Civil Rights: Persons Infected with HIV: Stewart B. McKinney Foundation v. Town Plan & (and) Zoning Commission: Forcing the AIDS Community to Live a Prophylactic Existence

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Civil Rights: Persons Infected with HIV: *Stewart B. McKinney Foundation v. Town Plan & Zoning Commission*: Forcing the AIDS Community To Live a Prophylactic Existence

**Introduction**

People with the Human Immuno-deficiency Virus (HIV) are rapidly becoming one of the most recent casualties of this nation's perpetual battle to rise above invidious discrimination by overcoming a wide spectrum of irrational prejudices and self-serving community ordinances. Discrimination against persons infected with HIV or persons infected with Acquired Immune Deficiency Syndrome (AIDS) comes in many forms. Landlords refuse to make repairs to residences of HIV-positive people, utility services are shut off, neighbors harass those whom they suspect have HIV or AIDS, property owners attempt to evict people with HIV, and real estate agents steer prospective home buyers away from homes in which people with HIV have previously resided. In addition, group homes for HIV-positive people may be excluded by local zoning ordinances or restricted to undesirable areas of the community. Some ordinances even go so far as to prevent people with AIDS from living together.

Substantial evidence indicates that people with AIDS or HIV are often subjected to irrational discrimination in their attempts to obtain and maintain private housing. HIV-positive persons often may not recognize discrimination or realize they have any legal recourse for such discrimination. If the discrimination is evident and they know they may file a complaint, many choose not to do so. Public policy should address these problems and encourage people infected with HIV or at risk of infection to come forward for care and education without fear of being subjected to discrimination. The struggle to establish such a public policy is necessary to preserve "our society's adherence to the principle of justice and equality."

4. See AIDS PRACTICE MANUAL, supra note 1, at 12-2.
6. Id. at 119; see also Board of Trustees, Am. Medical Ass'n, Prevention and Control of AIDS, 258 JAMA 2097, 2102 (1987) [hereinafter AMA Board of Trustees].
7. Lawrence O. Gostin, Public Health Strategies for Confronting AIDS, 261 JAMA 1621, 1628 (1989); see, e.g., PRESIDENTIAL COMM'N ON THE HUMAN IMMUNODEFICIENCY VIRUS, REPORT AT 120 (1988); INSTITUTE OF MEDICINE, NAT'L ACADEMY OF SCIENCES, CONFRONTING AIDS: DIRECTIONS FOR PUBLIC HEALTH, HEALTH CARE, AND RESEARCH 19 (1986); AMA Board of Trustees, supra note 6, at 2101-02.
In *Stewart B. McKinney Foundation v. Town Plan & Zoning Commission*, the United States District Court for the District of Connecticut clearly established that in the absence of a legitimate zoning concern, a municipality cannot require individuals with HIV to apply for a special use permit. An application such as this would subject HIV-positive individuals to unwarranted public scrutiny. Requiring HIV-infected persons who desire to live in a residential community to satisfy requirements which are not required of noninfected persons perpetuates segregation and discrimination.

This comment will address the problems encountered by people with HIV or AIDS in the area of zoning. Part I of this comment will offer a brief history of zoning discrimination in America. Part II will analyze the newest target of zoning discrimination — HIV-positive persons. This comment will also look to the future in determining the effect of the *McKinney* opinion in combating continued discrimination against people with HIV-related infections. Finally, this comment will propose HIV-specific legislation recognizing HIV as a handicap. The primary focus of the proposed legislation will facilitate community acceptance of group homes for the treatment of persons infected with HIV.

### I. History of Zoning Discrimination

Housing discrimination in the United States has existed since the founding of our nation. A glance at history reveals that residential and ethnic segregation and other forms of discrimination remain pervasive in the United States. Housing discrimination was established by deliberate government policies, fueled by the racially discriminatory operation of private financing and real estate markets. Racial segregation and discrimination in zoning bolsters segregation and discrimination in other areas, such as education, employment, health care, and virtually every aspect of today's society.

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9. *Id.* at 1219.
10. *Id.* at 1220.
13. Professor Douglas Massey has said:

Where you live determines the chances you get in this world. It determines the school your children go to, the crime you're exposed to, the peer influences on your children. If
Congress sought to prohibit discrimination in housing on the basis of race, color, national origin, religion, and sex by enacting Title VIII of the Civil Rights Act of 1968 and the Fair Housing Amendments Act of 1988. In 1960 President John F. Kennedy in his message to Congress called for Americans to accept the mentally retarded into their homes and communities. As late as 1975, the Supreme Court of the United States forbade the federal government from discriminating against people with different religious beliefs through zoning.

Since 1974 the Supreme Court has returned to reviewing zoning laws. Because the Court has continued to give broad deference to local zoning authority, the state legislatures have sought to remedy these exclusionary methods. The challenge of every state and community should be to break the stigma of classification and discrimination. A court, when considering the effects of zoning ordinances on a community, should consider the benefits total integration provides. The detriments society once feared from desegregation may be found to be insignificant.

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you're not isolated from the mainstream, it's not a fair world, it's not a fair contest. Segregation is structural underpinning of the underclass. Study Finds Segregation in Cities Worse Than Scientists Imagined, N.Y. TIMES, Aug. 5, 1989, at 6, col. 5 (quoting Professor Douglas Massey of the University of Chicago).

17. See Sherbert v. Verner, 374 U.S. 398 (1963) (holding that disqualification of Seventh-day Adventist for unemployment compensation solely because of her refusal to accept employment, which would have required her to work on Saturday, contrary to her religious beliefs, imposes unconstitutional burden on free exercise of religion); see also Westchester Reform Temple v. Brown, 239 N.E.2d 891 (N.Y. 1968) (stating that setback ordinance as applied to temple found to abridge religious freedom); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding application of compulsory school attendance law to Amish children to be violative of Free Exercise Clause); cf. Bowen v. Roy, 476 U.S. 693 (1983) (holding that the government may not compel religious observances, but individuals may not demand that the government join in their religious practice).
20. See ARDEN H. RATHKOPF, THE LAW OF ZONING & PLANNING § 17A, at 29 (4th ed. 1985) (finding that state agencies can preempt local control by having state agencies operate the group homes or by funding private group home operators).
II. The Fair Housing Act

Discrimination in housing and the pervasiveness of restrictive covenants contributed to urban unrest in the 1960's. Recognition of arbitrary treatment of particular groups led to the enactment of legislation prohibiting discrimination. Title VIII of the Civil Rights Act of 1968, commonly called the Fair Housing Act, was designed to eliminate all discrimination in housing. Despite the best efforts of Congress, the Fair Housing Act lacked an effective enforcement mechanism. Congress left the enforcement of the Fair Housing Act with private persons and fair housing organizations. Although some success was achieved, the effort was limited by the financial resources of the litigants and the bar. Although the Department of Housing and Urban Development (HUD) also investigates housing discrimination complaints, it can only use "informal methods of conference, conciliation, and persuasion" in an attempt to battle this discrimination.

In 1988 Congress passed the Fair Housing Amendments Act (the Act) which created an administrative enforcement mechanism. The Act grants HIV-infected persons the opportunity to use and enjoy a dwelling under the protection of federal authority. However, this right to freely associate in any residential community is not absolute. It is subject to the "direct threat" provision of the Act. According to the Act, a court would need to evaluate whether a "direct threat" and a "significant risk" of harm exists to individuals in the community and/or the immediate surroundings before the legislation will be upheld.

21. See, e.g., Kerner COMM'N REPORT, supra note 12.
23. Id. The Act states that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." Id. Handicapped persons have been protected from some forms of discrimination since Congress enacted the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988), and the same definitions and concepts from that well-established law are used in the Fair Housing Act.
24. Fair Housing Amendment Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3601-3631 (1988)). A recent study examined residential segregation in 60 metropolitan areas and found that blacks continue to experience very high levels of segregation. In Chicago, for example, the amount of segregation was 88% for blacks, 64% for Hispanics and 44% for Asians. Testimony of Professor Douglas S. Massey, University of Chicago, Issues Relating to Fair Housing, Hearings Before the Subcommittee on Housing and Community Development of the House Banking, Finance and Urban Affairs Comm., 100th Cong., 2d Sess. (1988).
29. Id.
30. 42 U.S.C. § 3604(f)(9) (Supp. III 1991) (defining a "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation").
The Act, therefore, enables the federal government to take an active role in enforcing the law. HUD continues to investigate housing discrimination complaints and reconciles the conflicts between the parties. However, if both parties fail to agree, and after determination of whether reasonable cause exists, HUD can order an administrative hearing. HUD can continue to enforce the law creating an incentive for both parties to resolve the complaint in the early stages. This incentive is further strengthened by expanding the statute of limitations, removing the restriction on punitive damages, and providing fee-shifting language similar to other civil rights statutes in Title VIII.

Another significant change in the Fair Housing Amendment Act of 1988 was the inclusion of handicapped persons as a protected class. There is little question that HIV-infected persons are considered "handicapped" within the meaning of the Fair Housing Act. The legislative history of the amended Act indicates Congress' intent to include AIDS sufferers within the class of protected persons. A report

33. Id.
35. Id.
36. Id. at 16, reprinted in 1988 U.S.C.C.A.N. at 2177. Unlike other civil rights laws, attorneys fees are available to a prevailing plaintiff only if the plaintiff cannot afford to pay. However, under the Civil Rights Attorney's Fees Act the court, in its discretion, may allow the prevailing party attorney fees as part of the costs in proceedings in vindication of civil rights. 42 U.S.C. § 1988 (1988 & Supp. III 1991).
37. 42 U.S.C. §§ 3601-3631 (1988). An individual with handicaps is defined as "any person 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 an impairment, or (iii) is regarded as having such an impairment." Id. § 3602(h); see also 134 CONG. REC. H4921 (daily ed. June 29, 1988) (statement of Rep. Waxman); 134 CONG. REC. S10,464 (daily ed. Aug. 1, 1988) (statement of Sen. Harkin); H.R. REP. No. 711, supra note 25, at 22 n.55, reprinted in 1988 U.S.C.C.A.N. at 2183 ("AIDS and infection with the Human Immunodeficiency Virus (HIV) are covered under this Act . . ."). "This language is substantially similar to the definition under the primary federal law prohibiting discrimination against the handicapped, the Rehabilitation Act of 1973. The Committee intends that the definition be interpreted consistent with regulations clarifying the meaning of the similar provision found in Section 504 of the Rehabilitation Act." Id. at 22, reprinted in 1988 U.S.C.C.A.N. at 2183; see, e.g., 45 C.F.R. § 84.3(j) (1992) (defining an individual with handicaps as "any person 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 an impairment, or (iii) is regarded as having such an impairment"); 45 C.F.R. pt. 84, app. A, subpart A (1992). As the regulations note, the definition of handicap does not include a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list and because some conditions covered under the definition of handicap may not even have been discovered or prevalent in the population at the time of passage of legislation. For example, AIDS and infection with HIV are covered under this Act, although such conditions were not even discovered when section 504 was passed in 1973. See, e.g., Local 1812, Am. Fed'n of Gov't Employees v. U.S. Dept of State, 662 F. Supp. 50, 54 (D.D.C. 1987); Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524 (M.D. Fla. 1987).
38. See 24 C.F.R. § 100.201(a)(2) (1991) (stating that regulations developed by HUD to implement the FHA Act explicitly confirm its coverage of HIV-infected persons); see also Trafficone v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972) (stating that because Congress gave HUD the authority to administer the Fair Housing Act, HUD's opinion is given great weight when interpreting the law).
of the House Judiciary Committee flatly stated that "AIDS and infection with the Human Immunodeficiency Virus (HIV) are covered under this Act . . ." However, although the Fair Housing Act prohibits discrimination against handicapped individuals, including AIDS patients, it does not prevent a landlord from denying housing in order to preserve the health and safety of the community. This provision was added by the Committee to allay the fears of those who believe that the nondiscriminatory provisions of the Act could force landlords and owners to rent or sell to individuals whose tenancies could pose a risk. Although the intent of Congress was to prohibit the use of stereotypes and prejudice in denying critical housing to HIV-infected persons, Congress succeeded in fanning the flames of prejudice that AIDS sufferers pose an immediate health risk to others. There is absolutely no evidence supporting the conclusion that AIDS patients pose any significant threat to the safety of a community.

Congress' inclusion of HIV-infected persons as handicapped is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. However, the continued use of stereotypes and public misinformation is alarming. There is uncontested medical evidence which establishes that HIV is not readily transmittable through social contact, insects, or with people living together. Each state must recognize the shortcomings of the Fair Housing Act when enacting legislation to prevent housing


41. 42 U.S.C. § 3604(9) (1988). The Act provides: "Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." Id.; see also H.R. Rep. No. 711, supra note 25, at 29, reprinted in 1988 U.S.C.C.A.N. at 2190.

42. See H.R. Rep. No. 711, supra note 25, at 28, reprinted in 1988 U.S.C.C.A.N. at 2189. The report also stated:

Following adoption of the substitute amendment, another amendment was offered that would have excluded from the definition of handicap 'any current impairment that consists of an infectious, contagious or communicable disease whether or not such disease causes a physical or mental impairment during the period of contagion.' The debate on this amendment primarily centered around people infected with HIV (and the AIDS virus). The amendment was defeated.

Id. at 28 n.72, reprinted in 1988 U.S.C.C.A.N. at 2189.

43. See Association of Relatives & Friends of AIDS Patients (AFAPS) v. Regulations & Permits Admin., 740 F. Supp. 95, 103 (D.P.R. 1990) (stating that "the uncontested scientific and medical evidence establishes that HIV is not readily transmittable through food, mosquitoes or casual contact, and that the presence of the hospice poses no risk to the community at large").


45. AFAPS, 740 F. Supp. at 103.
discrimination. Until HIV-specific language is included in all proposed legislation, persons infected with HIV will have little recourse against discrimination.

III. The "Newest" Target of Zoning Discrimination — HIV-Positive Persons

A. What Is HIV?

HIV is a virus that damages the human immune system and results in an ongoing disease which frequently leads to grave infections and malignancies.46 Most HIV-related infections are "opportunistic infections" that take advantage of the weakened immune system, although some diseases are caused directly by the virus itself.47

HIV is spread when the virus from one person makes contact with the blood stream or bodily fluids of another.48 The three basic modes of transmission are: (1) by contact with infected blood; (2) through unprotected sex with an infected person; and (3) from an infected mother to a fetus or newborn.49

As of January 1992, 209,693 cases meeting the definition of AIDS had been reported in the United States and its territories and 135,434 deaths had resulted.50 However, it has been estimated that over one million people in the United States are infected with HIV.51 There will have been from 390,000 to 480,000 cumulative cases of AIDS by the end of 1993; two-thirds of which will have resulted in death.52

46. See AIDS PRACTICE MANUAL, supra note 1, at 2-4. Earlier acronyms for HIV included HTLV-III (human T-cell lymphotropic virus type 3) and LAV (lymphadenopathy-associated virus). A second strain of HIV has been identified which is common in parts of West Africa, although virtually unreported in the U.S. This strain is identified as "HIV-2." The strain most common throughout the world is designated "HIV-1," although in much of the medical literature and in nonmedical circles it is referred to as "HIV." Martin E. Levy, Human Immunodeficiency Viruses and the Pathogenesis of AIDS, 261 JAMA 2997, 3003 (1989).

47. AIDS PRACTICE MANUAL, supra note 1, at 2-4.

48. Id.

49. Id.; see also Recommendations for Prevention of HIV Transmission in Health-Care Settings, 36 [No. 28] CENTERS FOR DISEASE CONTROL: MMWR (MORBIDITY & MORTALITY WKLY. REP.) at 25 (Supp. 1987); [hereinafter Recommendations for Prevention].


52. See AIDS Case Estimates, supra note 51, at 117. In 1991, 182,834 AIDS cases and 115,984
The extreme unlikelihood of casual transmission is confirmed by the history of the epidemic. Even when living in close contact in hygienic environments, family members of people with AIDS do not acquire HIV except through the usual routes: unprotected intercourse, contact with contaminated blood, and transmission from mother to fetus. Not one case of HIV transmission through air, tears, sweat, or urine has been reported. There is no danger of contracting the virus from common activities such as donating blood, shaking hands, hugging, social kissing, sharing swimming pools, touching toilet seats or telephones, massages, eating in restaurants or using the same drinking glasses or food utensils, sharing towels, sharing bed linens, or from any other form of everyday contact. All evidence indicates that being bitten by mosquitoes or other insects or animals poses no

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deads had been reported in the United States. CDC HIV/AIDS SURVEILLANCE REPORT 1-18 (July 1991). The World Health Organization (WHO) has estimated that eight million to ten million people were infected with HIV worldwide as of July 1990. Sharp Rise in AIDS Infection Is Reported in Third World, N.Y. TIMES, Aug. 2, 1990, at 18. The WHO predicts that between 25 million and 30 million people worldwide will be infected by the year 2000, of whom one-third will be children. Children's AIDS Cases Are Reported To Rise, N.Y. TIMES, Sept. 26, 1990, at 7; see also AIDS PRACTICE MANUAL, supra note 1, at 2-6.

53. See Robert J. Lifson, Do Alternative Modes for Transmission of HIV Exist?, 259 JAMA 1353 (1989) (stating that HIV is not spread by casual contact and is not contagious in the popular sense of being easy to transmit); A.A. Gershon et al., The Risk of Transmission of HIV-1 Through Non-percutaneous. Non-sexual Modes: A Review, 4 AIDS 645 (1990) (stating that unlike influenza, tuberculosis, and the common cold, HIV is not spread in the air by droplet infection, nor is spread by surface-to-skin or skin-to-skin contact, but is in fact a fragile virus outside the body); Recommendations for Prevention, supra note 49, at 28 (stating that the HIV infection is killed by heating and ordinary disinfectants, such as rubbing alcohol, hydrogen peroxide, chlorine bleach, and probably ordinary soaps).

54. Margaret A. Fishel et al., Evaluation of Heterosexual Partners, Children, and Household Contacts of Adults with AIDS, 25? JAMA 640, 642 (1987); see Ray v. School Dist., 665 F. Supp. 1524 (M.D. Fla. 1987). In holding that a student with AIDS must be readmitted to school, the court in Ray stated: Extensive and numerous studies consistently have found no apparent risk of HIV infection by individuals exposed through close, non-sexual contact with AIDS patients. These studies have demonstrated that contacts involving sharing of household items, such as toothbrushes, eating utensils, and baths or toilets, do not lead to HIV-infection. Similarly, there is no evidence that close personal, but non-sexual interaction, such as giving a bath, shaking hands or kissing on the lips, will cause HIV-infection.

Id. at 1530-31.

55. See AIDS PRACTICE MANUAL, supra note 1, at 2-12, 2-13.

56. See Martha F. Rogers et al., Lack of Transmission of Human Immunodeficiency virus from Infected Children to Their Household Contacts, 85 PEDIATRICS 210 (1990). The CDC introduced recommendations with the following paragraph:

Human immunodeficiency virus (HIV), the virus that causes acquired immunodeficiency syndrome (AIDS), is transmitted through sexual contact and exposure to infected blood or blood components and perinatally from mother to neonate. HIV has been isolated from blood, semen, vaginal secretions, saliva, tears, breast milk, cerebrospinal fluid, amniotic fluid, and urine and is likely to be isolated from other body fluids, secretions, and excretions. However, epidemiologic evidence has implicated only blood, semen, vaginal secretions, and possibly breast milk in transmission.

threat. Even human biting, an invasive contact between individuals, has not resulted in any documented cases of transmission.

Because of the debilitating effects of HIV, a patient in the terminal stage of AIDS is typically better off in a hospice situation than in a hospital because his immune system is not capable of fighting off intra-hospital acquired infections. Hospice care is also considerably less expensive than hospital treatment, which for an AIDS patient can be as much as $1,000 per day.

B. Case Law Prior to McKinney

Three cases illustrate the varying approaches courts have used to build public awareness of HIV as a handicap under the purview of the Fair Housing Amendment Act. In School Board of Nassau County v. Arline, the United States Supreme Court decided whether a person with a contagious disease is considered "handicapped" under Section 504 of the Federal Rehabilitation Act. Since Section 504 applies only to federal programs or activities receiving financial assistance in employment, the Federal Housing Amendment Act later adopted the same three-part definition of "handicap" to prohibit discrimination in housing.

Arline involved a school teacher who was terminated because of persistent tuberculosis. The disease posed a threat to the health of others. The school board argued that the teacher's illness distinguished her from handicapped persons protected under the Federal Rehabilitation Act. The majority in Arline disagreed

57. See Lifson, supra note 53.

58. In one study of 30 health care workers bitten and/or scratched by a patient with AIDS, not one seroconverted. At least three of the bites involved breaking of skin. Chris M. Tsoukas et al., Lack of Transmission of HIV Through Human Bites and Scratches, 1 AIDS 505 (1988); see also Rennie Drummond, Seronegative 18 Months After Being Bitten by a Patient with AIDS, 256 JAMA 2342 (1986).


60. Id.; see also Diane E. Felix et al., AIDS in the Long-Term Care Setting, 7 ST. LOUIS U. PUB. L. REV. 115 (1988) ("[A]s median survival time after an AIDS diagnosis lengthens with the advent of new therapeutic agents and better care, many more persons with AIDS will suffer care in long-term, residential institutions."). quoted in AIDS PRACTICE MANUAL, supra note 1, at 11-14.


62. Arline, 480 U.S. at 273; see also 29 U.S.C. § 706(8)(B) (1988 & Supp. II 1990) (defining an "individual with handicaps" as "any person 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 an impairment, or (iii) is regarded as having such an impairment").

63. See AIDS PRACTICE MANUAL, supra note 1, at 12-6. The Fair Housing Act adopts essentially the same three-part definition of "handicap" as that used in Section 504 of the Federal Rehabilitation Act. Legislative history indicates that "handicap" under the FHA Act should be interpreted in the same way as under Section 504 of the FRA. Given such intent, and given that Section 504 has been construed to cover HIV-infected persons, it is clear that the Fair Housing Act also applies to those persons. See H.R. REP. NO. 711, supra note 25, at 17, 22, reprinted in 1988 U.S.C.C.A.N. at 2178, 2183.

64. The school board asserted that a person with tuberculosis is not "handicapped" because tuberculosis does not constitute a "physical impairment" which limits one or more "major life activities," which is a requirement of § 504 of the Federal Rehabilitation Act.
and stated that excluding persons with contagious diseases would be inconsistent with congressional intent.\footnote{65} 

_Arlene_ did not specifically address whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether contagiousness alone is sufficient to warrant protection under the Federal Rehabilitation Act.\footnote{66} The decision did, however, uphold the statutory definition that any person is "handicapped" if the disease involves a "physical impairment" which limits one or more "major life activities."\footnote{67} This seemingly neutral judicial response sends an enlightening message of hope to those who maintain that AIDS limits a major life activity and deserves protection. Since _Arlene_, other courts have held that HIV infection and/or AIDS satisfies one or more of the "prongs" of the statutory definition of handicap.\footnote{68} In particular, where HIV impacts the hemic (blood) and lymphatic or reproductive systems, the individual is considered handicapped.\footnote{70} These handicaps allow for federal assistance in discriminatory actions.\footnote{71} 

Unlike the _Arlene_ case, _Baxter v. City of Belleville_\footnote{72} deals specifically with HIV. In _Baxter_ an individual sought and was denied a special permit to open a residence intended to house people with AIDS. The city's zoning board denied the permit because of the fear of the possible spread of HIV into the community. The United States District Court for the Southern District of Illinois held that legislative history and case law clearly indicate that HIV-positive persons are

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65. _Arlene_, 480 U.S. at 282. See _supra_ notes 39, 40 and accompanying text. 

66. Subsequent courts, however, have addressed the application of the Rehabilitation Act to persons infected with HIV, and have found that those with AIDS and HIV are handicapped under the Act. See, e.g., Stewart B. McKinnon Found. v. Town Plan & Zoning Comm'n, 790 F. Supp. 1197 (D. Conn. 1992); Association of Relatives & Friends of AIDS Patients (AFAPS) v. Regulations & Permits Admin., 740 F. Supp. 95 (D.P.R. 1990); Baxter v. City of Belleville, 720 F. Supp. 720 (S.D. Ill. 1989). 

67. _Arlene_, 480 U.S. at 281. 


69. See AIDS PRACTICE MANUAL, _supra_ note 1, at 12-4 ("since an HIV-positive person probably cannot engage in reproductive activity without endangering the lives of the offspring and the other parent"). 


71. See H.R. REP. No. 711, _supra_ note 25, at 13, 17, reprinted in 1988 U.S.C.C.A.N. at 2174, 2178. The report stated that the amendment to the Fair Housing Act seeks to provide an effective administrative enforcement system, subject to judicial review, by moving barriers to the use of court enforcement by private litigants and the Department of Justice. _Id._ Second, the amendment extends the principle of equal housing opportunity to handicapped persons, including AIDS sufferers. _Id._ Third, the amendment extends protection to families with children. _Id._ Both handicapped persons and families with children, like the other classes protected by title VIII, have been the victims of unfair and discriminatory housing practices. _Id._ 

protected under the Fair Housing Act. 73 Moreover, the Baxter decision brought to light the zoning commission's unwarranted fears, labeling them as a contributing cause of the public's hysteria surrounding the issue of AIDS. This hysteria prevents people with HIV from interacting with non-HIV-infected people, adversely affecting a "major life activity" in violation of the Fair Housing Act. 74

The fear of HIV has caused discrimination not only against those actually infected, but also against persons perceived to be members of high-risk groups. 75 An example of this hysteria can be found in Association of Relatives & Friends of AIDS Patients (AFAPS) v. Regulations & Permits Administration. 76

In AFAPS, a special interest group sought a special use permit to open an AIDS hospice "to comfort patients in the final stages of the [HIV] disease." 77 Outraged community residents strongly opposed the hospice, fearing that the AIDS virus might spread throughout the community. The community's fears ranged from contracting the virus through mosquito bites to the possibility that the hospice residents might pose a danger to students attending a nearby school.

Using current medical opinions, the district court in AFAPS rejected the resident's concerns as baseless and enjoined the agency from denying the issuance of the special use permit. 78 Relying on Baxter, the court noted "there is little question that persons terminally ill with AIDS are considered handicapped within the meaning of the Fair Housing Act" 79 and specifically referred to Congress' intent to include AIDS patients in the term "handicapped."

Both Baxter and AFAPS reflect an effort by the judiciary to develop and apply the three-part definition of handicap adopted by the Fair Housing Act. The Fair Housing Act includes a provision "that a dwelling be made available to an individual whose tenancy would not constitute a direct threat to the health or safety of other individuals or whose tenancy would not result in substantial physical damage to the property of others." 80

The House Judiciary Committee, when considering the "direct threat" provision, "did not foresee that the tenancy of any individual with handicaps would pose any risk, much less a significant risk, to the health or safety of others by the status of being handicapped . . . ." 81 Under this provision, a property

73. Id. at 729.
74. Id. at 730, 735.
77. Id. at 98.
78. Id. at 101, 107.
79. Id. at 103.
owner would have to establish that there is a nexus between the fact of the individual's tenancy and the asserted direct threat. Thus, a court needs to evaluate whether a direct threat and a significant risk of harm would exist in the context of the individual's tenancy.

Considering the limited occurrences in which HIV is transmitted, the habitability of homes in a residential neighborhood clearly does not cause a "direct threat" or "significant risk" to the public. In Baxter, it was held that "conclusive medical evidence" is insufficient to outweigh the harm to Baxter if he were unable to reside in the community. Similarly, in AFAPS it was held that "the uncontested scientific and medical evidence established that . . . the presence of the hospice poses no risk to the community at large."

Recent court decisions clearly demonstrate the Fair Housing Act's power has to remedy incidents of discrimination towards handicapped individuals, including persons infected with HIV. The Fair Housing Act successfully forecloses all avenues of redress available to communities who desire to arbitrarily discriminate against the handicapped. Arguments for exclusionary zoning are relegated to specific findings that the health, safety, and welfare of a community are imperiled. The judiciary's terse treatment of exclusionary zoning provides encouragement for HIV-infected persons who continue to fight for equality under the law.

The mere fact that zoning discrimination exists today is a vivid and ugly reminder of society's willingness to accept the things they feel they cannot change. From the beginning of recorded history, ethnocentricity towards different races and ambivalence towards people with handicaps have caused inaction by society at large, no matter how genuine or deserving the cause. Only ten states and municipalities have adopted laws explicitly banning housing discrimination on the basis of HIV infection. Stewart B. McKinney v. Town Plan & Zoning Commission offers a real opportunity for changing the attitudes of state and local municipalities in their treatment of all citizens they have taken an oath to protect.

("not foreseeable that the tenancy of any individual with handicaps would pose any risk"); 134 CONG. REC. H4613 (daily ed. June 22, 1988) (statement of Rep. Coelho) ("extremely unlikely that a person with a disability would ever pose such a direct threat").

83. Id.
85. AFAPS, 740 F. Supp. at 103.
86. Arline, 480 U.S. at 473; see also Baxter, 720 F. Supp. at 720.
IV. Statement of the Case

The United States District Court for the District of Connecticut was given the opportunity to unequivocally draw judicial lines concerning HIV-infected persons and their rights as American citizens to live in a residence of their choice. McKinney illustrates the inherent difficulty in enforcing non-HIV specific legislation in the housing discrimination arena. By trying to do what is right for both HIV-infected and non-HIV-infected persons, the scales of justice slowly tip toward equality one ounce at a time.

The Stewart B. McKinney Foundation (hereinafter the Foundation) is a nonprofit corporation which provides housing assistance for HIV-infected persons. Due to the serious shortages of housing in Connecticut for people with HIV, the Foundation received inquiries from persons infected with AIDS requesting its involvement. The defendant, Town Plan and Zoning Commission (hereinafter the Commission), is a municipal agency whose function is to adopt, interpret, and enforce zoning regulations.

In 1988, the Foundation purchased a two family residence located in the town of Fairfield. The residence was to be rented to seven HIV-infected persons who were presently homeless or threatened with homelessness. The Foundation did not intend to provide medical services to the residents in the house. The only conditions of tenancy were that each tenant be homeless and have HIV.

The Foundation informed the public that it had purchased a house and that it intended to use it as a residence for homeless HIV-infected persons. After refusing to disclose the location of the house, a town meeting was held where the neighbors expressed fear of AIDS and made discriminatory remarks about people with HIV. To address perceived problems, the Foundation sponsored a forum. The crowd became hostile and out of control; shortly thereafter, citizens of Fairfield formed a group called "Concerned Neighbors of Fairfield" to oppose the Foundation's agenda.

The attorney for the Foundation contacted the Director of the Planning and Zoning Commission and was told the proposed use of the Fairfield property was permitted subject to securing a special exception. The Foundation told the Director that it would obtain a certificate of rental occupancy only upon the town waiving the requirement of listing the occupants' names in order to protect their confidentiality.

The Director sent the Foundation a letter asking several questions about the proposed residence. The questions related to the average age of the occupants, the disposal of garbage, and the name of the record title holder to the property. The Foundation objected to these questions as being unrelated to legitimate zoning concerns.

The Commission offered the Foundation an alternate piece of property far away from other residences. A town task force was organized to study this proposal, but the dominant sentiment expressed by members of the public was one of opposition. Subsequently, the Commission withdrew the offer. The Commission notified the
Foundation, reiterating that its proposed use of the Fairfield property was permitted subject to securing a special exemption.\textsuperscript{90}

The Commission analogized the Foundation's residence to that of a chronic and convalescent nursing home. This classification is important in that it would require the Foundation to be licensed under the state public health code's chronic and convalescent nursing home provisions. The Foundation adamantly argued against this classification and sought a preliminary injunction enjoining the defendants from requiring a special exemption or otherwise taking any zoning enforcement action against the tenants for failure to obtain the special exemption.

\textbf{V. Analysis of the McKinney Decision}

The \textit{McKinney} court adopted a two part test for establishing a violation of the Fair Housing Act developed by the Seventh Circuit Court of Appeals in \textit{Village of Arlington Heights v. Metropolitan Housing Development Corporation}.\textsuperscript{91} The first part of the \textit{Arlington Heights} test requires a showing of discriminatory intent.\textsuperscript{92} However, the discriminatory intent need not be the sole factor.\textsuperscript{93} The second part is the "disparate impact" analysis, which examines whether the effect of the defendant's action is unnecessarily discriminatory absent any intent to discriminate.\textsuperscript{94} The \textit{McKinney} court determined that the actions of the Commission violated the plaintiff's rights under the Fair Housing Act.\textsuperscript{95} First, the court found that the Commission's claim that its actions were to further consistent zoning was fraudulent.\textsuperscript{96} Therefore the HIV-positive status of the Foundation's future tenants was at least a partial motivating factor in the Commission's decision.\textsuperscript{97} Second, the court determined that requiring HIV-infected persons to satisfy requirements which are not required of noninfected persons perpetuates the segregation of the handicapped.\textsuperscript{98} Finally, the court concluded that the town's concern about

\textsuperscript{90} Special uses are permitted subject to certain conditions specified in the zoning regulations. If the appropriate administrative agency determines that the conditions have been met, a use will be permitted. \textit{See} 3 \textbf{ROBERT M. ANDERSON, AMERICAN LAW OF ZONING} \textsection 19.01 (2d ed. 1976).


\textsuperscript{92} \textit{Arlington Heights I}, 429 U.S. at 265-66.

\textsuperscript{93} \textit{Id.}

\textsuperscript{94} \textit{Arlington Heights II}, 558 F.2d at 1290.

\textsuperscript{95} \textit{McKinney}, 790 F. Supp. at 1208.

\textsuperscript{96} \textit{Id.} at 1213.

\textsuperscript{97} \textit{Id.} at 1219.

\textsuperscript{98} \textit{Id.} at 1220.
inconsistent zoning was insufficient to outweigh the harm to the Foundation and its tenants. 99

A. The Arlington Test, Part One — Discriminatory Intent

The McKinney court, applying the discriminatory intent analysis, found the Commission's actions were discriminatory for several reasons. First, discriminatory intent involves different treatment of similarly situated persons or groups. 100 The McKinney court determined that the HIV status of the prospective residents was at least a partial motivating factor in the Commission's decision to require a special permit. 101 McKinney specifically held that choosing to focus on the legal concept of intent, without considering the motivation of the individuals, was inappropriate. 102 For the Foundation to prevail on this point, they were not required to show the Commission was motivated by some purposeful, malicious desire to discriminate against HIV-infected persons. 103 Nor must the Foundation prove that the Commission was motivated solely, primarily, or even predominately by the HIV-infected status of the Foundation's future tenants. 104

Rather, the Foundation need only show that the HIV-positive status of the people who were to live in the Fairfield property was a motivating factor in the Commission's decision to require the special permit. 105 The McKinney opinion noted that discriminatory intent does not necessarily depend on an open statement by a public official of an intent to discriminate. 106 Discriminatory intent may be gleaned through circumstantial evidence. 107 The facts illustrate that when the Foundation's plans to rent property to HIV-infected persons became generally known, it was met with organized, widespread, and effective opposition. The court concluded that the Commission, at the very least, bowed to the political pressure exerted by the residents of Fairfield. 108

Second, the McKinney court determined there were uncharacteristic departures from normal procedural sequences which further demonstrated discriminatory intent. 109 Namely, the Commission's letter concerning the nature of the home's occupants requested information irrelevant to zoning concerns. 110 The letter requested the Foundation to provide a "full picture of the manner in which the

99. Id. at 1222.
103. Id.
104. Id.
105. Id.
106. Id. at 1212 (citing AFAPS, 740 F. Supp. at 103, 104).
107. Id. at 1212 (citing Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970)) (addressing the issue in the context of equal protection).
108. Id.
109. Id. at 1213.
110. Id.
property is to be used" because of "the uniqueness of the situation." 111 This request, the court held, was not consistent with the Fair Housing Act, no matter how "unique" the handicap. 112 In addition, the requirement that the Foundation obtain a special exemption for its proposed use of the property was considered a departure from normal substantive criteria. 113

The McKinney holding emphatically rejects the Commission's argument that the Foundation's use of the property was analogous to a chronic and convalescent nursing home and that it was a charitable institution. 114 The Foundation proved the Commission was not only wrong, but that the decision was so arbitrary that it likely resulted from an intent to discriminate. 115

Zoning regulations define a family as "including a group of not more than five unrelated persons . . . who live together as a single housekeeping unit maintaining a common household." 116 The Commission's description of prospective tenants' use of the Foundation's property as a chronic and convalescent nursing home and a charitable institution was unreasonable. 117 Therefore, the Foundation's proposed use of the property, as a family use, was permitted according to part one of the Arlington test. 118

B. Arlington Test, Part Two — Disparate Impact

The McKinney court, in applying the disparate impact test, held that the Foundation sufficiently demonstrated a prima facie case of discrimination. 119 To establish a prima facie case, the Foundation need not show that the action resulting in discrimination was motivated by a desire to discriminate against the handicapped. 120 More importantly, it is the effect and not the motivation which is the touchstone. 121 In Arlington Heights, the Seventh Circuit established a list of factors to consider when evaluating facially neutral conduct that produces a discriminatory effect. 122 The four factors are:

(1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide

111. Id.
112. Id.
113. Id.
114. Id.
115. Id.; see also Lieberman v. Grant, 630 F.2d 60, 65 (2d Cir. 1980).
119. Id. at 1220.
120. Id. at 1216; see also United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974).
121. Id.
housing for members of a protected class or merely seeks to restrain the defendant from interfering with individual property owners wishing to provide such housing.\textsuperscript{123}

With respect to the discriminatory effect determination, \textit{McKinney} clearly held the Commission's actions adversely affected the Foundation's prospective tenants because they are HIV-positive, a protected class under the Fair Housing Act.\textsuperscript{124} Moreover, the burdens imposed on the noninfected individuals living in the community was negligible by comparison.\textsuperscript{125} The court noted that all AIDS patients in that community, without the availability of the hospice, were being denied a place to live.\textsuperscript{126} Therefore, "all plaintiffs have been adversely impacted each day the residence remains unopened," providing strong evidence of discriminatory effect.\textsuperscript{127}

In satisfying the second and third factors, the court found the neighbors' discriminatory attitude and prejudices against AIDS patients contributed to the commission's request for a special exception permit.\textsuperscript{128} The \textit{McKinney} court held that there were less discriminatory alternatives available to address the town's concerns.\textsuperscript{129}

For example, if the Commission was genuinely interested in ensuring uniformity in zoning, it could have used its police powers to investigate and protect the welfare of the citizens.\textsuperscript{130} At the very least, the Commission should have presented substantial evidence as to why the presence of the Foundation's house would impair significant interests within the community.\textsuperscript{131} Under the disparate impact analysis, a defendant is required to prove that its action "furthers a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect."\textsuperscript{132} Accordingly, without an additional showing of how the goals of the Commission were adversely affected by the Foundation's presence, the claim concerning inconsistent zoning must fail.

The final factor of part two of the \textit{Arlington Heights} test focuses on the nature of the relief the Foundation sought. The Foundation attempted to enjoin the Commission from imposing requirements that would have the effect of preventing it from providing housing.\textsuperscript{133} The Foundation did not seek to compel the City

\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{McKinney}, 790 F. Supp. at 1218.
\textsuperscript{125} \textit{Id.; see also Baxter}, 720 F. Supp. at 732.
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} \textit{Id.; see also Huntington Branch, NAACP v. Town of Huntington}, 844 F.2d 926, 934 (2d Cir.), \textit{aff'd}, 488 U.S. 15 (1988).
\textsuperscript{128} \textit{McKinney}, 790 F. Supp. at 1220.
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{132} \textit{Huntington Branch, NAACP}, 844 F.2d at 936.
\textsuperscript{133} \textit{McKinney}, 790 F. Supp. at 1221.
to build public housing for HIV-positive persons. Under part two of the Arlington Heights analysis, the McKinney court concluded that the Commission's requirement that the Foundation apply for a special exception for its property had a discriminatory effect on people with HIV. Consequently, this requirement interfered with the Foundation's rights under the Fair Housing Act.

C. Outlook for the Future

While the fight to end zoning discrimination continues, one must not lose sight of the battles being fought in virtually every community in America. Twenty years after the passage of the Fair Housing Act, discrimination and segregation in housing continue to be pervasive. HUD estimates that two million instances of housing discrimination occur each year. Once the discriminatory violation has been established, a decision must be made concerning enforcement of the law and the type of remedial relief desired.

So only because a judge in a court of law in some city or state renders a decision in one particular case does not mystically rid every community of discriminatory practices. Some state and local municipalities have enacted legislation which explicitly bars discrimination on the basis of HIV-related infection. Other HIV-specific laws contain a limitation excluding persons with a contagious infection which would "constitute a direct threat to the health and safety of other individuals." Most housing discrimination laws empower a court to "use any available remedy to make good the wrong done" by housing discrimination. Therefore, relief provided by the courts is generally "prohibitive and affirmative."

The prohibitive portion should forbid the defendant from disobeying the law. Typically these provisions alone fail to preclude repeated acts. In 1974, the Seventh Circuit established a plaintiff's right to damages for emotional distress under the Fair Housing Act. "Actual damages" were appropriate for "the humiliation caused [which] can be inferred from the circumstances as well as established by testimony." Recently, two HIV-related cases were settled for

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134. Id.; see also Baxter, 720 F. Supp. at 733.
136. Id. at 1221; cf. Baxter, 720 F. Supp. at 733.
139. See supra note 88.
141. See Moore v. Townsend, 525 F.2d 482, 485 (7th Cir. 1975).
142. See AIDS PRACTICE MANUAL, supra note 1, at 12-17.
143. Id.
144. See Seaton v. Sky Realty Co. 491 F.2d 634 (7th Cir. 1974).
145. Id. at 636; accord Gore v. Turner, 563 F.2d 159, 164 (5th Cir. 1977); see also Williams v.
Similarly, a number of Fair Housing cases have
returned damage awards of $20,000 or more. Surprisingly, the courts have had
little difficulty determining an appropriate award for such injury. In Baxter, after the city's unwillingness to grant a permit for a home for HIV-
infected persons, the defendants were ordered to pay $29,000 to each plaintiff and
to pay approximately $60,000 to plaintiffs' attorneys for their fees and costs. A
more aggressive approach is needed.

The Model Statute proposed in this comment identifies two problem areas
which have been continually ignored by state legislatures in their quest to provide
adequate protection for HIV-infected persons. First, in order to provide basic
protection for HIV-infected persons, the Model Statute specifically includes HIV-
infected persons in the definition of handicap.

Second, the Model Statute provides for the protection of group homes. That is,
the Model Statute specifically addresses group homes for the care of HIV-infected
persons in areas zoned for that purpose.

Trans World Airlines, 660 F.2d 1267, 1272 (8th Cir. 1981) (holding that damages are recoverable for emotional harm presumed from infringement of substantive constitutional rights); Chauffeurs, Teamsters & Helpers, Local Union No. 238 v. Iowa Civil Rights Comm'n, 394 N.W.2d 375 (Iowa 1986) (stating that emotional distress damages may be awarded under Iowa law).


149. Baxter v. City of Belleville, No. 89-3354 (S.D. Ill. Dec. 15, 1989) (order entering partial consent decree). Attorneys' fees and costs were resolved by a subsequent agreement.

150. Id. See supra note 101.
VII. Proposed Model Statute

Civil Rights: Discrimination in the Treatment of HIV-Infected Persons

STATEMENT OF PURPOSE
It is the purpose of this Statute to prohibit housing and zoning discrimination on the basis of acquired immune deficiency syndrome, acquired immune deficiency syndrome related complex, and human immunodeficiency virus.

Section A. Definitions:
1. "People with handicaps" means a natural person having a physical impairment which substantially limits one or more of a major life activity of such person, including the condition of a person with a positive human immunodeficiency virus test result, a diagnosis of acquired immune deficiency syndrome, a diagnosis of acquired immune deficiency syndrome-related complex, or any other condition related to acquired immune deficiency syndrome. The inclusion of a condition related to a positive human immunodeficiency virus test result in the meaning of "handicap" under the provisions of this chapter does not preclude the application of the provisions of this chapter to conditions resulting from other contagious or infectious diseases.151

2. "Discrimination in housing" means any unfair treatment of persons as it relates to individual housing or group homes based on acquired immune deficiency syndrome, acquired immune deficiency syndrome related complex, or human immunodeficiency virus. This subsection also applies to persons who are not currently infected with HIV but who are nevertheless denied housing on the belief that they are infected with the HIV virus.

3. "Unlawful Discriminatory Practice" means any act that is unlawful under this statute.

4. "Group Home" means any residential health care facility, nursing home, hospice, or any provider of long-term housing and shelter.

Section B. In General:
1. The Legislature finds and declares that persons infected or believed to be infected with human immunodeficiency virus have suffered and will continue to suffer irrational and scientifically unfounded discrimination. The Legislature further finds and declares that society itself is harmed by this discrimination, as otherwise able-bodied persons are deprived of the means of supporting themselves, providing for their own health care, housing themselves, living together in group homes, and participating in the opportunities otherwise available to them in society. The Legislature further finds and declares that remedies are needed to correct these problems.

2. Any person with or perceived as having acquired immune deficiency syndrome, acquired immune deficiency syndrome related complex, or human

immunodeficiency virus shall have every protection made available to handicapped persons.

3. No person, agency, organization, or corporate body may discriminate against a person on the basis of a positive acquired immune deficiency syndrome test result, or perception of same, in individual housing, group homes, or delivery of services, not shall an acquired immune deficiency syndrome test be required as a condition of being granted housing, except where nondiscrimination can be shown, on the testimony of competent medical authorities, to constitute a clear and present danger of AIDS virus transmission to others.

4. It is an unlawful discriminatory practice for any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the advantages, facilities, services, or privileges made available in public housing, group homes, or to segregate or discriminate against any such person in the use thereof on the grounds of immune deficiency syndrome, acquired immune deficiency syndrome related complex, or human immunodeficiency virus.

Section C. Burden of Proof:

1. A person may not discriminate against an otherwise qualified individual in individual housing or group homes on the basis of the fact that such individual is, or is regarded as being, infected with human immunodeficiency virus.

2. A person or other entity receiving or benefiting from state financial assistance for public housing may not discriminate against an otherwise qualified individual on the basis of the fact that such individual is, or is regarded as being, infected with human immunodeficiency virus.

3. A person who discriminates in individual housing or group homes against an individual who is infected with human immunodeficiency virus shall have the burden of proving that no reasonable accommodation can be made to prevent the likelihood that the individual will, under the circumstances involved, expose other individuals to a significant possibility of being infected with human immunodeficiency virus.

4. Exceptions to anti-discrimination laws in individual housing, group homes, and zoning will be strictly construed and certain exceptions will be allowed under very limited circumstances.152

(a) a private, single family homeowner renting or selling his or her own home will be exempt under the Fair Housing Act.153

(b) owner-occupied dwellings with no more than four living units.154

Section D. Remedies:

1. Any person aggrieved by a violation of this section shall have a right of action in the circuit court and may recover for each violation:

2. Against any person who violates a provision of this section, liquidated damages of $1,000 or actual damages, whichever is greater.

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154. Id. § 3603(b)(2).
3. Against any person who intentionally or recklessly violates a provision of this section, liquidated damages of $5,000 or actual damages, whichever is greater.
4. Against any person for willful and wanton conduct, punitive damages shall be awarded according to the discretion of the court.
5. Reasonable attorney's fees.
6. Such other relief, including an injunction, as the court may deem appropriate.
7. Nothing in this section limits the right of the person aggrieved by a violation of this section to recover damages or other relief under any other applicable law.

VIII. Commentary to the Proposed Model Statute

A. Title

The title chosen for the Model Statute, "Discrimination in the Treatment of HIV-Infected Persons," reflects the frustration associated with having a virus which requires special legislation to educate those who have not fallen prey to this fatal disease. There are two essential aspects of this disease that cause discrimination. First, most of the HIV-infected individuals are associated with socially ostracized groups. Although the virus transcends all economic, social, and cultural boundaries, persons diagnosed with the virus are suspected of "unacceptable" lifestyles and discriminated against on that basis.

Second, hysteria surrounding the fear of being infected with the fatal and incurable disease leads to inexcusable discrimination. This hysteria perpetuates fear and prevents the presence of infected persons in certain communities. Thus, the HIV epidemic and its discriminatory effects involve not only complex medical and legal issues, but interrelated moral issues regarding what is an "acceptable" lifestyle. Educating the public about the realities of the disease and the effects of this discrimination is necessary.

B. Section A: Definitions

Section A defines five terms which are central to the application of this Statute. Subsection I defines "People with Handicaps" broadly, adopting AIDS, AIDS-related complexes and HIV specific language. By employing this broad definition, the Model Statute makes clear that persons infected with HIV or any AIDS-related complexes, regardless of where the virus was contracted, will be considered

156. Id.; see, e.g., Robert J. Blendon & Karen Donelan, Discrimination Against People with AIDS: The Public's Perspective, 319 NEW ENG. J. MED. 1022, 1023-24 (1988) (describing a Harvard University study which found that 20% of the people surveyed believed that AIDS-infected individuals were "getting their rightful due").
157. See Wasson, supra note 151, at 230.
158. Id.
handicapped despite their citizenship status or nationality. Once it is shown that a person is infected with HIV, there should be no necessity for further inquiry into whether the person is substantially limited in a major life activity or is regarded as being so limited.

Subsection 2 defines "Discrimination" in a manner intended to make clear that it is both broad and narrow in scope. On the one hand, it is narrow enough to cover specific incidents of unfair treatment of persons with AIDS, AIDS Related Complex (ARC), or HIV. On the other hand, it is broad enough to include persons who are not infected with HIV but who are nevertheless treated as having HIV by a discriminating individual. Since the person is regarded as having an impairment that substantially limits a major life activity, the individual is therefore considered handicapped. For example, an employee who is rumored to be infected with HIV even though the rumor is totally unfounded may be subjected to discrimination. The person who perceives the individual as being handicapped and fires him is discriminating on the basis of handicap.

Subsection 3 defines "Unlawful Discriminatory Practice" to include all incidents of discrimination in individual housing and group homes related to AIDS, ARC, or HIV.

Subsection 5 defines "Group Homes" to encompass any licensed residential health care provider and does not limit the term to nursing homes or hospices. There shall be no set limit on the number of occupants receiving care. The number of occupants should be a reasonable amount determined by the licensed health care provider and its staff.

Consideration should be given to the severity of the disease in question. A landlord or property owner resisting the group's occupancy must establish that there is a nexus between the individual's tenancy that would constitute a direct threat to the health and safety of other individuals.

The perceived threat of economic loss to a landlord or property owner from renting, leasing, or selling to people with HIV does not constitute a direct threat. The landlord's conduct is linked with the handicap of potential tenants and therefore his conduct amounts to unlawful discriminatory intent. The direct threat provision does not allow landlords or property owners to ask probing questions concerning the individual's handicap. A landlord or property owner may only inquire into the person's ability to meet requirements for tenancy or property

purchase,\textsuperscript{(165)} and may not ask questions which require the individual to waive his or her right of confidentiality concerning his or her medical condition.\textsuperscript{(166)}

C. Section B: In General

This section sets forth specific rules concerning the treatment of people with AIDS, ARC, or HIV. The rules vest in the HIV-infected person every protection made available to handicapped persons.

D. Section C: Burden of Proof

Section C identifies two problem areas when dealing with unlawful discrimination, including allocating the burden of proof. In the area of housing discrimination, an "intent" analysis or an "effects" analysis can be used to establish discrimination. With an intent analysis, the HIV-positive individual merely shows that his handicap played "some part" or was a "consideration" in the challenged discriminatory conduct.\textsuperscript{(167)} The landlord or property owner's financial concerns are irrelevant in meeting his burden of proof.

Under the effects analysis, discrimination is shown without proof of discriminatory intent, as long as the challenged action has a disproportionate impact on the handicapped.\textsuperscript{(168)} Once established, the burden shifts to the defendant to justify his conduct. If the defendant is a private entity, it must show a "compelling business justification" for its conduct.\textsuperscript{(169)} If the defendant is a government entity, its actions must be necessary to promote a compelling government purpose.\textsuperscript{(170)}

E. Section D: Remedies

Remedies that are available for unlawful discrimination against HIV-infected persons should be both broad and specific. On one hand the defendant should be prohibited from engaging in any known discriminatory activity for which liability has been imputed. Courts should order affirmative relief when prohibitions alone may be ineffective. The affirmative measures may include judicial monitoring of compliance through education, advertising, or record keeping.\textsuperscript{(171)}

Other remedies available include injunctions which should be used to insure that no future violations occur and to recover any lingering effects of past discrimina-


\textsuperscript{166} Id.


\textsuperscript{168} See AIDS PRACTICE MANUAL, supra note 1, at 12-15.

\textsuperscript{169} Id.


Compensatory damages may be awarded for emotional suffering and humiliation, which can be inferred from the circumstances or by testimony. Punitive damages may be justified if it is clear that the defendant's conduct rose to the level of malevolence or wantonness. Attorney fee awards may be granted to successful complainants similar to provisions provided for under the Fair Housing Act.

IX. Conclusion

HIV and AIDS elicit a wide range of public reactions. Some people respond with fear while other people seek to become more informed. As the court in AFAPS observed:

No one will deny that the AIDS epidemic . . . has generated great cause for concern. No one can blame the residents of any town for making a priority of the health and safety of their families and community. But when legitimate concern is fanned by a profound misunderstanding of the causes of AIDS, the rush to panic can easily result in illegal and unjustifiable discrimination against not only the disease's victims but also against the laudable efforts of individuals working to contain the flames.

The McKinney opinion echoes these sentiments and attempts to conclusively allay the fears people have of a disease they do not understand. The message being communicated involves changing society's attitude toward the continued mistreatment of people with HIV-related infections.

History dramatically illustrates a pattern of discrimination. In the past, society thought it was justified in imposing barriers on people of color. The mentally retarded were herded like animals and housed under abominable conditions and locations. These incidents of invidious discrimination are not new. They continue to arise in communities throughout the United States.

Zoning discrimination against people with HIV is just the "newest" form of discrimination, slowly emerging as a result of public prejudice. The Fair Housing Amendment Act in 1988 provided the first positive step to recognize persons with HIV-related infections as having handicaps. This first step will facilitate their eventual inclusion into the American mainstream. The challenge to the legal community is to propose and seek enactment of specific legislation that recognizes

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172. Id. at 83; see also Marable v. Walder, 704 F.2d 1219, 1221 (11th Cir. 1983).
173. See Seaton v. Sky Realty Co., 491 F.2d 634, 636 (7th Cir. 1974); accord Gore v. Turner, 563 F.2d 159, 164 (5th Cir. 1977); see also Williams v. TWA, 660 F.2d 1267, 1272 (8th Cir. 1981) (holding that damages for emotional harm presumed from infringement of substantive constitutional rights).
175. 42 U.S.C. § 3613(c)(2) (1988); see also Baxter v. City of Belleville, 720 F. Supp. 720 (S.D. Ill. 1989) (order entering partial consent decree). Attorneys' fees and costs were resolved by a subsequent agreement.
HIV as a handicap for people who cannot escape its deadly grasp. The challenge to everyone is to strive to enforce what Congress has mandated by strengthening AIDS legislation through litigation and education, while avoiding the sins of past discrimination.

Patrick F. Summers