the reasoning of *Arline* mandate that HIV-positive people be protected in the same manner as those suffering from AIDS or ARC for three reasons. First, because the immune systems of HIV-positive individuals are slowly destroyed by the HTLV-III virus, these individuals have a physical impairment that may not substantially limit major life activities, but is treated by them as constituting such a limitation.[104] Second, seropositive individuals may be misclassified by others as having a physical impairment that limits their life activities.[105] Third, HIV-positive individuals have a contagious disease.[106]

The Ninth Circuit has already held that a teacher with AIDS is a handicapped individual protected under the Rehabilitation Act.[107] In *Chalk v. United States District Court,* the petitioner Chalk had been a teacher for the hearing-impaired in the Orange County Department of Education for six years when he was diagnosed with AIDS.[108] After

101. *See* Dlutowski, *Employment Discrimination: AIDS Victims,* 9 HARV. J.L. & PUB. POL'Y 739, 747 (1986).

102. *See* Memorandum from Charles J. Cooper, Asst. Att'y General, Office of Legal Counsel, U.S. Dep't of Justice, to Ronald E. Robertson, General Counsel, U.S. Dep't of Health and Human Services re: Application of sec. 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex, or Infection with the AIDS Virus (June 20, 1986).

103. *Id.*

104. *See* former 29 U.S.C. § 706(7)(B)(iv)(A) (1985).

105. *See* 29 U.S.C. § 706(8)(B)(iii) (1985).

106. *Arline,* 772 F.2d at 764.

107. Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988).

108. *Id.* at 703.

eight weeks of treatment, he was found fit for duty and released to return to work by his doctor.[109]

However, the school barred him from the classroom and placed him in an administrative position, where he remained for the duration of the school year.[110] Because Chalk insisted on returning to the classroom the following year, the school filed action for declaratory relief.[111] Chalk then moved for a preliminary injunction ordering the Department to allow him to teach pending trial.[112] He based his claim on section 504[113] of the Rehabilitation Act. The district court denied the motion on September 8, 1987.[114] Chalk then won a motion for expedited appeal and filed an emergency motion for an injunction pending appeal.[115] In granting the preliminary injunction, the court examined Chalk's probability of success on the merits.

The court first quoted the language of *Arline,* stating that section 504 is fully applicable to individuals who suffer from contagious diseases.[116] The Ninth Circuit noted that the district court had held that Chalk was handicapped within the meaning of the Act, and that the Department did not contest that ruling on appeal.[117] Therefore, this case answered affirmatively that a person with AIDS is handicapped under the Act.

However, the Rehabilitation Act of 1973 is aimed at programs that receive federal funds. The Act would not apply to movie studios, broadway productions, or television shows unless they receive federal funds. In fact, most employers are not covered under the Act. However, a new federal law was passed by Congress. The Americans with Disabilities Act of 1990 ("ADA")[118] was signed by President Bush on July 26, 1990.[119] The law was enacted in recognition that 43,000,000 Americans have physical or mental disabilities.[120]

The ADA goes beyond the Rehabilitation Act of 1973 because it affects every employer with fifteen to twenty employees or more. Con-

109. *Id.*
110. *Id.*
111. *Id.*
112. *Chalk,* 840 F.2d at 704.
113. Current version at 29 U.S.C. § 794 (1989).
114. *Chalk,* 840 F.2d at 704.
115. *Id.*
116. *Id.*
117. *Id.* at 705 n.6.
118. Pub. L. No. 101-336, 103 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (1992)) (1989).
119. *Id.*
120. *Id.* at § 12101.

gress based the ADA on the theory that any organization with fifteen to twenty or more employees impacts interstate commerce and thus may be federally regulated. It is likely that when the ADA reaches the courtroom, the analysis of *Arline* and its progeny will be applied.

The issue remaining open to debate is what constitutes "otherwise qualified" to work. Future litigation will focus on whether an HIV-positive person in groups two and three[121] are capable of meeting the requirements of their jobs.

Scene 3: Los Angeles Ordinance and Its Interpretation

In August, 1985, Los Angeles became the first city to respond to the AIDS crisis by adopting an AIDS anti-discrimination ordinance.[122] The day after the Los Angeles City Council adopted the ordinance, the city of West Hollywood, California, adopted one virtually identical to it.[123] Section 45.82 of the ordinance states, in pertinent part:

> A. Unlawful Employment Practices.
> It shall be unlawful employment practice for any employer, employment agency or labor organization or any agent or employee thereof to do or attempt to do any of the following:
>
> 1. Fail or refuse to hire, or to discharge any person, or otherwise to discriminate against any person with respect to compensation, terms, conditions, or privileges of employment on the basis (in whole or part) of the fact that such person has the medical condition AIDS or any condition related thereto.
>
> 2. Limit, segregate or classify employees or applicants for employment in any manner which would deprive or tend to deprive any person of employment opportunities, or adversely affect his or her employment status on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.
>
> 3. Fail or refuse to refer for employment any person, or otherwise to discriminate against any person on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.
>
> 4. Fail or refuse to include in its membership or to otherwise discriminate against any person; or to limit, segregate or classify its membership; or to classify or fail or refuse to refer

121. *See supra* note 66 and accompanying text.
122. LOS ANGELES, CAL., CODE ch. 4, art. 5.8 (1985).
123. WEST HOLLYWOOD, CAL., CODE ch. 2, art. IV, pt. E (1986).

for employment any person in any way which would deprive or tend to deprive such person of employment opportunities, or otherwise adversely affect her or his status as an employee or as an applicant for employment on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.

5. Discriminate against any person in admission to, or employment in, any program established to provide apprenticeship or other training or retraining, including any on-the-job training program on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.[124]

When the ordinance was passed, Mayor Tom Bradley announced that " '[t]he purpose is not to punish, not to file lawsuits but to help educate. . . .' And if the process accomplishes that, I think we will be a long step forward in the battle to deal with this very serious problem.' "[125] Although the original purpose may have been an educational one, people are using the ordinance to make their cause known in the papers and in the courtroom.

Many of the cases brought under the ordinance have been settled[126] because the language of the ordinance sends such a clear message: do not discriminate on the basis of AIDS. A recent case was brought under the West Hollywood ordinance by a man who was denied a pedicure because he had AIDS.[127] At this time, it is unknown whether the case will be settled or go to trial.

One of the reasons the ordinance has been such an effective tool is its wide scope. It protects both individuals with AIDS and shields those who have been discriminated against due to the fear of AIDS. This category of individuals could include not only HIV-positive people, but also homosexuals, prostitutes, Haitians, and all other individuals who fall into a "high risk" category.

The title of the ordinance itself indicates its breadth:

PROHIBITION AGAINST DISCRIMINATION BASED ON A PERSON SUFFERING FROM THE MEDICAL CONDITION AIDS, OR ANY MEDICAL SIGNS OR SYMPTOMS RELATED THERETO, OR ANY PERCEP-

124. LOS ANGELES, CAL., CODE ch. 4, art. 5.8, § 45.82(A) (1985).

125. Victor Merina, *Landmark Ordinance Banning Bias Against AIDS Victims Signed*, L.A. TIMES, Aug. 17, 1985, at B6.

126. Telephone Interview, *supra* note 55.

127. *Id.*

> TION THAT A PERSON IS SUFFERING FROM THE MEDICAL CONDITION AIDS WHETHER *REAL OR IMAGINARY*.[128]

Further proof that the aim of the ordinance is to protect against all victims of AIDS discrimination can be found in the definition section of the ordinance.[129] The term "[c]ondition related thereto" is defined as "*any perception* that a person is suffering from the medical condition AIDS, *whether real or imaginary*."[130] The language of the ordinance shows clearly that the Los Angeles city legislature sought, as early as 1985, to protect its citizens from AIDS discrimination caused by baseless myths and irrational fears.

The ordinance, however, allows an employer to fire or refuse to hire an individual based upon the lack of a bona fide occupational qualification. The relevant section states in part:

> B. Bona Fide Occupational Qualification not Prohibited; Burden of Proof.
>
> 1. Bona Fide Occupational Qualification. Nothing contained in this section shall be deemed to prohibit selection, rejection or dismissal based upon a bona fide occupational qualification.
>
> 2. Burden of Proof. In any action brought under this article, if a party asserts that an otherwise unlawful discriminatory practice is justified as a bona fide occupational qualification, that party shall have the burden of proving: (1) that the discrimination is in fact a necessary result of a bona fide occupational qualification, and (2) that there exists no less discriminatory means of satisfying the occupational qualification.[131]

As with the federal statute, the issue most open to debate involves whether individuals can be dismissed or rejected by an employer because they lack the requisite qualifications.

ACT III: POSSIBLE EMPLOYER DEFENSES TO AIDS DISCRIMINATION CLAIMS

Both the federal and the local statutes which protect AIDS carriers from discrimination allow an employer to proffer an affirmative defense

128. LOS ANGELES, CAL., CODE ch. 4, art. 5.8 (emphasis added); *see* Robert Roden, *Educating Through the Law*, 33 UCLA L. REV. 1410, 1430 (1986).

129. LOS ANGELES, CAL., CODE ch. 4, art. 5.8, § 45.81(B) (1985).

130. *Id.* (emphasis added).

131. LOS ANGELES, CAL., CODE ch. 4, art. 5.8, § 45.82(B) (1985).

that either the actor is not otherwise qualified[132] or lacks a bona fide occupational qualification.[133] There are two basic categories into which employer defenses may be divided: (1) reasons to protect an actor's co-workers; and (2) reasons to protect the product which the studio makes.

Scene 1: Employer's Need to Protect Co-workers

If AIDS presented a significant threat of infection to co-workers in a particular working atmosphere, the employer could argue that he must fire the AIDS carrier in order to protect other employees. However, current medical knowledge states that AIDS may be transferred only by exchanging body fluids, such as blood and semen. Although the HTLV-III virus has been found in saliva, there is no evidence that AIDS can be transmitted through the exchange of saliva.[134] Some actors may argue that although no scientific proof exists that AIDS can be transmitted by saliva, the Surgeon General has refused to state that it cannot be spread through saliva.

It may be noted that "[a]cting is the only profession in which kissing is a requirement."[135] However, some people in the profession believe kissing should no longer be required until more is known about HTLV-III in saliva. Ed Asner, former president of the Screen Actor's Guild, suggests that kissing should be written out of all love scenes until the consequences of exchanging saliva are known.[136] Asner states, "It certainly seems logical that we would forgo the peck on the mouth to avoid the one-in-a-million mistake."[137]

The only environment in which transmission of AIDS to co-workers could be a legitimate reason to fire an actor is the making of hard-core pornographic movies. In this medium, open-mouthed kissing as well as sexual intercourse is required. Some producers have made movies where the actors used prophylactics and oral dams.[138] These movies attempt to educate the public about the benefits of the use of condoms and the practice of safe sex. The use of condoms can diminish the spread of AIDS by preventing contaminated semen from entering another body. However, the marketability of these films is questionable. Although *Beyond the*

132. *See* 29 U.S.C. § 794 (1989).

133. *See* LOS ANGELES, CAL., CODE ch.4, art. 5.8, § 45.82(B)(1) (1985).

134. *See supra* notes 31-32 and accompanying text.

135. Haller, *supra* note 12 (quoting Morgan Fairchild).

136. Hall, *supra* note 2, at B1.

137. *Id.*

138. *See, e.g.*, BEYOND THE GREEN DOOR, THE SEQUEL (Art and Jim Mitchell 1988). This movie encouraged the production of at least 30 other safe-sex pornographic films. *Safe-Sex Version of a Pornographic Film*, N.Y. TIMES, Mar. 10, 1988, at C7.

Green Door, The Sequel was number one for five weeks on at least one video store's rental charts and netted more than $500,000,[139] its popularity may be due only to the novelty of the film and to the curiosity of the viewing public.

Moreover, AIDS may be spread sexually by means other than penis to vagina, penis to anus, or penis to mouth. AIDS can be transferred from females to males and females to females by vaginal discharge.[140] Although this method of transmission is significantly less prevalent than penis-to-anus transmission, the risk does exist. In an environment such as pornographic movie-making, encounters involving vaginal secretion are frequent and, thus, the probability of spreading AIDS by this means is increased.

Pornographic movie producer Russ Mitchell admits that AIDS may do to the pornographic film industry what the police have been trying to do for the last fifteen years—put it out of business.[141] However, outside the pornographic film industry, producers and studios cannot legitimately claim that they must fire an individual in order to protect other workers on the film. The *only* possible means of transmitting AIDS in a standard film-making environment is by open-mouthed kissing. To succeed in an affirmative defense of co-worker protection, an employer should be required to show that there is a substantial risk of injury to other employees.[142]

In *Shuttleworth v. Broward County Office of Budget and Management Policy,*[143] an analyst employed by the Broward County Office of Budget and Management Policy brought suit under the Florida Human Rights Act of 1977[144] when he was fired because he had AIDS. At the

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139. *Safe-Sex Version of Pornographic Film*, N.Y. TIMES, Mar. 10, 1988, at C7.

140. Koop, *supra* note 66, at 16.

141. Haller, *supra* note 12, at 28.

142. Shuttleworth v. Broward County Office of Budget and Management Policy, Daily Lab. Rep. (BNA) No. 242, E-1, at E-2 (Dec. 17, 1985) (*aff'd* without opinion (Apr. 7, 1986)).

143. Daily Lab. Rep. (BNA) No. 242, E-1 (Dec. 17, 1985) (*aff'd* without opinion (Apr. 7, 1986)).

144. FLA. STAT. ANN. §§ 760.01-760.10 (West 1986). The statute provides the following definitions:

1. Handicap - any condition or characteristic that renders a person a handicapped individual as defined in this section.
2. Handicapped individual - any person who
   a. has a physical or mental impairment which substantially limits one or more major life activities;
   b. has a record of such an impairment; or
   c. is regarded as having such a [sic] impairment
3. 'Physical or mental impairment'
   a. any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological,

time of his termination, Shuttleworth had Kaposi's sarcoma, a rare skin cancer that infects many AIDS victims. The defendant freely admitted that the action was taken "due to a lack of knowledge as to the severity and communicable aspect of the disease in consideration of protecting the Complainant, other county employees and the public."[145] The office claimed that it could not assume the risk of allowing even one person to unwittingly contract AIDS because of Shuttleworth's presence at the office.[146] In his argument, Shuttleworth asserted that medical opinion could not absolutely guarantee that exposure to ambient cigarette smoke in the office would not contribute to lung cancer among employees,[147] yet the office failed to institute a policy against smokers. He claimed that this double standard discriminated against AIDS carriers and similarly handicapped individuals.

The Florida Commission on Human Relations ("Commission") held that there was reason to believe that the office had discriminated against Todd Shuttleworth by firing him without showing "that there was a substantial risk of future injury or a reasonable basis for its assessment of the risk of injury to [Shuttleworth], other employees or the public by retaining [Shuttleworth] in its employ."[148] Todd Shuttleworth worked in a private office that was enclosed by a floor-to-ceiling wall on

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musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, endocrine; and

b. includes but is not limited to such diseases and conditions as: orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction, alcoholism.

4. 'Substantially limits' - the degree that the impairments affects an individual becoming a beneficiary of a program or activity receiving federal financial assistance or affects an individual's employability. A handicapped individual who is likely to experience difficulty in securing or retaining benefits or in securing or retaining or advancing in employment would be considered substantially limited.

5. 'Major life activities' - functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working and receiving education or vocational training.

6. 'Is regarded as having such an impairment' - the individual

a. has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation;

b. has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

c. has none of the impairments defined in Item 3 of this section but is treated by a recipient as having such impairment.

145. *Shuttleworth*, Daily Lab. Rep. (CCH), No. 242, at E-1.

146. *Id.*

147. Eleanor B. Alter, *Remarks as Chairman, in* AIDS: LEGAL ASPECTS OF A MEDICAL CRISIS 146 (Law Journal Seminars-Press 1986).

148. *Shuttleworth*, Daily Lab. Rep., No. 242, at E-2.

one side and five-foot-tall partitions on the other three sides. Shuttleworth's office also had a door.

Although the defendant claimed that it could not screen all the people who came into contact with Shuttleworth,[149] the Commission found that mere contact with Shuttleworth did not constitute a substantiated risk. The Commissioner concluded:

> I am mindful of the serious and important concerns of the employer, the other employees and the public . . . nevertheless, there is an absence of evidence to show with any *reasonable probability* that AIDS can be transmitted by casual contact that commonly occurs in the workplace.[150]

Similarly, in 1985, an arbiter held that United Airlines could not lay off a flight attendant simply because he had AIDS.[151] United Airlines argued that a flight attendant with AIDS is a *per se* threat to the health of other employees and passengers.[152] The arbiter rejected this argument, however, holding that the attendant could not be fired unless and until he had a physical examination to determine his fitness for the job.[153] For the same reasons, studios cannot argue that AIDS-carrying actors are a *per se* threat to co-actors in a movie or show.

The reasoning of the arbiter and the commission suggests that the law cannot protect all carriers of the AIDS virus. Those who have developed other communicable infections may be barred from working. However, the commission gave no guidance as to which diseases would be considered easily communicable, and which, if any, AIDS maladies could be considered easily transmissible opportunistic infections.[154]

The *fear* that AIDS may be passed through saliva does not translate into a reasonable probability that AIDS can actually be transmitted in that manner. The Surgeon General has concluded:

> There is no known risk of non-sexual infection in most of the situations we encounter in our daily lives. We know that family members living with individuals who have the AIDS virus do not become infected through sexual contact. There is no evidence of transmission (spread) of AIDS virus by everyday contact even though these family members shared food, towels,

149. *Id.* at E-1.

150. *Id.* at E-2 (emphasis added).

151. Rae A. Harder, *A Legal Guide for the Education of Legislators Facing the Inevitable Question: AIDS: The Problem Is Real - What Do We Do?*, 13 J. CONTEMP. L. 121, 133 (1987) (citing Traynor v. United Airlines (unreported arbitration decision, 1985)).

152. *Id.*

153. *Id.*

154. *See* Dlutowski, *supra* note 101.

cups, razors, even toothbrushes, *and kissed each other.*[155]

Despite this information, fearful actors may insist that family members do not kiss each other passionately as is so often required in the movie industry. Thus, there is little chance that family members will actually exchange saliva. Epidemiological evidence, however, has shown that only blood, semen, vaginal secretions, and possibly breast milk are capable of transmitting the HTLV-III virus.[156]

Another argument which may be advanced by nervous actors is that the fear of contracting AIDS from a co-worker debilitates their performance level. The actor could insist that the presence of the person with AIDS on the set causes so much anxiety and fear that the actor cannot concentrate on her role. This type of reaction has been evidenced time and time again throughout history. In 1880, people feared and loathed the Elephant Man because he looked grotesque according to society's standards. People ran from him in fear and confusion. In the recent history of this country, women and blacks were not hired because employees refused to work with them.

Although the argument has not yet been advanced, a Virginia case suggests that people are willing to fire employees because AIDS upsets them. In that case, a window dresser with AIDS was fired by his supervisor.[157] The supervisor claimed that his emaciated appearance and the time it took him to dress a window made it impossible to retain the window dresser.[158] However, the dresser worked through the night when no customers could see him. Although he may have taken longer to complete a scene than other window dressers, he had an entire night to do so and always finished by morning.[159] Furthermore, the dresser was paid by the project, not by the hour, so the time needed to complete a project did not affect the supervisor or the company.[160] The window dresser argued that his supervisor fired him due to his appearance and the distress he caused his supervisor because he had AIDS.[161] The window dresser was eventually awarded $25,000 by the Human Rights Commission.[162] He is now deceased.

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155. Koop, *supra* note 66, at 13.

156. Chalk v. United States Dist. Court, 840 F.2d 701, 706 (9th Cir. 1988).

157. Telephone Interview with Kenneth E. Labowitz, Esq., in Alexandria, VA (1989). Mr. Labowitz has been representing AIDS victims in litigation matters for more than five years.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *But see* Hall, *supra* note 8. However, Michael Kerns is the only HIV-positive actor currently working in Hollywood. Mr. Kerns answered the casting call of *Life Goes On* to portray an HIV-positive character.

A significant issue in HIV litigation is when and whether a cause of action survives the plaintiff's death. The California Probate Code, section 573(a), suggests that a suit for discrimination or wrongful termination would survive the death of the plaintiff. The plaintiff's estate could recover punitive damages and compensatory damages, but may not recover damages for pain and suffering or disfigurement.[163]

Courts have uniformly rejected affirmative defenses to civil rights legislation in the sex and race discrimination area based on nonacceptance of the protected class by co-workers. The defense of nonacceptance, or society bias, should also be rejected in HIV litigation.

Scene 2: Employer's Need to Sell the Product

The second category of possible employer defenses concerns efforts to make a profitable film or show. These concerns include (1) the popularity of the actor; (2) his image or believability in the role; and (3) his ability to work up to sixteen hours a day.

In Hollywood, the popularity of an actor can make or break a movie. A producer may argue that an actor's appeal is a bona fide occupational qualification. If an actor has been diagnosed as having AIDS, and the diagnosis is common knowledge, then it is likely that the actor will have a difficult time finding work anywhere.[164] However, if the diagnosis becomes common knowledge during the filming of a movie, or if the actor is diagnosed during filming, then a producer may insist on firing the actor in order to save the movie.

In standard employment cases, courts have not accepted the argument that an employee is not popular among customers as a sufficient reason to fire them. The situation most similar to an actor-studio contract is a flight attendant-airline contract. In both situations, the employee's popular appeal may financially affect the business.

In *Diaz v. Pan American World Airways, Inc.*,[165] Celio Diaz brought suit under section 703(a)(1) of Title VII of the 1964 Civil Rights Act because Pan Am had a policy of hiring only females as cabin attendants.[166] Section 703 states that:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . a bona fide occupational qualification reasonably necessary to the

163. CAL. PROB. CODE § 573(c) (West 1989).

164. *But see* Hall, *supra* note 8, at B1. One publicist remarked, "If Rock Hudson had a miracle cure and came back to work, I honestly don't know if it would hurt his career."

165. 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

166. *Id.* at 386.

normal operation of that particular business or enterprise.[167]

In holding that being female is not a bona fide occupational qualification for the job of flight attendant, the Fifth Circuit examined four factors: (1) Pan Am's history of the use of flight attendants; (2) passenger preference; (3) basic psychological reactions for the preference; and (4) the actualities of the hiring process.[168] Although the trial court found that Pan Am's passengers overwhelmingly preferred to be served by female stewardesses,[169] the appellate court did not feel that the discrimination practiced by Pan Am was justified. The court reasoned that while a "pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide" is important, it is tangential to the essence of the business involved.[170] The court concluded that having male flight attendants would not seriously jeopardize the ability of the airline to provide safe transportation from one place to another.[171]

However, the business of making movies depends completely upon pleasing the whims of the public, not on the necessity of fast transportation. Studios may argue that the entertainment field is the only one in which a person's "likability" is a bona fide occupational qualification. However, if the studios choose to advance this argument, they will have the burden of proving that all actors with AIDS are unpopular and harmful to a movie's profitability.[172]

Similarly, a studio may argue that if an actor is diagnosed with AIDS, society will assume that he is a homosexual. Although society is becoming more tolerant of homosexuality, a romantic actor's credibility may be severely undermined if society believes that he is gay. Rock Hudson refused to announce his diagnosis for almost a year after he was told that he had AIDS. Other actors in Hollywood fear that they would not be hired if directors knew that they were gay.[173] Many gay actors wear wedding rings at an audition in order to prevent any speculation that they are gay. Although an actor may lead an honest life among friends and family, Hollywood still refuses to believe that a homosexual actor can convince an audience that he is a romantic heterosexual.

Even those directors who may be willing to hire gay actors to play

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167. 42 U.S.C. § 2000e-2(e) (1981).

168. *Diaz*, 442 F.2d at 387.

169. *Id.*

170. *Id.* at 388.

171. *Id.*

172. *Cf.* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (employer must prove "all or substantially all women would be unable to perform safely and efficiently duties of job involved" to limit switchman position to males).

173. Hall, *supra* note 8, at B1.

straight roles take a risk that the public knows or will discover that the actor is a homosexual. The courts, based on analogous case law, would likely require a producer to prove that the lack of credibility, like the lack of popularity, would hurt a film.[174] Thus, the strongest argument that producers will advance in firing an actor is the actor's inability to meet the physical strain of shooting a movie. Production crews will often shoot for up to sixteen hours a day, especially while on location. If an actor is suffering from an opportunistic infection, he will likely be too tired to maintain the pace necessary to complete a film. In such a case, a studio should be allowed to fire an actor with AIDS just as they would fire any other actor who became sick or otherwise unable to fulfill his contract.

Similar claims have begun to surface throughout the nation's courtrooms. Michael Shawn was fired from his job as choreographer of *Legs Diamond* when the producers discovered that Shawn was HIV-positive.[175] Shawn claimed that he was fulfilling all the terms of his contract and that the producers had never been dissatisfied with his work.[176] The spokeswoman for the Society of Stage Directors and Choreographers ("SSDC") stated that Shawn was ready, willing and able to provide the services agreed to under his contract.[177] The executive producer of *Legs Diamond,* Marvin A. Krauss, called Shawn within hours of learning that Shawn was HIV-positive, threatening to fire him.[178]

The producers claim that Shawn was unable to work due to illness and he therefore breached his contract. Sources from the show agreed that Shawn choreographed slowly, often only sketching out an idea. Shawn hopes to appeal the case to the New York Supreme Court.

More cases like this are destined to arise, pitting the producer and studio against the actor and union. Such cases will degenerate into his word against hers. A studio could claim that an actor was unable to keep up the pace, even if the actor was not currently suffering from any AIDS symptoms. This would allow employers an easy route to avoid the AIDS and handicapped anti-discrimination statutes. For this reason, any employer who alleges that an actor is unable to meet the requirements of his job due to physical illness or exhaustion should be subject to a higher burden of proof. A producer who alleges that an actor is physically unfit

174. *See* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d at 228, 235 (5th Cir. 1969).

175. Robert Sandia, *Choreographer Charges AIDS Discrimination at* Legs Diamond, DANCE MAG., June 1989, at 18.

176. *Id.*

177. *Id.*

178. *Id.*

should have to prove by clear and convincing evidence that the actor did not meet the requirements of his contract.

ACT IV: DETECTING HIV IN THE INDUSTRY

Scene 1: Testing

In comparison to tests for heart or liver disease, which took fifteen to twenty years to develop, the HIV tests are still quite new.[179] In March of 1985, the Food and Drug Administration approved an HIV test called the ELISA test. Laboratories have only been using the test for six years. The test was developed in response to the threat to the country's blood supply. For that reason, the test has a very low point at which blood will test positive for HIV. The legislature decided that some safe blood could be sacrificed to ensure that no infectious units of blood would be used in transfusions. However, the test is not an appropriate one to test *people* for the AIDS virus.

The ELISA testing method registers positive when the body has produced antibodies to the AIDS virus. A person's serum is incubated with a viral substance or antigen that has been grown in cell culture.[180] Known positive and negative samples are supplied by the manufacturer with the test kits as controls and are run simultaneously with the sample in question.[181] If there is an antibody to any of the substances in the tested serum, a positive reaction will occur. The reaction is called positive when the color of the patient specimen is greater than the color of the control specimen.

However, many factors could cause the sample to turn the required color. The manufacturers of the antigen cannot completely purify the virus from the cell in which it grows. Therefore, the apparent antibody/antigen reaction could be caused by an impurity acting as an antigen in the material contained in the test kit, rather than the AIDS virus.[182]

In order to reduce the likelihood of these mistakes, a lab will run a second ELISA test when the first test is positive, using the same blood sample, but a different test kit. Nonetheless, these tests are often also positive because of the low point at which the test has been set to register positive. A third test, the Western Blot, is run on samples which result in two positive ELISA tests.

In the Western Blot test, proteins or antigens from HIV grown in

179. Griffith D. Thomas, *The Perils of AIDS Testing*, L.A. LAW., Sept. 1988, at 39, 40.
180. *Id.* at 41.
181. *Id.*
182. *Id.*

tissue culture are separated into bands according to their molecular weight.[183] A sample of serum is applied to determine if there are any specific antibodies in the serum that bind to the protein bands of HIV.[184] The Western Blot, unlike the ELISA test, is not subject to strict FDA regulations and thus is subject to many interpretations depending on which lab ran the test.[185] The definition of a positive Western Blot has changed over time and is still a matter of disagreement.[186] Moreover, a significant number of Western Blot tests register as indeterminate, thus leaving an individual's HIV status as unknown.

Notably, the test does not determine whether an individual has AIDS. AIDS can only be diagnosed by the detection of opportunistic infections or malignancies that indicate an underlying immune deficiency.[187] In fact, the test does not report the presence of HIV, but the presence of antibodies to the virus.

It may take two to twelve weeks after exposure to develop antibodies to HIV. A negative test result only means that a person has not yet developed antibodies (seroconverted). Therefore, a person who has been exposed to HIV may still test negative for up to twelve weeks. In rare instances it may take as long as six months for an individual to seroconvert.[188] In addition, there is new evidence that the virus may sometimes go into a latent period during which the person is still infectious, but the disease cannot be detected.[189]

There are two methods by which members of the entertainment industry can be tested:[190] (1) mandatory screening; and (2) voluntary testing. An example of mandatory screening of a population is the 1970's mass testing of blacks for sickle cell anemia which resulted in misinformation, stigmatization, and discrimination.[191] Before deciding whether to perform mandatory screening in any population, legislatures should determine: (1) the precise objectives of the screening program; (2) *exactly* how the test results will be used to reduce transmission of the virus;

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183. *Id.*

184. Thomas, *supra* note 179, at 41.

185. Theodore M. Hammett, *HIV Antibody Testing: Procedures, Interpretation, and Reliability of Results*, NAT'L INST. JUST. AIDS BULL. 2 (1988).

186. *Id.* at 6.

187. *Id.* at 2.

188. *Id.* at 4.

189. *Id.* at 4; A. Ranki et al., *Long Latency Precedes Overt Seroconversion in Sexually Transmitted HIV Infection*, LANCET, Sept. 12, 1987, at 589-93.

190. For purposes of this paper, "testing" refers to an individual being tested and "screening" refers to a certain population of people being tested.

191. R. Murray, Jr., et al., *Special Considerations for Minority Participation in Prenatal Diagnosis*, 243 JAMA 1254, 1256 (1980).

and (3) that it would be impossible to achieve the same objectives through a nonmandatory, or less extensive, testing program.[192] In the case of Hollywood actors, the test would be used to prevent the spread of HIV through saliva in love scenes required by the script. The test results would be given to the director of the film so that he could decide to change the scene in order to reduce the risk to the individual's co-actors. The least extensive means of obtaining this objective would be to only test those individuals who had the potential of acting in a love scene.

However, the need for testing could be eliminated altogether if directors and producers were more willing to eliminate passionate kissing on screen. Although these kind of universal cuts may damage the movie industry, it is certainly less damaging than the potential harm to the career of an actor who is HIV-positive.[193] Former SAG President Ed Asner advocates such a change in the film industry. Until the Surgeon General can say without hesitation that HIV cannot be spread through saliva, passionate kissing should be eliminated on film.

There is another solution which involves a case-by-case choice for the co-star of the HIV-positive actor. If the co-actor believes that there is little to no chance of acquiring HIV by kissing the co-star, then there would be no need for mandatory testing nor rewriting the script. Each contract could include a clause relieving the studio, director, producer, co-actor and anyone else from liability due to exposure to the HIV infection in connection with the demands made by the script. However, some attorneys may claim that this clause is unconscionable because a person cannot eliminate himself from a liability recognized by the law.

The pursuit of a healthy work environment is certainly a worthy goal for studios, producers, and directors. However, there is not enough evidence of the efficacy of testing to suggest that mandatory blood testing of either all actors or all actors eligible for a romantic role is necessary. Because this is an issue of first impression, we must look to other environments in which these same questions have been examined.

In *Glover v. Eastern Nebraska Community Office of Retardation,*[194] the court found that a mandatory blood testing policy imposed on employees of a community-based program that provided residential, vocational, and other specialized services for the mentally retarded was not justified. The court found that work involving the mentally retarded included numerous incidents of biting, scratching, throwing of objects, hit-

192. Hammett, *supra* note 185.

193. *See supra* notes 102-03 and accompanying text.

194. 686 F. Supp. 243 (D. Neb. 1988).

ting, violent outbursts, and pinching by the clients.[195] However, the court found that the risk of transmission of the AIDS virus from staff member to client was extremely low, approaching zero.[196] Thus, the court held, that mandatory testing required under the Chronic Infectious Disease Policy violated the staff's constitutional right of freedom from unreasonable government intrusion under the Fourth Amendment.[197]

Similarly, in the entertainment industry, the risk of transmission is so trivial as to be non-existent. When weighing this risk of transmission to a co-worker against a performer's right of privacy,[198] the individuals' privacy right must prevail. This is especially true when the risk can be eliminated by removing the kissing scene.

In California, the legislature has already come to the same conclusion and statutorily removed mandatory testing as an option. State law prohibits employers from testing a person's blood for AIDS without written consent.[199] It is worth noting, however, that tests which check for deficiency in a person's immune system, such as T-cell tests, are not prohibited. The foreseeable problem in Hollywood is that a studio may insist that an actor be tested before she is hired. Thus the actor would be under immense pressure, to the point of coercion, to give written consent to an HIV test, even if the actor did not wish the test to be performed. If an actor refused to take the test, a studio could refuse to hire him on the basis that he was uncooperative. This refusal would not necessarily violate any federal or state laws prohibiting discrimination against HIV carriers, because the actor's immune status would be unknown.

In cases like this, labor laws may be illustrative. Generally, employers may not implement AIDS screening programs or discharge policies in unionized operations without first negotiating with the collective bargaining representative.[200] The National Labor Relations Board has held that an employer must participate in such negotiations before implementing polygraph tests or physical examination policies.[201] SAG and The American Federation of Television and Radio Actors ("AFTRA") will not forego their statutory right to negotiate over these conditions where

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195. *Id.* at 245-46.

196. *Id.* at 249.

197. *Id.* at 250.

198. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986); Stanley v. Georgia, 394 U.S. 557 (1969); Griswald v. Connecticut, 381 U.S. 479 (1965).

199. CAL. HEALTH & SAFETY CODE § 199.21(a) (West 1989).

200. *See* 29 U.S.C.S. §§ 158(a)(5), (d) (Law Co-op. 1992).

201. *See* Medicenter, Mid-South Hosp. and Hotel & Restaurant Employees Int'l Union, Local 847, 221 N.L.R.B. 670 (1975) (polygraph); LeRoy Machine Co., 147 N.L.R.B. 1431 (1964) (physical examinations).

such testing could cause an actor to not only lose his current job, but also forfeit his future career.

California law, common law, and public policy mandate that any screening of actors for AIDS be prohibited and any testing be voluntary. Because an actor is in an unusually sensitive position due to the constant scrutiny of the public eye, voluntary testing should be completely anonymous. Completely anonymous means that a client does not provide her name, she is counseled before she takes the test, and if she decides to take it, she is given an identification number. It is then up to her to request the results by calling a telephone number. Although this method may preclude appropriate follow-up counseling and hinder accurate long-term epidemiological studies, it is the single most effective way of encouraging the voluntary use of the test and protecting the confidentiality of the results.

The Center for Disease Control ("CDC") advocates another approach. In 1987, the CDC shifted from encouraging voluntary counseling and testing of individuals and their sexual contacts, to favoring routine counseling and testing of individuals.[202] "Routine" means that tests are performed as part of a normal medical check-up or other procedure unless the individual refuses to take the test. Thus, the CDC has shifted the burden on the individual from requesting the test to declining the test. Although this procedure may increase the number of individuals who are tested, it does not adequately protect the confidentiality of an individual's test results.

Scene 2: Confidentiality[203]

Without assurances that test results will be kept confidential, there is little hope that actors will come forward to be tested. In Ohio, a patient sued his doctor and his insurance company because the insurance company had induced the doctor to divulge confidential information that he had gained through the doctor-patient relationship.[204]

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202. Center for Disease Control, *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, MORBIDITY AND MORTALITY WKLY. REP., Aug. 14, 1987, at 509-15.

203. An entire dissertation could be written on confidentiality and AIDS testing. For purposes of this paper, the author will examine confidentiality in the light of actors, special circumstances and a studio's need to know his HIV status.

204. *See* Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793 (N.D. Ohio 1965); *see also* Panko v. Consolidated Mut. Ins. Co., 423 F.2d 41 (3d Cir. 1970) (insurer induced breach of confidentiality by doctor); Anker v. Brondnitz, 413 N.Y.S.2d 582 (N.Y. Sup. Ct. 1979) (non-party, treating doctor interviewed by insurance investigator on behalf of defendant doctor); Alexander v. Knight, 197 Pa. Super. Ct. 79, 177 A.2d 142 (1962) (doctor operating as agent for insurance company induced fellow doctor to breach confidentiality).

When the medical information involved is HIV test results, the potential for violations of doctor-patient confidentiality become overwhelming. For example, in Denver, a hospital clerk was bribed to release the names of patients whose records disclosed that they were HIV-positive in order to show that such information could not be kept confidential.[205] In Washington, D.C., a confidential log of individuals who underwent HIV testing as part of a drug program was stolen from a city health clinic.[206] When the individuals involved are actors, the potential for abuse of the information is disastrous. An actor already suffers damage to her reputation and character at the hands of overzealous media personnel and rumor-hungry fans. When the physician and manager of Liberace preserved confidentiality by refusing to disclose the cause of death, the news media voiced its suspicion of deceit and forced a public officer to disclose the medical facts.[207] To add to the possible problem with disclosure, courts have held that public figures are afforded less privacy than non-public figures.[208]

Another impediment to voluntary testing is the fact that the majority of HIV-positive people are homosexuals. These individuals already suffer great discrimination and will not volunteer for testing if they face more discrimination. Furthermore, HIV-positive people are often presumed to be gay; thus, actors who are not homosexuals are unlikely to volunteer for testing unless the results are confidential. Additionally, stigmatization and ostracism often result from disclosure by HIV-positive individuals because AIDS is widely viewed as the "modern day equivalent of leprosy."[209] The damage can be particularly great when an actor, who is supposed to be making Hollywood dreams, is involved.

There are two ways in which test results of actors may be useful to prevent the spread of HIV. First, the results can be given to a director or studio executive, and second, the results may be given *only* to the individual tested. In the first instance, the individual trusted with the information would presumably need the test results in order to make a decision about the film or show that would protect everyone involved. In the

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205. *See* Robert E. Stein, *AIDS and the Confidentiality of Medical Records*, 11 J. AMBULATORY CARE MGMT. 39, 42 (1988) (citing ROCKY MTN. NEWS, 1987).

206. *Id.* (citing N.Y. TIMES, 1987).

207. Bernard M. Dickens, *Legal Limits of AIDS Confidentiality*, 259 JAMA 3449, 3451 (1988).

208. *See, e.g.*, Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973) (Ms. Onassis is a public figure subject to news coverage, thus some intrusion was allowed despite her expectation of privacy); Sidis v. F.R. Publishing Corp., 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940) (public figure subject to news coverage).

209. South Florida Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798, 802 (Fla. Dist. Ct. App. 1985).

second instance, it would be up to the actor to come forward with the information in order to protect his co-workers.

It is unlikely that legislatures or studios could ever mandate the disclosure of an actor's HIV status. The right to privacy, protected by the Constitution, encompasses at least two different interests. First, an individual has the right to autonomously make certain decisions.[210] Second, an individual has the right to prevent disclosure of personal matters.[211]

The Florida Supreme Court in *Rasmussen v. South Florida Blood Service*[212] held that disclosure of the names and addresses of blood donors would compromise the donor's constitutionally protected privacy interests.[213] The court reasoned that disclosure of the names would result in more damage to the individual in light of potential discrimination from co-workers, employers, and others.[214]

> The threat posed by the disclosure of the donors' identities goes far beyond the immediate discomfort occasioned by [a] third party probing into sensitive areas of donors' lives. Disclosure of donor identities in any context involving AIDS could be extremely disruptive and even devastating to the donor. If the requested information is released, and petitioner queries the donor's friends and fellow employees, it will be functionally impossible to prevent occasional references to AIDS.[215]

Thus, the harm in permitting disclosure of the names significantly outweighed the probative value of the information sought. The petitioner sought, under subpoena, the names of the blood donors in order to prove that he had contracted AIDS during a series of blood transfusions.[216]

The *Rasmussen* reasoning is equally applicable to the employment setting involving actors. The potential harm of disclosing an individual's HIV status would significantly outweigh the benefit to the studio, the picture, or the co-actor involved. Disclosure might not only result in discrimination against the actor, but discomfort and fear of the actor by his co-workers. It would be impossible to make a quality movie in this environment.

Despite this potential harm, courts have found that disclosure to

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210. *See, e.g.*, Whalen v. Roe, 429 U.S. 589 (1977) (medical information); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Griswald v. Connecticut, 381 U.S. 479 (1965) (birth control).

211. Rasmussen v. South Florida Blood Serv., 500 So. 2d 533, 534 (Fla. 1987).

212. 500 So. 2d 533 (Fla. 1987).

213. *Id.* at 535.

214. *Id.* at 537.

215. *Id.*

216. *Id.* at 534.

those unequivocally at risk is proper.[217] In *Tarasoff*, the California Supreme Court established a duty to warn where the victim is identifiable and the client is dangerous. In weighing confidentiality and safety, the court reasoned that

> the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.[218]

In *Tarasoff*, a mental health patient attacked and killed his girlfriend. Similarly, the principle of a duty to warn is also applicable to danger by the spread of HIV infection.

> In fact, in California, the legislature mandated that:
> [i]t shall be the duty of the physician in attendance on a case considered to be an infectious or communicable disease, to give detailed instructions to members of the household in regard to precautionary measures to be taken for preventing the spread of the disease.[219]

Therefore, disclosure to a client's spouse or lover would not violate the confidentiality privilege in California. However, the language of the statute limits disclosure to those *in the same household*. Thus, a doctor could not disclose HIV status to a studio under this statute.

In Utah, however, the court found that the duty to warn extended to any situation where life, safety, well-being, or another important interest is in jeopardy.[220] Not only is this standard more inclusive than both the California Code and *Tarasoff*, it is exercisable in good faith. In other words, someone having HIV information could reveal the data in the belief that he was protecting some "important interest," even if the data proves to be false at a later date. Because the nature of HIV testing is so inaccurate until all tests are complete,[221] the potential for release of false information is frighteningly real.

In 1988, the California legislature attempted to codify a similar law. Proposition 102[222] required doctors, blood banks, and others to report to

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217. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976); Skillings v. Allen, 173 N.W. 663 (Minn. 1919); Gill v. Hartford Accident & Indem. Co., 337 So. 2d 420 (Fla. Ct. App. 1978).

218. *Tarasoff*, 551 P.2d at 347.

219. CAL. ADMIN. CODE tit. 17, § 2514 (1989).

220. Berry v. Moench, 331 P.2d 814 (Utah 1958).

221. *See supra* notes 188-89 and accompanying text.

222. For current California HIV testing regulations, see CAL. HEALTH & SAFETY CODE § 199.21 (Deerings 1992).

knowledge begin? If the studio president, the director, the producer, and the co-actor involved in the love scene all know an individual's HIV status, can it really be called confidential information?

It is unlikely that the California legislature will ever be able to force disclosure to a director or studio against the wishes of an actor. Although most states require HIV information to be reported to public health organizations, such reporting is done on a completely anonymous basis. Where statutes indicate information should be given protection, courts have denied disclosure to third parties who claimed a need to know the HIV information.

When Illinois claimed that communicable disease reports were needed to support prosecution in *People ex rel. Director of Public Health v. Calvo,* the supreme court found that the request was precluded by a statutory privilege which provided for the confidentiality of individual identities contained in such reports.[229] The Court of Appeals of New York excused production of photographs of participants in a methadone program on the basis of a confidentiality provision created by statute in favor of participants in the program.[230] The court reasoned that the success of the methadone program depended upon the ability to guarantee to each patient that her participation would not be disclosed.[231]

In 1980, the New York legislature amended a statute regarding confidentiality in order to include HIV information.[232] In 1984, the court in *Grattan v. People* stated that the purpose of the provision is "to encourage sufferers of sexually transmitted diseases to report their conditions so that they and their partners can receive medical attention, and thus, contain the spread of the disease."[233] This statute, and others like it, have been passed by legislatures not only to encourage HIV carriers to report their conditions to their partners, but also to promote voluntary AIDS testing.

In 1985, California passed a similar statute prohibiting utilization of HIV test results for determination of suitability for employment.[234] The legislation provides civil and criminal penalties for violation of the statute. The maximum penalty for negligent disclosure of HIV test results is $1,000 plus court costs and any actual damages suffered by the complain-

229. *See* People *ex rel.* Director of Public Health v. Calvo, 432 N.E.2d 223 (Ill. 1982).

230. *See* People v. Newman, 298 N.E.2d 651 (N.Y. 1973).

231. *Id.*

232. N.Y. PUB. HEALTH LAW § 2306 (McKinney 1980). The amendment replaced "venereal disease" with "sexually transmissible diseases," thus including HIV under the statute.

233. Grattan v. People, 102 A.D.2d 1007, 1008 (N.Y. App. Div. 1984).

234. CAL. HEALTH & SAFETY CODE §§ 199.20-23 (West 1989). Wisconsin passed a similar statute in 1986. WIS. STAT. ANN. § 146.025 (West 1986).

local health officers the names of individuals who they *believed had been exposed* to HIV or had tested positive for it.[223] This proposal would have allowed almost anyone to report any individual they suspected of having HIV, or being gay, or knowing someone who might be HIV-positive. Although reporting was limited to local health officers, once revealed, information of this sensitivity is difficult to contain.[224] Fortunately, Proposition 102 was voted down.

Proposition 102 went much further than other state laws which had required disclosure by physicians. Proposition 102 recognized that most HIV tests are performed by non-doctors. Therefore, the doctor-patient privilege so often used to protect confidentiality may not apply to them. At least one court has recognized that medical information otherwise privileged against discovery under a doctor-patient privilege should not lose the privilege by virtue of being incorporated into hospital records.[225]

However, the California Supreme Court has refused to go so far. The court held that third parties have the right to *claim* the privilege, but they are not obligated to do so.[226] The court was criticized for undermining the doctor-patient privilege:

> [T]he [privilege] statute is designed to guarantee that the physician will assert the privilege whenever the law allows him to do so, in order to maintain the patient's confidences. *Because it is the patient's privacy that is at stake, it makes little difference who has the information.* If that person is *permitted* by law to assert the privilege, he should be under a *duty* to do so.[227]

Another commentator stated that third parties who receive confidential medical information from a physician should be subject to as stringent a duty as the physician to keep that information confidential.[228]

According to these commentators, a director or studio could be given an actor's HIV test results and then be held liable if the results became public. There comes a point, however, when "confidential" is a meaningless term because too many people know the information. Under this scenario, where would the need to know end and common

223. In the same election, Proposition 96 suggested that individuals accused of crimes such as rape or assault must be HIV tested if the victim requests it. This proposal would allow HIV testing on a person suspected of *spitting* on a police officer. *See* Stein, *supra* note 205, at 46.

224. *See supra* notes 175 and 178 and accompanying text.

225. *See* Tucson Medical Ctr., Inc. v. Rowles, 520 P.2d 518 (Ariz. 1974).

226. Rudnick v. Super. Ct. of Kern County, 523 P.2d 643 (1974).

227. Note, *Protecting the Privacy of the Absent Patient:* Rudnick v. Superior Court, 27 HASTINGS L.J. 99, 102 (1975) (first emphasis added, second and third emphasis in original).

228. Riskin & Reilly, *Remedies for Improper Disclosure of Genetic Data*, 8 RUT.-CAM. L.J. 480, 497 (1977).

ant.[235] It should be noted that private blood banks, plasma centers, and other public entities are excepted from liability for unintentional disclosures.[236] The maximum penalty for willful disclosure is $5,000 plus costs and damages.[237] The maximum penalty for criminal violation is up to one year in prison and/or a $10,000 fine.[238] Criminal penalties are applicable to disclosures which result in proven economic, bodily, or psychological harm to the subject that can be proven.[239]

Such penalties have the potential to go far to prevent the spread of HIV confidential information against the wishes of the individual in question. A studio with confidential information would be required to protect the information under threat of these penalties. In fact, criminal penalties would be applicable any time an individual was fired after disclosure of her HIV status. Loss of a job is an economic harm to the individual which can be proven. It would not be difficult to prove that the dismissal was based on the actor's HIV status as long as the actor were otherwise healthy. HIV status is not like other discrimination areas such as age, race, or gender which are noticeable immediately.

Thus, in a likely scenario, an actor would be hired before his HIV status were known by the studio. If the actor were involved in a love scene, the studio may inquire into his HIV status. If the actor were found to be HIV-positive and subsequently fired, he would have a prima facie case of violation of the California Code.

One drawback of the California legislation is that it enumerates the prohibited uses of confidential information. Implicit in such enumeration is the assumption that anything not listed is permissible.[240] If instead, permissible uses are enumerated, as in the Wisconsin statute,[241] the assumption is that all other uses are prohibited. Although the California statute explicitly prohibits use of HIV status as an excuse to fire an employee, employers may come up with a way to circumvent the statute. For example, a studio could simply pay an actor *not* to act in a film. This method of discrimination should also be illegal and prohibited by legislation. Therefore, the California legislature should consider amending the health code to enumerate permitted uses of test results rather than prohibited uses.

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235. CAL. HEALTH & SAFETY CODE § 199.21(a), (d) (West 1989).
236. CAL. HEALTH & SAFETY CODE §§ 199.23, 1603.4 (West 1989).
237. CAL. HEALTH & SAFETY CODE § 199.21(b), (d) (West 1989).
238. CAL. HEALTH & SAFETY CODE § 199.21(c) (West 1989).
239. *Id.*
240. *See* P. Nanula, *Protecting Confidentiality in the Effort to Control AIDS*, 24 HARV. J. ON LEGIS. 315, 342 (1986).
241. WIS. STAT. ANN. § 146.025 (West 1989).

In light of the interests involved and the competing arguments of confidentiality and safety, four questions should be considered in this discussion: (1) What public health objective will be furthered by release of HIV information? (2) Is there any way short of release of the identity of an individual that will accomplish the same objective as effectively? (3) If the release of certain information is desirable, what can be done to ensure that this information will not be released to other individuals beyond those intended? (4) Are there any mechanisms that can be put in place to limit the harmful aspects of the release?[242]

When considered by the entertainment industry, the answers to these questions weigh heavily in favor of complete confidentiality regarding HIV status. The only physical health objective is the prevention of the spread of HIV through saliva. As discussed, this possibility is almost non-existent, although still theoretically possible. An emotional health objective is mental well-being and freedom of fear on the part of an HIV carrier's co-workers. However, individual fears should not be allowed to curb constitutional and statutory rights.

The same objective can be accomplished by avoiding passionate kissing on screen. This solution, although potentially damaging to a film, is a far lesser infraction of individual rights. Furthermore, if kissing were unilaterally eliminated, no particular actor would be under suspicion or in fear of losing his career.

Arguably, nothing can be done to prevent the wholesale communication of an actor's HIV status. Despite the existing legal penalties, confidentiality is often broken in many employment fields. In Massachusetts, for example, a supervisor told other employees that a coworker was HIV-positive, resulting in harassment for the HIV-positive employee.[243] That employee sued for invasion of privacy under Massachusetts law. In the entertainment industry, violations would be impossible to control because Hollywood is a rumor mill.

No mechanism could possibly control the damage done by disclosing that an actor is HIV-positive. Not only would that actor have difficulty gaining employment, but his private life would also be destroyed. It is a matter of human dignity as well as privacy, that an individual have the opportunity to tell those whom he chooses to tell that he is going to die of AIDS. This responsibility is not up to the rumor mill or the news media.

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242. *See* Stein, *supra* note 205.

243. *Id.* at 44 (citing Cronan v. New England Tel. Co., 41 Fair. Empl. Prac. Cas. (BNA) 1273 (Mass. Super. 1986)).

ACT V: CONCLUSION

The *Legs Diamond* case is only the tip of the iceberg regarding AIDS litigation in the entertainment industry. In order to avoid disastrous results, producers, studios, and the general public must strive to understand and accept AIDS carriers and HIV-positive individuals.

At the end of *The Elephant Man*, John Merrick has the opportunity to examine Dr. Treves while Treves sleeps.

> The mouth, deformed by satisfaction at being the hub of the best of existent worlds, was rendered therefore utterly incapable of self-critical speech, thus of the ability to change. The heart showed signs of worry at this unchanging yet untenable state. . . .
>
> Had we caught it early it might have been different. But his condition has already spread both East and West. The truth is, I am afraid, we are dealing with an epidemic.[244]

We, as a society, must be capable of self-criticism and change. We must open our eyes to the reality of AIDS, and we must find a way to accept HIV-positive individuals as individuals who are capable of living, loving and working.

244. BERNARD POMERANCE, THE ELEPHANT MAN sc. 18.