AIDS and the Perception of AIDS as Handicaps under Florida Law

Robert Craig Waters

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ARTICLES

AIDS AND THE PERCEPTION OF AIDS AS HANDICAPS UNDER FLORIDA LAW†

ROBERT CRAIG WATERS

Until 1989, many questions remained unanswered about the extent of protection afforded by Florida's numerous handicap discrimination laws for those with symptomless infection of the AIDS virus or those perceived as having such an infection. The 1989 Florida Legislature settled these questions by declaring that having the infection and being perceived as infected fall within the protection of these statutes. As a rationale, the Legislature adopted an express statement of intent that found all forms of AIDS-related discrimination irrational, scientifically unfounded, and detrimental to society as a whole. This Article explores the sweeping implications of these legislative determinations.

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AIDS AND THE PERCEPTION OF AIDS AS HANDICAPS UNDER FLORIDA LAW

ROBERT CRAIG WATERS*

FACED WITH a rapidly rising number of AIDS\(^1\) cases\(^2\) and disturbing evidence that the disease has spread deeply into the popu-

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* Judicial Assistant to Gerald Kogan, Justice, the Florida Supreme Court; A.B., 1979, Brown University; J.D., 1986, University of Florida. Mr. Waters is the author of a treatise, AIDS AND FLORIDA LAW (D & S Publishers 1989), and numerous articles on AIDS and health-care law. At the request of State Representative Lois Frankel (Dem., West Palm Beach), he assisted the House of Representatives' AIDS Task Force in preparing its 1989 AIDS-related legislation. Mr. Waters drafted the AIDS nondiscrimination provisions analyzed in this Article.

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The views expressed in this Article are entirely those of the author and do not reflect the views of any other individual or institution.

This Article is dedicated to the memory of the 5,858 Floridians who have died of AIDS as of the final editing of this Article.


Although no cure for AIDS has been found, a number of new experimental therapies, drugs, and vaccines are being tested. Mitsuya, Yarchoon & Broder, AIDS Therapies, Sci. Am., Oct. 1988, at 110; Matthews & Bolognesi, AIDS Vaccines, Sci. Am., Oct. 1988, at 120.


lation of South Florida, the 1989 Florida Legislature revisited the state's year-old Omnibus AIDS Act and took several steps to extend the protection it provides against AIDS-related discrimination. The most significant of these new enactments consisted of a single sentence:

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.

This simple declaration (hereinafter 1989 Enactment) thus equates AIDS and its precursor infections, along with the mere perception that a person has any of these illnesses or infections, with handicaps already protected under Florida law.

The effect, however, is more far-reaching than first appears. Under the 1989 Enactment, all other remedial statutes and regulations granting "protection" to the handicapped are incorporated by general reference into this AIDS specific nondiscrimination provision.

3. On March 29, 1989, HRS released information showing widespread non-homosexual transmission in South Florida of HIV, the agent responsible for AIDS. For instance, the statistics for Palm Beach County showed that a total of 25% of all cases were of heterosexual origin, while 29% were caused by intravenous drug use. Thus, 57% of all Palm Beach County cases were spread through these two means alone. The corresponding figure in Dade County was 19% heterosexual transmission, and 17% through intravenous drug use, for a total of 36%. In Broward County, 12% of AIDS cases were from heterosexual transmission, while 14% were from intravenous drug use, for a total of 26%. FLA. DEP'T OF HEALTH & REHABILITATIVE SERVICES, ADULT AIDS CASES AMONG NON HOMOSEXUAL PERSONS (March 29, 1989) (available from department). Nationally, only about 4% of all cases were caused by heterosexual transmission, while about 20% were from intravenous drug abuse. Id. See generally Heyward & Curran, The Epidemiology of AIDS in the U.S., Sci. Am., Oct. 1988, at 72; Mann, Chin, Piot & Quinn, The International Epidemiology of AIDS, Sci. Am., Oct. 1988, at 82.


5. The nondiscrimination provisions adopted in 1988 are discussed extensively in the author's prior analyses of the subject and will not be treated in detail here. See R.C. WATERS, supra note 1; 1988 AIDS Article, supra note 2. The present Article is intended to build upon the discussion contained in these prior publications by analyzing the impact of the 1989 legislation on this field of law.

6. This Article will address only those aspects of AIDS-related legislation approved in 1989 that define AIDS-related infections and being perceived as infected as handicaps. A few other provisions of the 1989 legislation concern other issues not related to discrimination. See ch. 89-350, § 14, 1989 Fla. Laws 2233, 2250-51 (codified at FLA. STAT. §§ 760.50(3)-.50(6) (1989)).

7. Id. at 2250 (codified at FLA. STAT. § 760.50(2) (1989)).

8. The 1989 Enactment is a "reference statute." See State v. J.R.M., 388 So. 2d 1227, 1229 (Fla. 1980); see also Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (1918); Jones v. Dexter, 8 Fla. 276 (1859), overruled on other grounds, Bushnell v. Denison, 13 Fla. 77 (1869).

9. See infra notes 102-223 and accompanying text, where this argument is fully developed.
list of such remedial measures is extensive. It includes provisions for-bidding discrimination against the handicapped in employment, housing, the receipt and use of state-backed housing and loans, education, emergency medical treatment, insurance, and the right to be served alcoholic beverages. Most significant of the prior handicap laws, however, is the Florida Constitution's explicit guarantee of equal protection and other basic rights for the handicapped. By incorporating this guarantee, the 1989 Enactment elevates persons with AIDS, or perceived as having AIDS, to the level of a highly protected "suspect class" under state constitutional law.

This Article traces the limits of the 1989 Enactment by analyzing its incorporation of handicap discrimination laws. To provide a historical context, the Article first examines the development of AIDS-specific nondiscrimination law prior to the 1989 Enactment, including the

Most of these remedial statutes do not define the term "handicapped." The major exception is the Florida Fair Housing Act. However, the Florida Fair Housing Act defines handicap in a way that is consistent with the view that having AIDS and being perceived as having AIDS-related infections are handicaps. See Fla. Stat. § 760.22(5) (1989).

11. Id. §§ 760.20-.37.
13. Id. § 228.001 (1989); see ch. 84-305, 1984 Fla. Laws 1435, 1439.
15. Id. §§ 627.644, .6615.
16. Id. § 562.51.
landmark Omnibus AIDS Act passed only a year earlier. Second, the Article discusses the relevant legislative history underlying the 1989 Enactment and the explicit findings that accompany it. Third, the Article analyzes the most significant of the prior handicap discrimination laws and the ways in which they now are incorporated into Florida's AIDS-specific statutes. Finally, the Article discusses the remedies available for AIDS-related handicap discrimination. The Article does not attempt to address the incorporation of all laws dealing with the handicapped.

I. Florida AIDS Discrimination Law Prior to 1989

Before the 1988 Omnibus AIDS Act, Florida's AIDS-specific non-discrimination law consisted entirely of a single administrative law order, Shuttleworth v. Broward County Office of Budget and Management Policy. In that decision, the executive director of the Florida Commission on Human Relations (Human Relations Commission) relied on the Florida Human Rights Act of 1977 (Human Rights Act) to declare that job-related discrimination against a person with full-blown AIDS was unlawful. This was so, according to the order, because AIDS constitutes a handicap, and discrimination against the handicapped by many employers is illegal under the Human Rights Act.

A. The Basis for the Shuttleworth Order

The Shuttleworth order based this conclusion on the "common usage" of the term "handicap," which it found to connote a condition

22. Shuttleworth, FCHR No. 85-0624, slip op. at 5-6.
23. The Human Rights Act applies only to those employers having 15 or more workers during 20 or more weeks during the current or preceding calendar year. Fla. Stat. § 760.02(6) (1989).
24. Shuttleworth, FCHR No. 85-0624, slip op. at 5-6. The Human Rights Act provides in pertinent part:
   (1) It is an unlawful employment practice for an employer:
      (a) To discharge or to fail or refuse to hire any individual or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's . . . handicap . . . .
      (b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's . . . handicap . . . .
that prevents normal functioning: "A person with a handicap does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties." The Human Relations Commission consistently has declined to read the term "handicap" in a more technical sense. For example, the Commission has rejected the detailed and somewhat more limited definition of "handicap" provided in the Florida Fair Housing Act (Fair Housing Act) and the one used in the federal Vocational Rehabilitation Act of 1973 (Rehabilitation Act). Thus, the Commission has leeway to develop its own working definition of "handicap" because the term is undefined in the Human Rights Act itself.

This "common usage" approach to the definition of "handicap," however, left some doubt as to how far the Commission might go in

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27. FLA. STAT. § 760.22(5) (1987). That statute declared that a handicap means:

(a) A person has a physical impairment which substantially limits one or more major life activities, or he has a record of having, or is regarded as having, such physical impairment; or

(b) A person is impaired by retardation, in that he has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18; or a person has a developmental disability as defined in s. 393.063(6). "Significantly subaverage general intellectual functioning," for the purpose of this definition, means performance which is two or more standard deviations from the mean score on a standardized intelligence test. "Adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his age, cultural group, and community.

Id.


Any person who (i) has a physical and 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 having such impairment. For the purposes of [the operative nondiscrimination provisions of the Rehabilitation Act] as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Id. at 706 (7)(B) (West 1985).

29. See FLA. STAT. § 760.02 (1989) (definitional section of Human Rights Act fails to define "handicap").
dealing with the full array of potential AIDS-related discrimination.\textsuperscript{30} Given the vagueness of the Commission’s position, this question appeared unanswerable prior to the Omnibus AIDS Act of 1988.\textsuperscript{31} For instance, it seemed likely that the diseases somewhat loosely described as AIDS-Related Complex (ARC) fell within the definition of “handicap” adopted by the Commission.\textsuperscript{32} However, this issue was clouded by the lack of a legal definition of ARC.\textsuperscript{33} Thus, it was not clear whether discrimination was illegal under *Shuttleworth* if based entirely on (1) a person’s symptomless infection with HIV,\textsuperscript{34} (2) the mere perception of such infection,\textsuperscript{35} or (3) fear of possible future infection.\textsuperscript{36}

Each of these three additional forms of discrimination is relatively remote from the physical condition formally classified as AIDS.\textsuperscript{37} As

\begin{itemize}
\item \textsuperscript{31} This problem is discussed at length in the author’s prior analysis of the statute. See 1988 AIDS Article, supra note 2, at 449-58.
\item \textsuperscript{32} Id. at 454.
\item \textsuperscript{33} R.C. Waters, supra note 1, app. A at 297-303 (reproducing transcripts of Fla. S., Comm. on HRS, May 3, 1988) (comments of Gary Clarke and others); 1988 AIDS Article, supra note 2, at 498.
\item \textsuperscript{34} “HIV” means “human immunodeficiency virus,” the causative agent of AIDS. It is synonymous with the terms “lymphadenopathy-associated virus” (LAV) and human T-cell lymphotrophic virus type three (HTLV-III), both earlier names given by researchers. Campbell, Medical Aspects of AIDS-Related Litigation, in National Gay Rights Advocates & National Lawyers Guild AIDS Network, AIDS Practice Manual: A Legal and Educational Guide II-9 n.12 (2d ed. 1988). The term “HIV” has been adopted by the Centers for Disease Control upon recommendation of the Assistant Secretary for Health, Department of Health & Human Services. HIV Infection Codes, 36 Centers for Disease Control: Morbidity and Mortality Weekly Report S-7, at 1-5 (Supp. Dec. 25, 1987).
\item Whether HIV actually causes, or is the exclusive cause of, AIDS, has been the subject of some controversy. See Campbell, supra, at II-9 n.12. The National Academy of Sciences, however, has concluded that HIV alone causes AIDS. Update 1988, supra note 1, at 2. For a discussion of the possible biological origins of HIV, see Essex & Kanki, The Origin of the AIDS Virus, Sci. Am., Oct. 1988, at 64.
\item \textsuperscript{35} 1988 AIDS Article, supra note 2, at 454-57.
\item \textsuperscript{36} Id. at 457-58.
\item To be formally described as “AIDS,” the infections or cancers associated with HIV infection must meet a rigorous five-step test prescribed by the Centers for Disease Control. *Id.* 474-75 n.159. First, the physician must discover no other diseases, drug use or congenital defect that would cause immunosuppression. Second, the patient must be diagnosed with at least one of twelve “indicator” diseases associated with AIDS. Third, if none of these diseases are present, AIDS can be diagnosed if the patient tests positive for the AIDS virus and has a disease usually caused by immunosuppression. Fourth, if normal diagnostic tests cannot be conducted, the physician can diagnose AIDS if the patient tests positive and has one of the seven most serious AIDS-related illnesses. Fifth, in the absence of a positive test result, the physician can diagnose AIDS only if the patient has (a) clinical evidence of pneumocystis carinii pneumonia or (b) any one of the other twelve “indicator” diseases in combination with a T-lymphocyte blood cell count of less than 400. *Id.* (quoting Revision of the CDC Surveillance Case Definition for Acquired Immunodeficiency Syndrome, 36 Centers for Disease Control: Morbidity & Mortality Weekly Report 1S passim (Supp. Aug. 14, 1987)).
\end{itemize}
that remoteness increases, legal arguments that Shuttleworth applies become less supportable. While one might contend that symptomless HIV infection is a "handicap" because of its emotional and life-shortening effects,38 the logic becomes far more strained when discrimination is based on subjective notions about AIDS.39 The mere belief that someone is or will become infected does not result in that person having less than "the full and normal use of . . . sensory, mental or physical faculties," as Shuttleworth requires.40

Such a narrow reading of Shuttleworth, however, would cause obvious social and policy problems. If employers violate the law by discriminating only against persons with AIDS and ARC, then the protections of the Human Rights Act apply only to a small fraction of those whose lives currently are being affected by HIV. In April 1988, for instance, the Florida Legislature estimated that over 200,000 Floridians were infected with the virus.41 Of these, only 4,446 had full-blown AIDS, and no more than about 42,000 had ARC.42 The remainder were symptomless carriers who, though infected, remained healthy and capable of being productive.43 Some knew of their infection; many did not. Countless other persons could be perceived as being "at risk" for HIV infection because of their life-styles, national origins or personal associations.44

38. 1988 AIDS Article, supra note 2, at 454-56.
39. See id. at 456-58.
40. This uncertainty was reflected in the legislative hearings on the Omnibus AIDS Act of 1988. R.C. Waters, supra note 1, app. A at 207-08 (reproducing Fla. H.R., Comm. on Health Care, transcript of hearing (Apr. 13, 1988) (comments of Rep. Lois Frankel, Dem., West Palm Beach)).
42. Staff of Fla. H.R. Comm. on Health Care, PCB for HC 88-07 (1988) Staff Analysis 1 (May 3, 1988) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.). The number of AIDS cases had risen to 7,700 by June 1, 1989. Fla. Dep't of HRS, ACQUIRED IMMUNODEFICIENCY SYNDROME (AIDS) SURVEILLANCE REPORT 2 (June 1, 1989).
43. R.C. Waters, supra note 1, app. A at 210-11 (reproducing Fla. H.R., Comm. on Health Care, transcript of hearing (Apr. 13, 1988) (comments of Rep. Frankel)) (people with symptomless HIV infection can remain productive for many years); id. at 426 (reproducing Fla. H. R., transcript of floor debate (May 11, 1988) (comments of Rep. Frankel)) (society cannot afford to provide welfare to those who lose jobs because of AIDS-related discrimination); id. at 435-38 (reproducing Fla. S., Comm. on Commerce, transcript of hearing (May 26, 1988) (testimony of Rep. Frankel)) (infected persons can be productive for up to 10 years in some cases).
44. See, e.g., Schram, AIDS Prevention—Too Little, Too Late, 12 NOVA L. REV. 1253, 1255 (1988) (AIDS has been perceived as a "gay" disease).
Denying the protection of *Shuttleworth* to symptomless carriers and persons perceived as being "unknowing" or "future" carriers would therefore endorse potential discrimination on a scale unprecedented since the days of racial segregation.\(^4\) Such denial would permit discrimination against persons who are healthy and able to contribute to society, while granting broad protections to those who are actually ill. Given the AIDS-related hysteria already evident in Florida,\(^4\) the result might well be the loss of a significant portion of the state's productive capacity, as well as bitter and unnecessary animosity.

**B. The Omnibus AIDS Act of 1988**

As the epidemic in Florida progressed and the number of the infected persons grew larger, reforms became necessary. The most sweeping of these reforms was the Omnibus AIDS Act of 1988.\(^4\)\(^7\) This broad series of enactments was meant to bring a radical attitudinal change to the state in the face of the grim death toll expected in the 1990s.\(^4\)\(^8\) One legislator predicted in 1988 that as many as 200,000 Floridians will die of AIDS-related illnesses by the end of the century, with an estimated cost to the state of up to a billion dollars per year.\(^4\)\(^9\)
In light of such forecasts, the 1988 Legislature concluded that AIDS-related discrimination is contrary to the interests of society and must be curbed.\(^{50}\) The Legislature also determined that methods must be established to encourage people to be tested voluntarily, without fear of reprisal.\(^{51}\)

Based on these two premises of the Omnibus AIDS Act, the 1988 Legislature enacted a series of AIDS-specific nondiscrimination and confidentiality laws. These included provisions outlawing work-related discrimination based on the results of HIV-related tests;\(^{52}\) forbidding employers from requiring HIV-related tests of their workers;\(^{53}\) providing strong civil remedies for AIDS-related discrimination in housing,\(^{54}\) public accommodations and governmental services\(^{55}\) or discrimination by any entity benefiting from state financial assistance;\(^{56}\)

\(^{50}\) *1988 AIDS Article*, supra note 2, at 462-63 nn.106-07 and accompanying text.

\(^{51}\) *Id.* at 463-64 nn.108-11 and accompanying text.

\(^{52}\) *FLA. STAT.* § 760.50(2)(b) (1989); *see 1988 AIDS Article*, supra note 2, at 473-81. The statute provides:

(b) No person may fail or refuse to hire or discharge any individual, segregate or classify any individual in any way which would deprive or tend to deprive that individual of employment opportunities or adversely affect his status as an employee, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment on the basis of the results of a human immunodeficiency virus-related test unless the absence of human immunodeficiency virus infection is a bona fide occupational qualification of the job in question.

*FLA. STAT.* § 760.50(2)(b) (1989).

\(^{53}\) *Id.* 760.50(3)(a); *see 1988 AIDS Article*, supra note 2, at 472-73. The statute provides:

"(2)(a) No person may require an individual to take a human immunodeficiency virus-related test as a condition of hiring, promotion, or continued employment unless the absence of human immunodeficiency virus infection is a bona fide occupational qualification for the job in question." *FLA. STAT.* § 760.50(3)(a) (1989).

\(^{54}\) *FLA. STAT.* §§ 760.50(1), 760.50(4)(a) (1989); *see 1988 AIDS Article*, supra note 2, at 468-70, 83. Section 760.50(1) (Supp. 1988) provided in pertinent part: "(1) Any person with acquired immune deficiency syndrome, acquired immune deficiency syndrome related complex, or human immunodeficiency virus shall have every protection made available to handicapped persons under the Fair Housing Act, ss. 760.20-760.37 . . . ." *FLA. STAT.* § 760.50(1) (Supp. 1988). The phrase "under the Fair Housing Act, ss. 760.20-760.37" was deleted in the 1989 session when all of the limiting language attached to this provision was deleted. This deletion is discussed more fully *infra*, notes 99-109 and accompanying text. Section 760.50(3)(a) (Supp. 1988) provided in pertinent part: "(3)(a) A person may not discriminate against an otherwise qualified individual in housing . . . on the basis of the fact that such individual is, or is regarded as being, infected with human immunodeficiency virus." *FLA. STAT.* § 760.50(3)(a) (Supp. 1988).

\(^{55}\) *FLA. STAT.* § 760.50(4)(a) (1989); *see 1988 AIDS Article*, supra note 2, at 481-85. The statute provides in pertinent part: "(3)(a) A person may not discriminate against an otherwise qualified individual in . . . public accommodations, or governmental services on the basis of the fact that such individual is, or is regarded as being, infected with human immunodeficiency virus." *FLA. STAT.* § 760.50(4)(a) (1989).

\(^{56}\) *FLA. STAT.* § 760.50(4)(b) (1989); *see 1988 AIDS Article*, supra note 2, at 485-88. The statute provides in pertinent part: "(3)(b) A person or other entity receiving or benefiting from state financial assistance 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." *FLA. STAT.* § 760.50 (4)(b) (1989).
and giving significant new protections to health care professionals who suffer discrimination because they are perceived as treating infected patients. 57

Despite the broad policies that inspired it, the Omnibus Act won final approval with a number of vague provisions and oversights that cast some doubt on how fully it would achieve its goals. 58 Many of the errors were minor. For instance, the section protecting health care professionals overlooked the possibility that many workers in health institutions may not be legally protected because they do not qualify as "professionals." 59 This oversight was corrected in the 1989 session. 60

Other vague portions of the law proved far more troublesome. Notable by its absence, for example, was any provision addressing the proper meaning of the term "handicap" as used in the Human Rights Act and in Shuttleworth. An earlier version of the 1988 bill in the House of Representatives had contained sections to codify Shuttleworth to state that symptomless infection and the perception of infection were "handicaps" under the Human Rights Act and other laws. 61 These provisions were deleted, however, in the final compro-

57. FLA. STAT. § 760.50(3)(d) (Supp. 1988); see 1988 AIDS Article, supra note 2, at 488-89.

The statute provided in pertinent part:

(d) No person may fail or refuse to hire or discharge any individual, segregate or classify any individual in any way which would deprive or tend to deprive that individual of employment opportunities or adversely affect his or her status as an employee, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment on the basis of the fact that the individual is a licensed health care professional who treats or provides patient care to persons infected with human immunodeficiency virus.

FLA. STAT. § 760.50(3)(d) (Supp. 1988).

58. These problems are documented in 1988 AIDS Article, supra note 2, at 449-90.

59. See Pierce v. AALL Ins., Inc., 531 So. 2d 84, 87 (Fla. 1988) (defining "professional" as any person practicing a vocation that requires at least a four-year college degree); see also 1988 AIDS Article, supra note 2, at 489 (discussing the problem).

60. See ch. 89-350, § 14, 1989 Fla. Laws 2233, 2251 (codified at FLA. STAT. § 760.50(4)(d) (1989)). The error originally was noted in 1988 AIDS Article, supra note 2, at 489.

61. R.C. Waters, supra note 1, app. B at 198-202 (reproducing Fla. H.R., Comm. on Health Care, PCB for HC 88-07, §§ 72-74 (draft of Apr. 13, 1988)). The pertinent sections of the Omnibus AIDS Act's early drafts had stated: "Section 72 ... (4) PROHIBITION AGAINST DISCRIMINATION. (a) A person may not discriminate against an otherwise qualified individual in employment ... on the basis of the fact that such individual is, or is regarded as being, infected with Human Immunodeficiency Virus." Id. at 199 (reproducing Fla. H.R. Comm. on Health Care, PCB for HC 88-07, § 72 (draft of Apr. 13, 1988)); "Section 73 ... For the purposes of defining an unlawful employment practice under §§ 760.01-760.10 [the Human Rights Act] for an employer, employment agency, labor organization, or joint labor-management committee, the term handicap shall include Human Immunodeficiency Virus Infection." Id. at 201 (reproducing Fla. H.R. Comm. on Health Care, PCB for HC 88-07, § 73 (draft of Apr. 13, 1988)); "Section 74 ... 760.22 Definitions.—As used in ss. 760.20-760.37
muse bill. Thus, it was unclear whether the Omnibus AIDS Act had extended *Shuttleworth* to address the full range of HIV-related discrimination.

Strong arguments existed that the two premises of the Omnibus AIDS Act, combined with some of its substantive language, required this extension. Such a conclusion might be derived particularly from the provision prohibiting workplace discrimination based on HIV-related test results. Because scientifically valid information on AIDS can be obtained only through such tests, any AIDS-related job discrimination arguably runs afoul of this section.

Nevertheless, the deletion of the earlier draft sections left the issue unsettled. Despite the arduous work that went into the Omnibus AIDS Act, the 1988 Legislature’s final compromise AIDS bill failed to clarify exactly how the Human Rights Act and other handicap laws would relate to AIDS and the perception of AIDS in Florida.

II. History of the 1989 Enactment

Commentators and practitioners examining the 1988 AIDS-related nondiscrimination laws were faced with an ambiguity whose resolution ultimately led to the 1989 Enactment. On the one hand, detailed analysis of the legislative history showed that, with a few noteworthy exceptions, the Omnibus AIDS Act was meant to outlaw most forms of AIDS-related discrimination. On the other hand, the exact language of the Omnibus AIDS Act did not answer the most significant question: whether symptomless infection and the mere perception of infection were “handicaps” under Florida law. The result was a good deal of confusion in the year between the 1988 and 1989 Legislative Sessions.

[the Fair Housing Act], the term: (5) ‘Handicap’ means: . . . . (c) A person infected with, or regarded as infected with, Human Immunodeficiency Virus.” *Id.* at 201-02 (reproducing Fla. H.R. Comm. on Health Care, PCB for HC 88-07, § 74 (draft of Apr. 13, 1988)).


63. FLA. STAT. § 760.50(3)(b) (1989).

64. This argument is made in 1988 AIDS Article, *supra* note 2, at 473-81.

65. The primary exception was the refusal of the Florida Senate to adopt language in the Omnibus AIDS Act that would have extended the *Shuttleworth* decision to businesses with fewer than 15 employees. *See 1988 AIDS Article, supra* note 2, at 456.

66. This legislative history is quoted and analyzed in detail. *Id.* 458-67. Transcripts of all the major legislative hearings on the Omnibus AIDS Act are reproduced in R.C. Waters, *supra* note 1, app. A, along with copies of all early drafts and analyses of the bill. *Id.* app. B.

67. *Id.* at 449-58; Barford & Wiley, *supra* note 30, at 46.
A. Precursors in the Omnibus AIDS Act

Some commentators were swayed by the 1988 legislative history and suggested that all or most forms of employment discrimination were rendered illegal.68 A few even speculated that the Omnibus AIDS Act made it unlawful to discriminate against intravenous drug abusers.69 They based this argument on a single vague provision in the Omnibus AIDS Act, subsection 760.50(1),70 that purported to give HIV-infected persons "every protection made available to handicapped persons under the . . . [federal] Rehabilitation Act . . . ."71 Because a few lower federal courts had found that the definition of "handicap" in the Rehabilitation Act included AIDS and symptomless HIV infection,72 these commentators felt that the 1988 Legislature had incorporated the Rehabilitation Act's definition of "handicap" by reference.73 The result, they believed, was a sweeping prohibition on AIDS-related discrimination by "all Florida employers [and not just federal contractors and grantees]."74

This reading, however, ignored the fact that a person can be "handicapped" under the Rehabilitation Act and still not be entitled to any of that law's "protection." Indeed, determining if a "handicap" existed is only the first step in the federal analysis. Basic tort law concepts illuminate the problem. A "protection" is the legal right to be free from conduct committed by persons who are under a duty to refrain from such conduct. No one may claim a civil law's protection unless the "breaching" party actually was under such a duty.75

70. FLA. STAT. § 760.50(1) (Supp. 1988). This subsection was the provision amended by the 1989 Enactment. See infra notes 89-92 and accompanying text.
71. FLA. STAT. § 760.50(1) (Supp. 1988); see 1988 AIDS Article, supra note 2, at 470-71. The section provided in pertinent part: "(1) Any person with acquired immune deficiency syndrome, acquired immune deficiency syndrome related complex, or human immunodeficiency virus shall have every protection made available to handicapped persons under . . . s. 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112." FLA. STAT. § 760.50(1) (Supp. 1988). This provision was rewritten in 1989 to delete the reference to the federal Rehabilitation Act as well as other limiting language. Ch. 89-350, § 14, 1989 Fla. Laws 2233, 2250 (codified at FLA. STAT. § 760.50(2) (1989)).
74. Barford & Wiley, supra note 23, at 46 (emphasis in original); accord McHugh, supra note 68, at 62.
75. See, e.g., Tiedler v. Little, 502 So. 2d 923, 925 n.1 (Fla. 3d DCA 1987); Lake Parker Mall, Inc. v. Carson, 327 So. 2d 121, 123 (Fla. 2d DCA 1976).
The second step in the analysis is to determine whether a duty was owed to the handicapped individual. The Rehabilitation Act was clear on this point. The "protections" created under the federal statute did not extend to all handicapped persons but merely to a subclass—those suffering discrimination by certain named entities. These entities are the only ones under a duty not to discriminate. The federal law names them: "any program or activity receiving Federal financial assistance or . . . any program or activity conducted by any Executive agency or by the United States Postal Service." Unless the discriminatory conduct was committed by one of these entities, no duty, no breach, and no "protection" existed. The effort to incorporate these federal "protections" into Florida law thus appeared dubious at best.

The 1988 Enactment attempted to impose an additional state law duty on the entities named in the federal Rehabilitation Act. The supremacy clause of the federal Constitution, however, almost certainly voided this effort, because the state cannot modify federal legislation, regulate federal agencies, or attach conditions to federal grants. Even the sponsor of this provision, Senator William Myers, had conceded in the 1988 legislative hearings that the language "doesn't really say anything other than there is a federal law." This interpretation was endorsed by Representative Lois Frankel, primary sponsor of the Omnibus AIDS Act in 1988. Frankel said the provision was probably mere surplusage.

76. 29 U.S.C.A. §§ 793-94 (West Supp. 1989). The argument advanced by Barford & Wiley, supra note 30, at 46, was all the more puzzling in light of their concession that "[t]he only meaningful limitation to the protections of the Rehabilitation Act in Florida is that the Act applies only to federal contractors and recipients of federal assistance." Id. (emphasis added). They did not explain how "protections" could be limited in this way under federal law, but somehow expanded to include all persons when a Florida statute purports to incorporate the Rehabilitation Act by reference. See id. 46-47. In any event, the Rehabilitation Act also covers postal workers, a fact they neglected to mention. See 29 U.S.C.A. § 794(a) (West Supp. 1989).
78. Indeed, a "reference statute" has the effect of incorporating the literal language of the statute as though it were recited verbatim. State v. J.R.M., 388 So. 2d 1227, 1229 (Fla. 1980).
79. U.S. Const. art. VI, § 2.
80. 1988 AIDS Article, supra note 2, at 470-71.
81. Repub., Hobe Sound.
82. R.C. Waters, supra note 1, app. A at 452 (reproducing Fla. S., Comm. on Commerce, transcript of hearing (May 26, 1988) (comments of Sen. Myers)). At this time, in fact, Sen. Myers noted a staff analysis arguing that the mention of the Rehabilitation Act might have some substantive effect. Id.
83. 1988 AIDS Article, supra note 2, at 471 n.142 (citing Fla. S., Comm. on Commerce, transcript of hearing at 20 (May 26, 1988) (comments of Sen. Myers)).
84. Dem., West Palm Beach.
85. Representative Frankel's role in the drafting of the Omnibus AIDS Act is documented in 1988 AIDS Article, supra note 2. Full transcripts of major legislative hearings also show she was primarily responsible for the omnibus bill. See R.C. Waters, supra note 1, app. A.
86. 1988 AIDS Article, supra note 2, at 471 n.142.
The 1988 Legislature, then, did not settle the troubling question left unresolved by Shuttleworth: whether symptomless HIV infection and the perception of such infection were "handicaps" under Florida law. More work was required, and it came in 1989.

B. Development of the 1989 Enactment

Partly as a result of the confusion caused by these provisions of the Omnibus AIDS Act, Representative Frankel requested suggestions from a number of sources, including the author of this Article. On March 1, 1989, the author submitted a package of proposed amendments. The package included the following change to subsection 760.50(1), the ambiguous provision discussed in the preceding subsection of this Article:

(2) Any person with or perceived as having Acquired Immune Deficiency Syndrome, Acquired Immune Related Complex, or Human Immunodeficiency Virus shall have every protection available to handicapped persons under 760.20-37, Florida Statutes, Fair Housing Act, and s. 504, Pub. L. No. 93.112, the Rehabilitation Act of 1973.

The 1989 Legislature adopted these amendments with a minor, technical alteration, and Florida Governor Bob Martinez approved them on July 5, 1989. The end result was the 1989 Enactment, and the effect was threefold: (1) to delete the reference to the Rehabilitation Act; (2) to delete the reference to the Fair Housing Act, thereby re-


88. See Letter from Robert Craig Waters to Tom Cooper, Staff Analyst, Fla. H.R., Comm. on Health Care, and Phil Williams, Staff Analyst, Fla. S., Comm. on Health Care (March 1, 1989) (available at Fla. Dept' of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.) [hereinafter Waters Letter].

89. FLA. STAT. § 760.50(1) (1989). It is important to note that, in the 1989 Florida Statutes, the 1989 Enactment's changes to section 760.50(1), Florida Statutes (Supp. 1988), will result in its being renumbered as section 760.50(2), Florida Statutes. See ch. 89-350, § 14, 1989 Fla Laws 2233, 2250 (codified at FLA. STAT. § 760.50(2) (1989)).

90. Waters Letter, supra note 88, app. D at 23 (additions underlined, deletions struck through).

91. The word "made," which had been mistakenly omitted by the Author, was inserted between the words "protection" and "available." Compare id. with ch. 89-350, § 14, 1989 Fla. Laws 2233, 2250 (codified at FLA. STAT. § 760.50(2) (1989)). The word "made" was in the original text of the 1988 statute and should have appeared in the proposal. See FLA. STAT. § 760.50(1) (Supp. 1988).

92. Ch. 89-350, § 14, 1989 Fla. Laws 2233, 2250 (codified at FLA. STAT. § 760.50(2) (1989)).
moving all other limiting language; and (3) to make the perception of AIDS a protected handicap.

1. Deleting Reference to the Rehabilitation Act

As noted above, the reference to the Rehabilitation Act had prompted some commentators to interpret the new law directly contrary to the legislative history, especially that of the 1988 Senate. This history showed that subsection 760.50(1) had never been intended to impose a duty upon persons not already bound by handicap discrimination law, as these commentators had urged. Rather, the 1988 Legislature had intended simply to equate AIDS, ARC and HIV infection with handicaps. By deleting the reference to the Rehabilitation Act, the 1989 Legislature directly rejected the views of these commentators. The duty to treat AIDS as a protected handicap would bind only those people whom the handicap laws already have bound, not the entire world.

93. See supra notes 58-65 and accompanying text. In contrast, the author stated:

I do not believe it was what the Legislature intended, as evidenced by the Senate's unwillingness in 1988 to extend Shuttleworth to small businesses (those with fewer than 15 workers during specified periods of a year). Indeed, a section that would have extended Shuttleworth to small businesses was the only nondiscrimination proposal from the House that the Senate rejected.


94. Barford and Wiley stated:

It applies not just to federal contractors and grantees or employers of 15 or more employees, but to all employers regardless of type or size. . . .

The most likely interpretation of §45(1) [sic] is that by extending the protections of the Rehabilitation Act to any person with AIDS, ARC or HIV, the legislature sought to subject all Florida employers (and not just federal contractors and grantees) to the antidiscrimination provisions of the Rehabilitation Act. This interpretation would represent a major expansion of AIDS discrimination law in Florida. Under this interpretation, §45 [sic], unlike the Rehabilitation Act, would apply to employers of all types rather than just federal contractors and grantees. And unlike the Florida Human Rights Act, § 45 would apply to employers of all sizes rather than only those employing 15 or more employees. Put simply, all employees with AIDS, ARC, or HIV would be protected by the new law.

Barford & Wiley, supra note 30, at 46; accord McHugh, supra note 68, at 62.

95. See 1988 AIDS Article, supra note 2, at 467-71; Waters Letter, supra note 88, at 5. This argument applies, however, only to section 760.50(1), Florida Statutes (Supp. 1988). Other provisions of the Omnibus Act create special AIDS-specific civil rights, particularly in the areas of HIV testing, discrimination by entities benefiting from state assistance and discrimination against health care workers. 1988 AIDS Article, supra note 2, at 471-89.

96. See ch. 89-350, § 14, 1989 Fla. Laws 2233, 2250 (codified at Fla. Stat. § 760.50(2) (1989)).

97. This does not mean, however, that additional remedies are not available to those with or perceived as having AIDS, ARC, or HIV infection. Certainly, the Omnibus AIDS Act provides several extraordinary remedies other handicapped persons cannot seek. See Fla. Stat. § 760.50 (1989). Rather, the Legislature in enacting section 760.50(1) did not intend to create a duty where none existed under the handicap discrimination laws mentioned in the statute, as some of the commentators had urged. See Barford & Wiley, supra note 30, at 46.
The deletion, however, was not intended as a rejection of the general principles underlying the Rehabilitation Act. Rather, the deletion acknowledged that the Florida Legislature is powerless to modify federal law or to regulate federal grants, federal executive agencies, or the Postal Service. In this way, the 1989 Enactment clarified the actual intent of the Omnibus AIDS Act, which was to provide that AIDS and the perception of AIDS are handicaps entitled to certain specific protections under Florida law. The principles of the Rehabilitation Act were not rejected; they were used as the starting point for the creation of a new state law that resolved the issues left unsettled before.

2. Removing Other Limiting Language

In addition to deleting the reference to the Rehabilitation Act, the 1989 Enactment also removed a separate reference to the Fair Housing Act. These were the only two provisions of law specifically incorporated into subsection 760.50(1) in 1988 and they operated as limiting language. Under settled rules of statutory construction, the mention of only two specific statutes would mean that the Legislature did not intend to incorporate any others. The 1989 Legislature's deletion of limiting language thus did not deny persons with AIDS or the perception of HIV infection the protections of the Fair Housing Act. Any other conclusion is untenable in light of a separate statute directly forbidding housing-related discrimination against these same people.

The Legislature's purpose was only to remove all the limiting language previously attached to subsection 760.50(1). This converts subsection 760.50(1) into a general "reference statute"—one that incorporates the literal language of a number of other laws by referring to them by subject. The subject here is all other handicap discrimination law, which is incorporated by reference to the "protection" this law provides.

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100. See, e.g., Thayer v. State, 335 So. 2d 815 (Fla. 1976). The principle is often expressed in the Latin phrase "expressio unius est exclusio alterius," which means that the mention of one thing excludes others. See id. at 817.


102. See State v. J.R.M., 388 So. 2d 1227, 1229 (Fla. 1980); Van Pelt v. Hilliard, 75 Fla. 792, 808-09, 78 So. 693, 698 (1918); Jones v. Dexter, 8 Fla. 276 (1859), overruled on other grounds, Bushnell v. Dennison, 13 Fla. 77 (1869).
Florida courts have long recognized the viability of this sort of gen-
eral reference statute. As early as 1859, for instance, the Florida Su-
preme Court held that a statutory reference to "the law regulating
descents" had the effect of incorporating all law on the subject.\textsuperscript{103} As late as 1980, the Court reaffirmed this principle. In \textit{State v. J.R.M.},\textsuperscript{104} the court upheld a reference statute against a charge it violated the constitutional ban on amending other statutes by reference to their titles alone. This ban applies, the court said, in only two instances: (1) if the reference statute directly and irreconcilably conflicts with the other statutes it purported to incorporate, or (2) if the reference statute seeks to revise the subject matter of the other statutes.\textsuperscript{105}

The 1989 Enactment does not run afoul of these concerns. First, no "irreconcilable repugnancy"\textsuperscript{106} exists between the 1989 Enactment and other handicap legislation. The former merely provides a partial definition of the term "handicap," so that AIDS and the perception of AIDS-related infections will be included. Thus, "the former rule can operate without conflicting with the latter."\textsuperscript{107} Second, the 1989 En-
actment does not attempt to address the subject matter of the handi-
cap discrimination laws. The scope of these laws remains unchanged. The 1989 Enactment merely resolves the question of whether the term "handicap" includes AIDS-related problems and perceptions.

The effect is to declare that AIDS and the perception of AIDS-re-
lated infections are entitled to the protections provided by \textit{every} Flor-
da handicap discrimination statute and law, including the Fair
Housing Act. The reference to "every protection made available to
handicapped persons"\textsuperscript{108} brooks no exceptions. Thus, by removing the
references to the Rehabilitation Act and the Fair Housing Act, the
1989 Legislature expanded subsection 760.50(1) so that it is now a refer-
ence statute, approved without violation of the Florida Constitu-
tion.\textsuperscript{109}

\section{The Perception of AIDS as a "Handicap"}

Finally, by adding a new clause to the statute,\textsuperscript{110} the 1989 Enact-
ment expanded the definition of "handicap" to include the perception

\begin{flushleft}
103. \textit{Jones}, 8 Fla. at 285.
104. 388 So. 2d 1227 (Fla. 1980).
105. \textit{id.} at 1229.
106. \textit{See id.}
107. \textit{See id.}
108. Ch. 89-350, § 14, 1989 Fla. Laws 2233, 2250 (codified at FlA. Stat. § 760.50(2) (1989)).
(reprinted \textit{supra} page 444).
\end{flushleft}
that a person has AIDS, ARC, or HIV infection. The new language within this definition effectively settles one of the most difficult questions left unresolved by Shuttleworth and the Omnibus AIDS Act—the status of those merely thought to be at risk of contracting AIDS.\textsuperscript{111} Read together, the Human Rights Act\textsuperscript{112} and the declaration contained in the 1989 Enactment now mean that workplace discrimination based on a mere perception of infection is as unlawful as discrimination based on the disease itself. Thus, even an erroneous belief that someone is infected by HIV is a handicap for purposes of Florida handicap discrimination statutes.

In this way, the 1989 Enactment also addresses discrimination based on the belief that someone will develop AIDS or related infections in the future.\textsuperscript{113} The symptomless latency period of early HIV infection, lasting a probable average of four and a half years,\textsuperscript{114} necessarily favors this conclusion. Because of this long latency, a belief that someone will develop HIV-related infections at a later date is the equivalent of saying that the person probably is infected today.\textsuperscript{115} If AIDS is thought to be in prospect, HIV infection must have occurred already. Moreover, any attempt to excuse AIDS-related discrimination on the basis of latency would permit the use of pretexts, such as saying one did not perceive a present illness, but feared a future one.\textsuperscript{116} Logic dictates that, if only for practical reasons, such pretexts cannot be tolerated under the 1989 Enactment.

This argument is strongly buttressed by another 1989 addition to section 760.50—an explicit statement of findings and intent.\textsuperscript{117} The 1989 Legislature declared that "persons infected or believed to be infected with human immunodeficiency virus have suffered and will continue to suffer irrational and scientifically unfounded discrimination."\textsuperscript{118} The Legislature then concluded that this discrimination harms society itself. Such harm occurs because "otherwise able-bodied persons are deprived of the means of supporting themselves, providing for their own health care, housing themselves, and

\begin{footnotes}
\item[111] This question was discussed in 1988 AIDS Article, supra note 2, at 456-58.
\item[112] FLA. STAT. §§ 760.01-10 (1989).
\item[113] This problem was discussed in 1988 AIDS Article, supra note 2, at 457-58.
\item[115] See 1988 AIDS Article, supra note 2, at 458.
\item[116] This argument is made in 1988 AIDS Article, supra note 2, at 457-58.
\item[117] Ch. 89-350, § 14, 1989 Fla. Laws 2233, 2250 (codified at FLA. STAT. § 760.50(1) (1989)). This language also originated in the proposal submitted by the author of this Article at Representative Frankel's request. See Waters Letter, supra note 88, at 22-23.
\item[118] Ch. 89-350, § 14, 1989 Fla. Laws 2233, 2250 (codified at FLA. STAT. § 760.50(1) (1989)) (emphasis added).
\end{footnotes}
participating in the opportunities otherwise available to them in society." Additionally, the 1989 Legislature explicitly labeled section 760.50 as remedial legislation intended "to correct these problems" and thereby contribute to the welfare of society as a whole.

These findings, combined with the other provisions of the statute, will ensure far-reaching protection against AIDS-related discrimination. Florida law requires that remedial statutes of this type be construed broadly to achieve their purposes. In the event of an ambiguity in the statutory language, the courts are obligated to accept the interpretation that best affords the remedies created by the Legislature, even if the interpretation exceeds the literal language of the statute. Florida law also requires that statutes for the public welfare must be liberally construed in favor of the public, even though such statutes penalize specific persons who violate the law.

Thus, the statement of findings and intent added to section 760.50 in 1989 will require the courts to interpret the amended section 760.50 so as to achieve the legislature's purpose of eliminating harm to society. This purpose, in turn, requires that people not be denied the opportunity to work, to take advantage of society's opportunities, to support themselves, to obtain housing and to provide for their own health care based on AIDS or the perception of HIV infection.

III. THE 1989 ENACTMENT'S INCORPORATION OF PRIOR HANDICAP LAW

Because the 1989 Enactment is a general reference statute, the incorporation of other handicap laws will have a far-reaching impact. Before the threat of AIDS was fully appreciated, Florida had adopted a variety of statutes outlawing discrimination against the handicapped in several contexts, particularly employment and housing. These prior handicap statutes have been supplemented through the years with laws that have further extended handicap discrimination law into other contexts. Perhaps the most significant provision is a clause in the

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119. Id.
120. Id. The specific language was that "remedies are needed to correct these problems." Id.
121. See, e.g., Stern v. Miller, 348 So. 2d 303 (Fla. 1977); State ex rel. Cooper v. Coleman, 138 Fla. 520, 189 So. 691 (1939).
122. Neville v. Leamington Hotel Corp., 47 So. 2d 8 (Fla. 1950); Becker v. Amos, 105 Fla. 231, 141 So. 136 (1932).
123. Jones v. Dexter, 8 Fla. 276 (1859), overruled on other grounds, Bushnell v. Dennison, 13 Fla. 77 (1869).
125. See supra note 8 and accompanying text.
Florida Constitution that explicitly guarantees equal protection and other basic rights to the handicapped.  

A. The Florida Constitution's "Handicap Clause"

The "handicap clause" was added to the state constitution by Florida voters on November 5, 1974. Falling under a constitutional section labeled "[b]asic rights," the provision states in pertinent part that "[n]o person shall be deprived of any right because of . . . physical handicap." The provision further states that these rights include equality before the law, the right to enjoy and defend life and liberty, the right to pursue happiness, the right to be rewarded for industry, and the right to acquire, possess and protect property. Based on this constitutional language, the physically handicapped in Florida should be entitled to equal protection—the right to be treated the same as anyone else under the law.

1. Effects of the Constitutional Provision

By incorporating prior handicap law, the 1989 Enactment extends state constitutional protections to those who have AIDS, ARC, HIV infection or the perception of any of these illnesses. The 1989 Enactment thus resolves a question not yet addressed by the courts: whether the term "physical handicap" in the Florida Constitution includes AIDS-related conditions or perceptions. Previously, some authors believed that it did, and the issue had been raised but not resolved in at least one lawsuit based on AIDS discrimination.

The 1989 Enactment shows that, as a matter of public policy, the law of Florida recognizes AIDS-related conditions and perceptions as handicaps. This is only in keeping with the interpretation of other statutes. As discussed earlier in this Article, the use of the term "handicap" in the Florida Human Rights Act has been construed to include AIDS. Similarly, the Florida Department of Education has interpreted the term "handicap" in education-related statutes to include AIDS and related conditions. Additionally, no Florida court or ad-

126. FLA. CONST. art. I, § 2.
128. Id.
129. Id.
130. See R. C. WATERS, supra note 1, § 4.01; McHugh, supra note 68, at 56-57.
132. See supra notes 22-25 and accompanying text.
ministrative body addressing the question has excluded AIDS-related conditions and perceptions from the definition of the term "handicap."

Accordingly, the author submits that the issue now has been settled by the Legislature. The 1989 Enactment, read in light of the uniformity of law and public policy on this matter, should mean that AIDS, ARC, HIV infection, and the perception of any of these illnesses now are "physical handicaps" under state constitutional law. Thus, those afflicted or perceived as being afflicted would be protected by the "handicap clause" contained in the state constitution's equal protection provision. The next question is the exact scope of these protections.

2. Scope of the Constitutional Protection

The extent of the state equal protection guarantee was previously settled in *Schreiner v. McKenzie Tank Lines*, where the Florida Supreme Court determined that discrimination is not forbidden by the state constitution unless it originates in "state action." The First District Court of Appeal suggested two theories as to the meaning of "state action," both of which are concerned primarily with determining whether the state is sufficiently involved in the activity in question. Thus, the equal protection provision binds only the state and its agents, not private parties.

Another limitation arises from the two alternative standards of review used by Florida's courts to gauge the propriety of a government-sponsored discriminatory act: the so-called "rational basis" test and the "strict scrutiny" test. Generally, the more severe strict scrutiny

134. 432 So. 2d 567 (Fla. 1983), approving and adopting 408 So. 2d 711 (Fla. 1st DCA 1982).

135. *Id.* at 569-70.


The symbiotic relationship test asks whether "a symbiotic relationship [exists] between the state and private concerns which in effect made them joint partners in discrimination." *Id.* The close nexus test asks "whether there is a sufficiently close nexus between the state and the challenged action of the private party so that the action of the later [sic] may be fairly treated as that of the state itself." *Id.* (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

It is unclear which of these tests is preferred in Florida. The United States Supreme Court has continued to analyze the state action issue using both tests, without apparently favoring one or the other. See, e.g., *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 547 n.29 (1987).

137. It is now clear that a "strict scrutiny" analysis is applied purely as a matter of Florida constitutional law. See *De Ayala v. Florida Farm Bureau Casualty Ins. Co.*, 543 So. 2d 204, 207 (Fla. 1989); *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 251 (Fla. 1987).
test requires that the statute or regulation in question be based on a compelling state need advanced by the least restrictive means available. This test is applied only when fundamental rights are involved or the discrimination is aimed at a "suspect class," such as a racial or religious group. Otherwise, the courts use the rational basis test, which gives great deference to the governmental activity, even if it discriminates between two similarly situated groups. Thus, the question arises whether the handicapped are a suspect class.

The language of the Florida Constitution strongly suggests that the physically handicapped are a suspect class, explicitly placing them on a level with other suspect classes. Specifically, the only minorities actually named in the Florida equal protection provision are racial groups, religious groups, and the handicapped. It follows that a discriminatory act based on physical handicap should be regarded as "inherently suspect" and deserving of substantial judicial scrutiny under state law, even though the physically handicapped are not given this higher degree of judicial review under the federal Constitution. The Florida courts now may be obligated to apply at least something approaching a "strict scrutiny" test, rather than the more lenient "rational basis" test, in state handicap discrimination cases. Hence, in light of the 1989 Enactment, both AIDS-related illnesses and the perception of them now fall within these same constitutional protections.

In sum, the Legislature determined in 1989 that "any person with or perceived as having [AIDS, ARC or HIV infection] shall have every protection made available to handicapped persons." Foremost among these protections is the Florida Constitution's guarantee that the physically handicapped are entitled to equal protection, the same as racial and religious minorities. The author thus submits that the 1989 Enactment equated the constitutional term "physical handicap" with AIDS, ARC, HIV infection, and the perception of any of these illnesses—a conclusion underscored by the liberal construction ac-

138. *See De Ayala*, 543 So. 2d at 206-07; *Palm Harbor*, 516 So. 2d at 251.
139. *Palm Harbor*, 516 So. 2d at 251.
141. *Id.*
143. Florida courts, purely as a matter of state constitutional law, follow the "strict scrutiny" approach whenever the government engages in an act that treats a suspect class differently from others. *De Ayala v. Florida Farm Bureau Casualty Ins. Co.*, 543 So. 2d 207, 207 (Fla. 1989); *Palm Harbor*, 516 So. 2d at 251-52.
144. Ch. 89-350, § 14, 1989 Fla. Laws 2233, 2250 (codified at *Fla. Stat. § 760.50(2)* (1989)).
corded to terms in the constitution. People who have these conditions or suffer from these perceptions now are entitled to a stricter level of scrutiny when they suffer government-sponsored discrimination. This strict scrutiny applies either as a matter of statutory law under the 1989 Enactment or as a matter of a definite state policy that people with AIDS, or the perception of AIDS-related conditions, are to be regarded as handicapped under all Florida law.

B. The Florida Human Rights Act of 1977

One of the most far-reaching state handicap discrimination laws, after the Florida Constitution's "handicap clause," is the Human Rights Act of 1977. As noted earlier, this statute was the basis of the landmark Shuttleworth order. Before the Omnibus AIDS Act was passed, the Human Rights Act was the primary state-law vehicle for redressing AIDS-related job discrimination. Read in light of the 1989 Enactment, the Human Rights Act now will be applied to prohibit job-related discrimination whenever it arises from the fact or perception that someone has an AIDS-related illness or infection. In effect, the 1989 Enactment both codifies Shuttleworth and extends its principles to those with symptomless HIV infection and those perceived as being infected.

1. Scope of the Protections

The protections afforded by the Human Rights Act will be substantial. In a series of subsections, the Human Rights Act prohibits discrimination against the handicapped in hiring, firing, and job-related conditions, privileges, or compensation; in internal job policies and classifications; in the practices of employment agencies; in the practices of labor organizations; in apprenticeship and job-training

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145. Words contained in the constitution should be accorded a broader and more liberal construction than would those in a statute. Florida Soc'y of Ophthalmology v. Florida Optometric Ass'n, 489 So. 2d 1118, 1119 (Fla. 1986) (citing State Highway Comm'n v. Spainhower, 504 S.W.2d 121, 125 (Mo. 1973)).

146. FLA. STAT. §§ 760.01-.10 (1989).

147. See supra notes 25-29 and accompanying text.

148. FLA. STAT. § 760.10(1)(a) (1989).

149. Id. § 760.10(1)(b).

150. Id. § 760.10(2).

151. Id. § 760.10(3). A "labor organization" is defined as "any organization which exists for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or other mutual aid or protection in connection with employment." Id. § 760.02(8).
programs;\textsuperscript{152} in job-related licensing or certification programs;\textsuperscript{153} in job-related advertisements;\textsuperscript{154} and in case of retaliation for a complaint filed under the Human Rights Act.\textsuperscript{155} Read in light of the 1989 Enactment, the effect of these subsections will be to prohibit virtually all job-related discrimination against those who have, or are believed to have, AIDS or related infections.

2. \textit{The Bona Fide Occupational Qualification Defense}

The Human Rights Act is subject to one defense, however, that may sometimes, if rarely, be applicable in this context. Closely tracking analogous federal law,\textsuperscript{156} the Human Rights Act permits exceptions for "bona fide occupational qualifications" (BFOQs).\textsuperscript{157} BFOQs generally exist when the discriminatory act is based on a job qualification reasonably necessary to the essence of the business and when, in addition, those who lack the qualification either will be unable to work safely and efficiently or cannot be reasonably identified by the employer.\textsuperscript{158} In a few cases, a BFOQ might apply to AIDS-related job discrimination. For instance, an employer might reasonably refuse to hire someone suffering from a physically debilitating symptom of HIV infection, such as AIDS-related dementia,\textsuperscript{159} when it impairs job performance.

The BFOQ exception, however, does not offer any guidance on more subtle "facially neutral" forms of discrimination. Employers might adopt policies, for example, that inordinately affect people with AIDS but do not expressly discriminate against them, such as policies against excessive absenteeism. In analogous situations, the federal courts have examined the employer's actions to determine whether they were mere "pretexts."\textsuperscript{160} If, for instance, a policy against excessive absenteeism is applied selectively to people with AIDS but not to others, the courts might find it to be an impermissible pretext.

\textsuperscript{152} Id. § 760.10(4).
\textsuperscript{153} Id. § 760.10(5).
\textsuperscript{154} Id. § 760.10(6).
\textsuperscript{155} Id. § 760.10(7).
\textsuperscript{157} Fla. Stat. § 760.10(8)(a) (1989).
\textsuperscript{159} AIDS-related "HIV dementia" is a disabling of thinking and motor functions interfering with daily activities when nothing other than a positive HIV test can explain the impairment. R.C. Waters, supra note 1, § 1.06, at 23 & n.137 (citing \textit{Revision of the CDC Surveillance Case Definition for Acquired Immunodeficiency Syndrome}, 36 \textit{Centers For Disease Control: Morbidity and Mortality Weekly Report} IS, 14S (Supp. Aug. 14, 1987)).
\textsuperscript{160} See, e.g., Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); see also R.C. Waters, supra note 1, § 2.02(c).
Even in the absence of a provable pretext, the federal courts still have applied close scrutiny to some job policies that have a "disparate impact" on protected classes. An example might be a policy against absenteeism that apparently was applied evenhandedly, but that had the effect of forcing all employees with AIDS to lose their jobs. In such instances, the courts have required an employer to justify its policy as a "business necessity," which means the policy in question must be reasonably necessary for the safe and efficient operation of the business. If the employer can justify a practice according to "business necessity," the employee can prevail only by showing that reasonable alternative policies could have accomplished the business purposes without having a disparate impact.

The Human Relations Commission has not yet indicated whether it will apply the federal "pretext" and "business necessity" concepts to state handicap discrimination. Nevertheless, at least one Florida appellate court has suggested that these theories may be useful. If the Human Relations Commission and the courts accept this view, the Human Rights Act could sweep very broadly in the area of AIDS-related job discrimination. It could mean that employers are significantly restricted even in adopting facially neutral policies if the burden falls too heavily on those with, or those perceived as having, AIDS. By declaring that AIDS and the perception of HIV infection are handicaps, the 1989 Enactment may have broadened the Human Rights Act so that it now reaches both "pretexts" and "unnecessary" business policies, subject to the BFOQ defense.

C. The Florida Fair Housing Act of 1983

Another broad handicap discrimination statute is the Florida Fair Housing Act. Passed by the Legislature in 1983 and amended substantially in 1984, the Fair Housing Act now makes it illegal to discriminate against handicapped persons in practices associated with

161. See, e.g., Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1552 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172, 1188 (4th Cir. 1981) (quoting Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971)); see also R.C. Waters, supra note 1, § 2.02(c).
162. See, e.g., Hayes, 726 F.2d at 1552.
163. E.g., id. at 1553.
164. See School Bd. of Pinellas Cty. v. Rateau, 449 So. 2d 839, 842 (Fla. 1st DCA 1984).
168. As noted earlier, the Fair Housing Act expressly defines "handicapped person." See supra note 9. This definition, however, is entirely consistent with the conclusion reached in this Article, that having AIDS and being perceived as having a HIV infection are handicaps.
buying, selling, and renting housing. This statute, read in light of the 1989 Enactment, now will be extended to cover people with AIDS, ARC, HIV infection, or the perception of any of these illnesses.169

1. Scope of the Statute

These protections are very broad. The Fair Housing Act prohibits discrimination against the handicapped in rentals and sales in general;170 in the terms, conditions, or privileges of a sale or rental;171 in real estate advertisements;172 in making representations that property is unavailable for inspection, rental, or sale;173 in "preemptively" selling or renting to a non-handicapped person to exclude one who is handicapped;174 in access to multiple listing services and real estate brokers;175 in real estate financing;176 and when the discrimination is in retaliation for filing a complaint under the Fair Housing Act.177 Under the state policy contained in the 1989 Enactment, these same protections now will be extended to persons with, or perceived as having, any AIDS-related illness or condition.

2. Exceptions

The Fair Housing Act, like the Human Rights Act, is subject to some exceptions. Most significant is an exemption provided to landlords or sellers who do not own more than three "dwellings"178 at a time.179 This exemption, however, cannot be claimed more than once in a two-year period,180 or if the landlord or seller has any interest in rents or proceeds from more than three other single-family houses at any one time.181 Nor can the exemption be claimed if a realtor or other

169. Other statutes extend similar protections to those who are handicapped by AIDS or AIDS-related perceptions in the area of housing. See, e.g., Fla. Stat. § 760.50(3)(a) (1989).
170. Id. § 760.23(1).
171. Id. § 760.23(2).
172. Id. § 760.23(3).
173. Id. § 760.23(4).
174. Id. § 760.23(5).
175. Id. § 760.24.
176. Id. § 769.25.
177. Id. § 760.37.
178. The term "dwelling" is defined as:
   any building or structure, or portion thereof, which is occupied as, or designated or
   intended for occupancy as, a residence by one or more families, and any vacant land
   which is offered for sale or lease for the construction or location on the land of any
   such building or structure, or portion thereof.
   Id. § 760.22(4). The term "family" includes a single individual. Id. § 760.22(6).
179. Id. § 760.29(1)(a)1.
180. Id.
181. Id.
person engaged in the business of selling or renting dwellings is involved in the transaction. An owner waives the exemption by publishing any advertisement indicating an intent to violate the Fair Housing Act. Other exemptions apply to boarding houses and similar structures housing both the owner and no more than four other families or persons; to housing operated by certain religious organizations for the benefit of their own members; and to private clubs that operate housing for their own members.

D. Receipt and Use of State-Backed Housing Loans

The 1989 Enactment's incorporation of prior handicap law will impact housing discrimination in another way. Under a separate Florida Statute, entities that have received state-backed housing loans under the Affordable Housing Loan Program cannot discriminate against the handicapped. Similar restrictions applied to recipients of loans under the now defunct Community-Based Organization Loan Program. These protections extend not only to leasing, use, or occupancy of housing units built with the loan; they also cover the employment practices associated with the operation and maintenance of the housing project. Under the policy announced in the 1989 Enactment, these same protections now will extend to those with, or perceived as having, AIDS or HIV infection.

E. The Educational Equity Act of 1984

Another significant statute is the Florida Educational Equity Act, passed in 1984. This statute was aimed at banning discrimination against the handicapped in virtually every state-supported educational setting in Florida, including public schools, colleges, and universities. Read together with the 1989 Enactment, the Educational Equity Act now will extend these protections to those who have AIDS or are perceived as having any HIV-related infection.

182. Id. § 760.29(1)(a)1a.
183. Id. § 760.29(1)(a)1b.
184. Id. § 760.29(1)(a)2.
185. Id. § 760.29(2).
186. Id.
187. Id. § 420.605(5)(i)1 (1989).
189. Id. § 420.605(5)(i)1 (1989).
190. Id. § 228.2001; see ch. 84-305, 1984 Fla. Laws 1435, 1439.
191. R.C. WATERS, supra note 1, § 12.05.
192. Even before the 1989 Enactment, the Florida Department of Education had concluded that symptomless HIV infection and being perceived as having such infection were handicaps under the Educational Equity Act. R.C. WATERS, supra note 1, § 12.05.
These protections are some of the broadest afforded the handicapped by state law. The Educational Equity Act explicitly forbids discrimination in all educational programs and activities and in the hiring practices of state-supported educational entities. It applies to any public educational institution that receives or benefits from federal or state financial assistance. The statute's prohibitions cover not only direct discrimination, but also activities that merely "have the effect of restricting access by persons of a particular ... handicap." Finally, the statute specifically prohibits discrimination against the handicapped in the right to attend classes and in guidance, financial aid, and other counseling services.

By incorporating the Educational Equity Act, the 1989 Enactment essentially codifies existing state rules and policy. In an October 14, 1987 memorandum, State Education Commissioner Betty Castor advised the Florida educational system that AIDS, symptomless HIV infection, and the perception of such infection are handicaps under the Educational Equity Act. Accordingly, the 1989 Enactment endorses and codifies the statements of Commissioner Castor.

F. The Emergency Medical Services Act of 1988

At the same time as the Omnibus AIDS Act was passed in 1988, the Legislature also adopted a separate statute covering the rights of handicapped persons seeking emergency medical services at a hospital. In pertinent part, the statute declares that a hospital's decision to provide emergency medical services cannot "be based upon, or affected by, the person's ... physical or mental handicap ...." If the patient has acute symptoms or pain that could result in serious harm or dysfunction, the patient is entitled to receive care sufficient to relieve or eliminate the condition, "within the service capacity of ..."

194. Id.
195. Id. § 228.2001(2)(b).
196. Id. § 228.2001(2)(c).
197. Id. § 228.2001(2)(e).
198. R.C. WATERS, supra note 1, § 12.12 (reproducing Dept. of Ed. Memorandum, supra note 133). The memorandum in turn relied on a State Board of Education administrative rule defining "handicap" broadly as any physical or mental impairment that substantially limits one or more major life activities, a history of such impairment, or being perceived as having such impairment. FLA. ADMIN. CODE R. 6A-19.001(6) (1988). This rule draws heavily from the federal Rehabilitation Act's definition of "handicap." See 29 U.S.C. § 706(8)(B) (Supp. 1989).
200. Id. § 395.0142(3)(b).
201. Id. § 395.0142(2)(c).
202. Id. § 395.0142(3)(a).
the facility." Read in light of the 1989 Enactment, the Emergency Medical Services Act now will have the effect of prohibiting hospitals from refusing otherwise available acute medical care based on the fact or perception that a person is HIV-infected or has AIDS.204

It is significant to note that the Emergency Medical Services Act supplements other related laws. As part of the 1988 Omnibus AIDS Act, the Legislature had enacted nondiscrimination laws forbidding all AIDS-related discrimination against "otherwise qualified persons" in the provision of governmental services or by any entity receiving state financial assistance.207 Government-operated hospitals fall under both of these laws, and a significant number of private hospitals fall under the second. Such hospitals could not selectively turn away people with AIDS, including those who need acute medical care, because doing so would constitute discrimination against an otherwise qualified person.208 Thus, in the context of AIDS-related hospital care, the Emergency Medical Services Act, together with the 1989 Enactment, adds to these earlier laws by prohibiting all other private hospitals from turning away people with AIDS who need acute care.

G. Insurance

Several provisions of state law significantly restrict the way insurers can limit insurance coverage of the handicapped. For instance, a state law governing non-group insurance states that insurers may not "refuse to provide, or . . . charge unfairly discriminatory rates for, health insurance coverage for a person solely because the person is mentally or physically handicapped." A similar prohibition has

203. Id. § 395.0142(2)(d).
204. This conclusion is underscored by the fact that the Emergency Medical Services Act also prohibits discrimination based on a "preexisting medical condition." Id. § 395.0142(3)(b).
205. The term "otherwise qualified" means: "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." Ch. 89-350, § 14, 1989 Fla. Laws 2233, 2251 (codified at Fla. Stat. § 760.50(4)(c) (1989)). The term "otherwise qualified," borrowed from the federal Rehabilitation Act, frequently is used in connection with employment-related discrimination. See, e.g., 29 U.S.C. § 794 (Supp. 1988). However, the relevant portions of the Omnibus AIDS Act do not limit the application merely to employment settings; they cover all settings. Ch. 89-350, § 14, 1989 Fla. Laws 2233, 2250 (codified at Fla. Stat. §§ 760.50(4)(a)-(b) (1989)).
207. Id. (codified at Fla. Stat. § 760.50(4)(b) (1989)).
208. This assumes the hospital in fact has adequate facilities and staff to treat the particular acute illness in question. The hospital would not be obligated to give any service it lacks the capacity to provide. Fla. Stat. § 395.0142(2)(d) (1989).
209. Id. § 627.644 (1989). The insurer, however, is not required to cover the expenses arising from a handicap that predates insurance coverage. Id.
been placed on group, blanket, and franchise health insurance policies. Another statute provides that group policies cannot terminate the insurance of handicapped dependents because they have reached a certain age, provided the parent or guardian continues to be covered under the group policy.

Under the 1989 Enactment, these insurance laws now must be read as applying equally to people with, or perceived as having, AIDS or HIV infection. The effect is to supplement similar insurance laws passed as part of the Omnibus AIDS Act, which prohibited many forms of AIDS-related discrimination in the insurance industry.

While the 1988 laws dealt with a number of other forms of discrimination, they did not directly address issues such as discriminatory rates and termination of coverage for handicapped dependents. Thus, the 1989 Enactment's incorporation of prior handicap discrimination law will extend significantly the protections afforded to those suffering AIDS-related insurance discrimination.

**H. Serving Alcoholic Beverages**

Another of the state's handicap discrimination statutes covers licensed retail alcoholic beverage establishments. Under this statute, such establishments are recognized as private businesses with the authority to refuse to serve an "objectionable or undesirable" person. This right, however, cannot be exercised based on "physical handicap," among other reasons. Under the 1989 Enactment, the term "physical handicap" will encompass persons with, or perceived as having, AIDS or HIV infection. This protection duplicates and reiterates a portion of the Omnibus AIDS Act that directly outlawed discrimination against such persons in "public accommodations," including restaurants and alcoholic beverage establishments.

**I. Government Jobs**

One of the other major protections afforded the handicapped by state law concerns government jobs. For instance, one statute declares that the policy of the state is that all government job-related decisions

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210. *Id.* § 627.644. Again, an insurer is not required to pay expenses arising from a handicap that predates insurance coverage. *Id.*

211. *Id.* § 627.6615.

212. *See R.C. Waters,* supra note 1, §§ 7.01-.09.


214. *Id.*


"shall be made without regard to . . . handicap," unless a BFOQ applies. The policy has been implemented by two other laws. One makes it unlawful in the state career service to base employment decisions on a person's handicap. The second makes it unlawful for local government bodies to discriminate in their own employment practices based on handicap, and grants a limited right for aggrieved persons to challenge such actions in the circuit court. Under the 1989 Enactment, these provisions also will prohibit discrimination based on AIDS or the perception of HIV infection.

These handicap statutes duplicate other legal provisions. Several subsections of the Omnibus AIDS Act directly forbid these types of discriminatory job practices based on AIDS or the perception of AIDS. One, for instance, outlaws discrimination by any entity benefitting from state financial assistance, which includes every agency of state government. Another provision of the Omnibus AIDS Act makes it unlawful to discriminate based on the results of an HIV-related test. Because no information on a person's HIV status can be obtained except through such tests, virtually any job-related discrimination based on AIDS-related concerns is arguably illegal, including discrimination by governmental agencies.

IV. REMEDIES

As shown in the foregoing discussion, the 1989 Enactment equates AIDS and the perception of AIDS with handicaps. It thus cloaks AIDS-related discrimination with all the "protections" contained in other state handicap discrimination law. The 1989 Enactment operates as a binding statement of legislative policy. In effect, the Legislature has declared that the policy of Florida is to treat AIDS and the perception of AIDS-related illnesses as protected handicaps. At the very least, then, the 1989 Enactment contemplates that those who suffer such discrimination can seek the remedies provided in each of the handicap statutes discussed above, among others.

A. Remedies Created by Handicap Statutes

The remedies created by the handicap statutes vary considerably. Some include direct court review and no restrictions on damages. A
complaint filed under the Florida Constitution’s handicap clause, for instance, may be brought directly in court without apparent limitation on the damages that may be recovered.224 Likewise, the Emergency Medical Services Act provides for direct judicial review, damages and any other relief the court deems appropriate.225

Other provisions, however, restrict damages in significant ways or establish special reviewing procedures. The Educational Equity Act, for instance, provides for direct judicial enforcement but limits the remedy exclusively to equitable relief, reasonable attorney’s fees, and court costs for a prevailing party.226 The Human Rights Act and Fair Housing Act require administrative review prior to judicial proceedings and allow the recovery of some actual damages but not punitive damages.227 A claim of handicap discrimination by a local governmental agency can proceed to court only after an appeal to an appropriate supervisory body, but is not otherwise restricted.228

Still other handicap statutes appear to confine their remedies exclusively to administrative procedures. For instance, the only apparent means of enforcing the prohibition on handicap discrimination in state-backed housing loans is through discretionary administrative agency action.229 The same is true of a violation of the insurance statutes discussed above,230 of laws prohibiting discrimination in the state career service,231 and of the statute governing handicap discrimination in alcoholic beverage establishments.232 In the absence of an agency’s willingness to act, the language of these particular handicap discrimination statutes provides no other remedy.

The question remaining, then, is whether the 1989 Enactment provides any other remedies. If it operates only as a simple statement of public policy, the answer almost certainly is “no.” There is every indication, however, that this is not the result the Legislature intended in the case of AIDS-related discrimination.

226. Id. § 228.2001(8).
228. Id. § 112.042(2)(b) (1989).
229. See id. § 420.605(6).
230. See id. §§ 627.644, 627.6576 & 627.6615.
231. Id. § 110.233(1).
232. See id. § 562.51.
B. Remedies Created by the Omnibus AIDS Act

The 1989 Enactment is one of several parts of section 760.50, Florida Statutes, which provides other remedies designed specifically for those suffering from discrimination. Section 760.50 originally was created by the Omnibus AIDS Act, and it states in pertinent part that "[a]ny person aggrieved by a violation of this section shall have a right of action in the circuit court . . . ." In lawsuits brought under section 760.50, the recovery for each violation can include liquidated or actual damages, reasonable attorney's fees, an injunction, and any other relief the court deems appropriate, including punitive damages. Moreover, section 760.50 declares that "[n]othing 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." This statement indicates that the remedies provided here are cumulative to all other remedies.

Two possible interpretations of the 1989 Enactment relate to the remedies provided in section 760.50. First, it is possible to conclude that the 1989 Enactment incorporates only the specific remedies available under other handicap law but not those independently available under section 760.50. Under this interpretation, the 1989 Enactment would be read as nothing but a statement of public policy, freestanding and unrelated to section 760.50. As a result, the right of action created by section 760.50 would not be available to those suffering AIDS-related handicap discrimination, although such persons might be entitled to relief under other provisions of the Omnibus AIDS Act.

This restrictive construction, however, ignores the plain language of section 760.50 as amended by the 1989 Enactment. The 1989 Enactment does not stand alone; it is one of several related parts attached

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233. *Id.* § 760.50.
235. Fla. Stat. § 760.50(6)(a) (1989)).
236. *Id.* Liquidated damages can be $1,000 for a violation or $5,000 for an intentional or reckless violation of the statute. *Id.* §§ 760.50(6)(a)1, 2.
237. *Id.* § 760.50(6)(a)3.
238. *Id.* § 760.50(6)(a)4.
239. *Id.*
240. See 1988 AIDS Article, supra note 2, at 490.
241. Fla. Stat. § 760.50(6)(b) (1989)).
242. 1988 AIDS Article, supra note 2, at 490.
to the remedy section outlined above. This fact alone suggests the second possible interpretation: that the remedies fashioned by the Omnibus AIDS Act and codified in section 760.50 were meant to be applied to the 1989 Enactment. Denying plaintiffs the specific relief crafted by the Legislature arguably violates the legislative intent.

The nature of the 1989 Enactment as remedial legislation, which must be liberally construed to achieve its purpose, underscores this conclusion. In fact, as legislation advancing the welfare of society as a whole, the 1989 Enactment is entitled to liberal construction even though it imposes civil liabilities on individuals who breach its standards. By cloaking victims of AIDS-related discrimination with "every protection made available to handicapped persons," the 1989 Enactment could be strictly construed as extending only those remedies available under any other handicap discrimination law. Yet, the 1989 Enactment also can be liberally construed as providing dual remedies: those available under the handicap law and those available under section 760.50. Settled rules of statutory construction, which require liberal construction in this instance, favor this interpretation.

So does the statutory language itself. The 1989 Enactment did not subject AIDS-related discrimination merely to the remedies created by other law. Rather, section 760.50 as amended by the 1989 Enactment subjected such discrimination to "every protection made available to handicapped persons." After establishing the right to these protections, the statutory section created a new cause of action for "[a]ny person aggrieved by a violation of this section" and declared that this remedy is cumulative to all other remedies available under law. Nothing in the statute purports to deny these other remedies to those claiming a violation under the 1989 Enactment.

In the context of this language, the use of the word "protection" can be read to suggest something broader than and apart from "remedy." Specifically, a "protection" in this context is the legal right to be free from certain conduct committed by other classes of persons.

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244. The purpose is preventing the harm society suffers when AIDS-related discrimination causes a loss of productivity and opportunity. Ch. 89-350, § 14, 1989 Fla. Laws 2233, 2250 (codified at Fla. Stat. § 760.50(1) (1989)). For more extensive discussions and documentation of this harm, see the books and articles cited infra note 264.

245. See supra notes 117-24 and accompanying text.

246. State v. Hamilton, 388 So. 2d 561, 563 (Fla. 1980) (quoting City of Miami Beach v. Berns, 245 So. 2d 38, 40 (Fla. 1971)).


248. Id.


250. Id. (codified at Fla. Stat. § 760.50(6)(b) (1989)).
This right gives rise to a corresponding duty imposed upon these other classes of persons. Unlike a "protection" provided by law, a "remedy" does not concern the breach of a duty or the rights of an individual suffering discrimination; rather, a remedy is simply the legal device for redress after breach has been established. "Protection," then, is a broader term than "remedy."

This distinction between the two terms supports the liberal construction advanced in this Article. Specifically, the reference to "every protection" need not be read as limiting remedies only to those available under other handicap discrimination laws. Rather, the 1989 Enactment can be interpreted as creating specific new rights for which new remedies also were fashioned, with these new remedies being cumulative to all others.

This conclusion is also supported by the 1989 Enactment's status as a "reference statute." As such, the statutory reference to "every protection made available to handicapped persons" literally incorporates all other handicap discrimination law. Accordingly, all other handicap discrimination law now must be read as though incorporated word-for-word into the 1989 Enactment, subject to the explicit remedies provided in section 760.50.

C. Liberal v. Strict Construction

This Article does not suggest that this is the only reasonable interpretation of the 1989 Enactment. Rather, it suggests that this is the interpretation that must be accorded the 1989 Enactment under the liberal construction required by Florida law. Undoubtedly, a reasonably strict construction of the 1989 Enactment could hold it to be nothing more than a statement of public policy that merely refines the definition of "handicap." Yet, a reasonably liberal construction is that the 1989 Enactment operates on two levels, both as a statement of policy and as a direct incorporation of all other handicap law. The settled rules of construction and the explicit statement of findings adopted by the 1989 Legislature require the courts to favor the second of these alternatives.

V. Conclusions

Under a liberal construction, the 1989 Enactment has three specific effects. First, it equates the term "handicap" with AIDS, ARC, and HIV infection, and the perception of any of these illnesses or infec-

251. See supra notes 105-09 and accompanying text.
tions. The result is to give anyone suffering AIDS-related discrimination of whatever type the protections of all other Florida handicap discrimination laws.

Second, the 1989 Enactment directly incorporates all of the existing handicap discrimination laws into the nondiscrimination section of the Omnibus AIDS Act. The result is that existing handicap discrimination laws will be treated as though they were word-for-word a part of the AIDS section. In effect, all the rights, duties, and protections created by other handicap discrimination law are incorporated into the 1989 Enactment. For this reason, the 1989 Enactment is a general "reference statute" similar to other such statutes upheld as constitutional by the Florida Supreme Court.253

Third, the 1989 Enactment and the section it amended create a new statutory cause of action for violations of these rights and duties. This remedy, which can include actual and punitive damages and reasonable attorneys' fees,254 is expressly declared to be cumulative to all other remedies. As a result, dual remedies will be available to persons suffering handicap discrimination based on having or being perceived as having AIDS, ARC, or HIV infection. Such persons will be able to seek remedies under (1) any other handicap discrimination laws and (2) under the 1989 Enactment and its related remedial provisions.

The duplication of remedies required by a liberal construction of the 1989 Enactment may seem extraordinary. The 1989 Legislature, however, gave explicit reasons why extraordinary remedies are needed. After an intensive three-year review of AIDS-related issues in Florida, the Florida House of Representatives' AIDS Task Force determined that society itself is suffering serious harm because of AIDS related discrimination. This harm occurs because "otherwise able-bodied persons are deprived of the means of supporting themselves, providing for their own health care, housing themselves, and participating in the opportunities otherwise available to them in society."255 The deprivation of these opportunities results in definite and provable harm to society itself.256

The entire Legislature and the Governor concurred in this assessment without a single dissenting voice.257 The validity of this legisla-

253. See State v. J.R.M., 388 So. 2d 1227, 1229 (Fla. 1980); Van Pelt v. Hilliard, 75 Fla. 792, 808-09, 78 So. 693, 698 (1918); Jones v. Dexter, 8 Fla. 276 (1859), overruled on other grounds, Bushnell v. Dennison, 13 Fla. 77 (1869).
254. Ch. 89-350, § 14, 1989 Fla. Laws 2233, 2250 (codified at FLA. STAT. § 760.50(6)(a) (1989)).
255. Id. (codified at FLA. STAT. § 760.50(1) (1989)).
256. Id.
257. See FLA. S. JOUR. 891 (June 2, 1989) (vote on CS for CS for HB 1590 (1989) was 35 to 0
tive finding cannot be doubted. In the decade since AIDS first emerged as a serious health threat, Florida has become one of three states hardest hit by the epidemic. Florida has witnessed virtual hysteria engulf some segments of its population. The result has been a kind of mindless bigotry unparalleled since the days when Florida was racially segregated. Members of the Florida Legislature have repeatedly noted that the bigotry must end if the state is to deal effectively with the epidemic.

Examples of the evils caused by this irrational fear are close at hand in Florida. In one instance, three small schoolchildren were harassed, their home was burned to the ground, and they finally were run out of the small Florida town of Arcadia because they wanted to attend public school. In another instance, a 14-year-old Pensacola boy was taken from his mother and "quarantined" in an isolation cell of a county mental health hospital because a judge believed the boy to be sexually promiscuous. In yet another instance, a Fort Lauderdale hospice for people with AIDS was repeatedly set afire, apparently because of the unknown arsonists' blind and groundless fear of AIDS. These are not isolated examples of the bigotry Florida must now confront. Similar incidents have occurred countless times throughout the state and the nation. People have lost jobs, insurance coverage,
and access to resources usually available to the ill.\textsuperscript{265} Families have been split and lives have been ruined. Otherwise healthy and productive people have suffered discrimination that robs them of the means of caring for themselves. Those most in need of health care have been turned into wards of the state, dependent upon charity that, in the final analysis, usually is paid from public tax monies.\textsuperscript{266}

Unquestionably, these problems harm society as a whole. With 200,000 to 400,000 residents now believed to be infected,\textsuperscript{267} Florida could face staggering disruptions and enormous losses of productivity if the events in Arcadia, Pensacola, and Fort Lauderdale were repeated every time a Floridian is believed to be infected.\textsuperscript{268} The ultimate cost of such discrimination is too high a price for society to pay.

This is the evil the 1988 and 1989 Legislatures sought to remedy.\textsuperscript{269} Broad-based bigotry aimed at those believed to be infected required broad-based remedies. By extending extraordinary remedies to those who suffer AIDS-related discrimination, the Legislature has sought not only to protect constitutional rights but also to prepare Florida for the incredible toll AIDS will exact in the 1990s, barring a cure.\textsuperscript{270} Only in this way can Florida hope to combat the ill effects of AIDS. Until the illness itself finally succumbs to medical science, having and being perceived as having AIDS are handicaps protected by Florida law.

\textsuperscript{265} See South Fla. Blood Serv., Inc., v. Rasmussen, 467 So. 2d 798, 802 (Fla. 3d DCA 1985), approved, 500 So. 2d 533 (Fla. 1987) ("AIDS, or a suspicion of AIDS, can lead to discrimination in employment, education, housing and even medical treatment").

\textsuperscript{266} E.g., R.C. Waters, supra note 1, app. A at 280 (1989) (reproducing Fla. H.R., Comm. on Health Care, transcript of hearing (Apr. 28, 1988) (statement of Gary Clarke) (approximately 60 percent of AIDS-related debts at Florida's largest treatment facility, Jackson Memorial Hospital, are ultimately paid from public resources)).

\textsuperscript{267} See supra note 41 and accompanying text.

\textsuperscript{268} The 1989 Legislature made an explicit finding to this effect. Ch. 89-350, § 14, 1989 Fla. Laws 2233, 2250 (codified at Fla. Stat. § 760.50(1) (1989)).

\textsuperscript{269} Id.

\textsuperscript{270} See id.