

1997

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### Recommended Citation

Ann E. Stanley, *May I Ask You a Personal Question--The Right to Privacy and HIV Testing in the European Community and the United States*, 65 Fordham L. Rev. 2775 (1997).

Available at: <https://ir.lawnet.fordham.edu/flr/vol65/iss6/12>

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## May I Ask You a Personal Question—The Right to Privacy and HIV Testing in the European Community and the United States

### Cover Page Footnote

The Author would like to thank Professor Roger Goebel for his thoughtful comments.

# MAY I ASK YOU A PERSONAL QUESTION? THE RIGHT TO PRIVACY AND HIV TESTING IN THE EUROPEAN COMMUNITY AND THE UNITED STATES

Ann E. Stanley\*

## INTRODUCTION

The Human Immunodeficiency Virus ("HIV")<sup>1</sup> and Acquired Immune Deficiency Syndrome ("AIDS")<sup>2</sup> have afflicted millions of individuals worldwide. In the United States alone, the Centers for Disease Control and Prevention ("CDC") estimate that almost 550,000 people have AIDS,<sup>3</sup> with one AIDS diagnosis occurring every nine minutes.<sup>4</sup> In 1994, HIV infection became the most common cause of death among persons aged twenty-five to forty-four years,<sup>5</sup> bringing the issue of HIV/AIDS into the workplace.<sup>6</sup> This issue is not unique to the United States; according to the United Nations, by the end of 1996, there were an estimated 750,000 persons living with HIV/AIDS in North America and 510,000 in Western Europe.<sup>7</sup> In 1995, more than 15,000 cases of AIDS were diagnosed in the European Community ("Community" or "E.C.") alone,<sup>8</sup> and over 20,000 cases were reported in both 1993 and 1994.<sup>9</sup>

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\* The author would like to thank Professor Roger Goebel for his thoughtful comments.

1. The HIV attaches itself to lymphocytes, white blood cells, essential to the immune system. The lymphocytes are then killed, impairing the immune system and leaving the body open to opportunistic diseases. Steven Eisenstat, *An Analysis of the Rationality of Mandatory Testing for the HIV Antibody: Balancing the Governmental Public Health Interests with the Individual's Privacy Interest*, 52 U. Pitt. L. Rev. 327, 329 (1991). For further information regarding the definition of HIV and AIDS, see Mary Ellen Hombs, *AIDS Crisis in America: A Reference Handbook* 3-6 (1992); Jeffrey T. Huber, *HIV/AIDS Community Information Services: Experiences in Serving Both At-Risk and HIV-Infected Populations* 1-29 (1996).

2. "AIDS represents the latter stages of HIV infection, characterized by the onset of opportunistic infections and cancers associated with the disease." Eisenstat, *supra* note 1, at 329 n.10.

3. Center for Disease Control, 1996 HIV/AIDS Surveillance Report 5 (1996) [hereinafter HIV Surveillance Report].

4. Gay Men's Health Crisis, GMHC Facts 1 (1997). There were over 70,000 cases reported from July 1995 through June 1996. HIV Surveillance Report, *supra* note 3, at 5.

5. *Update: Mortality Attributable to HIV Infection Among Persons Aged 25-44 Years—United States, 1994*, 45 Morbidity & Mortality Wkly. Rep. 121, 121 (1996).

6. AIDS Agenda: Emerging Issues in Civil Rights 271 (Nan D. Hunter & William B. Rubenstein eds., 1992); Ilana deBare, *World of Work Beckons AIDS Patients: Boosted by New Drug Treatments, Some May Climb Back into Job Market*, S.F. Chron., Mar. 10, 1997, at E1.

7. UNAIDS, World AIDS Day Report Documents HIV Threat to New Global Populations, UNAIDS Press Release, Nov. 28, 1996.

8. Eurostat, Eurostat Yearbook '96: A Statistical Eye on Europe 1985-1996 (1996).

9. *Id.*

Although there is currently no cure for AIDS,<sup>10</sup> many new treatments enable seropositive<sup>11</sup> individuals to manage the disease for longer periods of time.<sup>12</sup> Due to the severity of the disease, however, as well as the moral judgments of some of the modes of transmission, such as sexual relations and drug use, a stigma now surrounds HIV/AIDS, almost unmatched since the days of leprosy, as well as a fear of the disease itself.<sup>13</sup> In response, employers on both sides of the Atlantic have grappled with how to provide a safe work environment in the age of AIDS, often resorting to mandatory HIV testing at the time of recruitment.<sup>14</sup> Testing, however, "can produce serious implications for the individuals tested. In addition to the bodily invasion . . . a positive test result can lead to the loss of employment, housing, education, social and sexual associations, or medical treatment."<sup>15</sup> Individuals have raised the right to privacy as a defense against testing by employers.

Both the European Community and the United States have long traditions of protecting individual rights, including the right to privacy.<sup>16</sup> In the context of HIV testing, however, the United States has

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10. Huber, *supra* note 1, at 24.

11. In this Note, "seropositive" is used to indicate seropositivity for the HIV, not necessarily an individual with AIDS.

12. Carl T. Hall, *How Wonder Drugs Give New Life*, S.F. Chron., Mar. 10, 1997, at E1 (quoting a doctor who says that new drugs provide not only "a little more time" but also the "possibility of living out a full life-span"); Lisa M. Krieger, *Good News on AIDS Deaths Has a Flip Side: More People Living with the Disease Will Need Long-Term Care*, S.F. Examiner, Feb. 28, 1997, at A2 (reporting that not only has there been "a large drop in deaths in the past two years, but also a drop in the need for hospitalization, home care, hospice care and specialist referrals"); Oscar Suris, *AIDS Deaths Drop Significantly for First Time*, Wall St. J., Feb. 28, 1997, at B1 (reporting that the CDC said "12% fewer Americans with AIDS died from the disease in the first half of 1996 than during the same period a year earlier—the first marked decline in the death toll since the epidemic's emergence 15 years ago").

13. Anonymous Fireman v. City of Willoughby, 779 F. Supp 402, 413 (N.D. Ohio 1991) ("Failure to maintain confidentiality [about] HIV status creates a likelihood of discrimination. . . ."); Doe v. Borough of Barrington, 729 F. Supp. 376, 384 (D.N.J. 1990) (noting the "stigma and harassment that comes with public knowledge of one's affliction with AIDS"); Terry Morehead Dworkin & Elies Steyger, *AIDS Victims in the European Community and the United States: Are They Protected from Unjustified Discrimination*, 24 Tex. Int'l L.J. 295, 310 (1989) (stating "many view AIDS as the modern equivalent of leprosy"); Patrick Twomey, Case Comment, X v. Commission, Common Mkt. L. Rev. 1013, 1022-23 (1995) (noting that in protecting the rights of people with AIDS the victimization caused by the disease must be considered); Clare Ansberry, *Fear and Loathing: AIDS, Stirring Panic and Prejudice, Tests the Nation's Character*, Wall St. J., Nov. 13, 1987, at 1 (quoting one AIDS victim who said, "I know what it's like to be a leper").

14. See *infra* parts I.C., II.A.2.b, II.B.2. This Note will focus on testing by public employers only.

15. Dworkin, *supra* note 13, at 310.

16. Privacy has been defined in many ways, although it can be separated into two basic categories: the right governing "the conduct of other individuals who intrude in various ways upon one's life," (an informational privacy interest), and the right which immunizes certain conduct from government proscription or penalty, (a substantive

gone further than the European Community in its protection of seropositive individuals, providing constitutional as well as statutory guarantees.<sup>17</sup> Although neither region's constitutional case law adequately upholds the individual's right to privacy, the United States better protects this right under its statutory framework, setting an example upon which the European Community could base its own legislative scheme.<sup>18</sup>

This Note focuses on HIV testing policies of public employers in the United States and of the European Community's own institutions.<sup>19</sup> Part I examines E.C. law, including the rights of privacy and protec-

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right to privacy). Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 740 (1989); see also *infra* part II.A. See generally Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962, 963 (1964) (proposing a theory to reconcile the "divergent strands of legal developments" in the right's interpretation and application); Charles Fried, *Privacy*, 77 Yale L.J. 475 (1968) (examining the foundations of the right); Richard A. Posner, *The Right of Privacy*, 12 Ga. L. Rev. 393 (1978) (analyzing the informational right from an economic perspective).

Several sources of the right to privacy are: (1) tort law, see Fowler v. Harper et al., *The Law of Torts* §§ 9.5-9.7 (2d ed. 1986 & Supp. 1996); J.D. Lee & Barry A. Lindahl, *Modern Tort Law: Liability & Litigation* §§ 48.01-48.20 (rev. ed. 1996); John D. Blackburn et al., *Invasion of Privacy: Refocusing the Tort in Private Sector Employment*, 6 DePaul Bus. L.J. 41 (1993); (2) state protections, see Margaret C. Crosby, *Rights of Privacy*, in *Recent Developments in State Constitutional Law* 231 (1985); and (3) constitutional protections, see Darien A. McWhirter & Jon D. Bible, *Privacy as a Constitutional Right: Sex, Drugs, and the Right to Life* (1992); Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. Rev. 133 (1991); see also Peter J. Nanula, Comment, *Protecting Confidentiality in the Effort to Control AIDS*, 24 Harv. J. on Legis. 315, 334-35 (1987) (listing potential causes of action for AIDS plaintiffs).

For a discussion of the sources of the right to privacy in the EC, see Carlos A. Ball, *The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community's Legal Order*, 37 Harv. Int'l L.J. 307, 367-86 (1996); Manfred A. Dausen, *The Protection of Fundamental Rights in the Community Legal Order*, 10 Eur. L. Rev. 398 (1985); Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 Wash. L. Rev. 1103 (1986). See also *infra* part I.A. (examining the foundation for the right to privacy).

In both regions, the right to privacy is actionable against the government. Rubenfeld, *supra*, at 737 (stating privacy rights are constitutional rights that "delineat[e] the legitimate limits of governmental power"); Weiler, *supra*, at 1108 (stating "protection of human rights is typically designed to protect the individual against public authority").

17. See *infra* part III.B.

18. Dworkin & Steyger, *supra* note 13, at 302-03.

19. This Note will not discuss Member State laws in this area. See generally Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws*, 18 Comp. Lab. L.J. 62 (1996) (discussing Member State disability laws); Dworkin & Steyger, *supra* note 13 (comparing testing and movement restriction on AIDS victims in the EC with discrimination under the US statutory scheme); J. Pais Macedo van Overbeek, *AIDS/HIV Infection and the Free Movement of Persons Within the European Economic Community*, 27 Common Mkt. L. Rev. 791 (1990) (discussing movement restrictions in the European Community).

tion of medical secrets, founded by Community case law and now enshrined in the Treaty on European Union. This part also reviews two recent cases brought by employment candidates against the Commission of the European Communities. Part II discusses relevant U.S. law, first by examining constitutional rights arising from the Fourth Amendment and the Due Process clauses of the Fifth and Fourteenth Amendments, and then by discussing two statutory provisions, the Rehabilitation Act of 1973 ("Rehabilitation Act")<sup>20</sup> and the Americans with Disabilities Act of 1990 ("ADA").<sup>21</sup> Part III compares the two systems, analyzes the courts' reasoning in cases under these laws, and evaluates how well each system protects the right to privacy of HIV-infected individuals in the employment context. This part finds that although each region has a proper policy approach to the issue, because of the fear and paranoia surrounding HIV/AIDS and the failure by the courts to consider properly the risk of transmission, courts have not applied the law in a way that adequately protects the individual's right to privacy. This Note concludes that the United States guards this right better as a result of the protection mandated by the disability statutes, and suggests that protection of the right to privacy would be better guaranteed if the European Community were to adopt legislation similar to what exists in the United States.

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20. 29 U.S.C. §§ 701-796 (1994). For further discussion, see James F. Baxley, *Rehabilitating AIDS-Based Employment Discrimination: HIV Infection as a Handicap Under the Vocational Rehabilitation Act of 1973*, 19 Seton Hall L. Rev. 23 (1989) (discussing how HIV qualifies as a handicap under the Rehabilitation Act); Walter B. Connolly, Jr. & Alison B. Marshall, *An Employer's Legal Guide to AIDS in the Workplace*, 9 St. Louis U. Pub. L. Rev. 561 (1990) (discussing employers' responsibilities under the ADA and the Rehabilitation Act in the AIDS context); Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 Wm. & Mary L. Rev. 1089 (1995) (comparing the two Acts).

21. 42 U.S.C. §§ 12101-12213 (1994). For further discussion, see Thomas H. Christopher & Charles M. Rice, *The Americans with Disabilities Act: An Overview of the Employment Provisions*, 33 S. Tex. L. Rev. 759 (1992) (discussing generally the ADA); Mark Cody et al., *Americans with Disabilities Act: Emerging Caselaw*, 75 Mich. B.J. 382 (1996) (discussing recent cases arising under the ADA); Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393 (1991) (discussing government-sponsored discrimination against disabled persons and the adoption of the ADA); *Developments in the Law—Employment Discrimination*, 109 Harv. L. Rev. 1568, 1602-46 (1996) (evaluating the ADA and protection of homosexuals in private employment); Chai Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside*, 64 Temp. L. Rev. 521 (1991) (discussing the development of the ADA and the medical inquiries provisions); P. Kathleen Lower, *The Americans with Disabilities Act: Regulations, Technical Assistance Manual and Developing Case Law*, 23 Colo. Law. 807 (1994) (providing a summary explanation of the ADA's key provisions); Dick Thornburgh, *The Americans with Disabilities Act: What It Means to All Americans*, 64 Temp. L. Rev. 375 (1991) (discussing generally the ADA); Bless S. Young & Kimberly R. Wells, *Managing AIDS in the Workplace*, 41 No.3 Prac. Law. 41 (1995) (providing an employer's guide to the ADA and Rehabilitation Act in the HIV/AIDS context).

## I. EUROPEAN COMMUNITY LAW

The European Community is a supranational entity composed of fifteen Member States that have exchanged sovereignty in certain sectors for the benefits of uniformity.<sup>22</sup> The European Community has several institutions,<sup>23</sup> including: the Council of the European Union;<sup>24</sup> the European Commission;<sup>25</sup> the European Parliament;<sup>26</sup> and the European Court of Justice ("ECJ" or "Court").<sup>27</sup> While the founding treaties establish the nature and scope of the European Community's power,<sup>28</sup> the ECJ has the role of interpreting the meaning of their provisions.<sup>29</sup>

22. The Member States are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. See Commission of the European Communities, *Serving the European Union: A Citizen's Guide to the Institutions of the European Union* 10 (1996) [hereinafter *A Citizen's Guide*].

23. Other E.C. institutions include the Economic and Social Committee, the Committee of Regions, and the Court of Auditors. *Id.* at 19-20, 24-27.

24. Treaty Establishing the European Community, Feb. 7, 1992, 1992 O.J. (C 224) 1, [1992] 1 C.M.L.R. 573 (1992), arts. 145-54 [hereinafter *EC Treaty*]. The Council has a rotating Presidency, held by each Member State for a period of six months, and functions in the framework of meetings hosted by the current Presidency. Ministers of each Member State responsible for the topic at hand attend the meetings to discuss and vote on proposed legislation. *A Citizen's Guide*, *supra* note 22, at 9-10.

25. The Commission is responsible for the administration of Community matters and retains the sole power to propose legislation. See *EC Treaty* arts. 155-63.

26. One of the European Parliament's functions is to review all proposed legislation. The Parliament then votes on whether to recommend adoption of the measure and issues an opinion. See *EC Treaty* arts. 137-44.

27. The ECJ is aided by the Court of First Instance ("CFI"), which has jurisdiction over all staff cases as well as competition and antidumping cases. The CFI's decisions are appealable to the ECJ only for review of a point of law. See *EC Treaty* arts. 164-88; George A. Bermann et al., *Cases and Materials on European Community Law* 73 (1993) [hereinafter *Bermann et al., EC Law*]; George A. Bermann et al., *Cases and Materials on European Community Law* 25 (1995 Supp.) [hereinafter *Bermann et al., 1995 Supp.*].

28. There are three founding treaties: Treaty Instituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140; the *EC Treaty*; and the Treaty Establishing the European Atomic Energy Community (EURATOM), Mar. 25, 1957, 298 U.N.T.S. 167. The Treaty Establishing the European Union, Feb. 7, 1992, 1992 O.J. (C 224) 1, [1992] 1 C.M.L.R. 719 (1992) [hereinafter *TEU*], amended the original Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, as amended by Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1, [1987] 2 C.M.L.R. 741 (1987), dropping the word "Economic" from its name to reflect that the goals of the *EC Treaty* go beyond forming a purely economic community and include political union as well. The *TEU* also established the Common Foreign and Security Policy and coordination in the fields of justice and home affairs. *Bermann et al., EC Law*, *supra* note 27, at 16-19; *Bermann et al., 1995 Supp., supra* note 27, at 2-4. Although references to both the terms "EC" and "EU" are correct, this Note will use "EC" because the law discussed is EC law, not EU law. See *Bermann et al., 1995 Supp., supra* note 27, at 4.

29. For a more complete analysis of the European Community, see Ian Barnes & Pamela M. Barnes, *The Enlarged European Union* (1995); James D. Dinnage & John F. Murphy, *The Constitutional Law of the European Union* (1996); Europe after Maastricht: An Ever Closer Union? (Renaud Dehousse ed., 1994); T.C. Hartley, *The*

### A. *Foundation for the Right to Privacy*

The European Community respects fundamental rights, including the right to privacy and protection of medical information. To this end, the Council and the Member States have issued Conclusions that establish guidelines for the treatment of HIV and AIDS in the employment context.<sup>30</sup> However, because of the European Commission's policy of requesting recruits to undergo an HIV test during the obligatory prerecruitment medical exam, several cases have arisen in which both the ECJ and the Court of First Instance ("CFI" or "court") have addressed the privacy concerns raised by candidates.<sup>31</sup>

#### 1. Right to Privacy Stemming from Human Rights

The initial Treaty Establishing the European Economic Community ("EEC Treaty") did not contain a catalogue of basic rights, but did recognize three human rights specifically: freedom from discrimination based on nationality,<sup>32</sup> the right of personal mobility between Member States for workers<sup>33</sup> and self-employed individuals,<sup>34</sup> and the right to equal pay.<sup>35</sup> In 1969, the ECJ first articulated, in dicta, the concept of "fundamental rights enshrined in the general principles of Community law" in *Stauder v. Ulm*.<sup>36</sup> In *Internationale Handelsgesellschaft v. Einfuhr*,<sup>37</sup> the ECJ reaffirmed the notion that the Community ensures the protection of fundamental human rights, and named itself the principal guarantor of such rights.<sup>38</sup> As the ECJ later stated in *Nold v. Commission*,<sup>39</sup> "[i]n safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to

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Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community (1994).

30. See *infra* part I.B.

31. Case 404/92, X v. Commission, 1994 E.C.R. I-4737; Case 10/93, A v. Commission, 1994 E.C.R. II-179 (Ct. First Instance), [1994] 3 C.M.L.R. 242 (1994).

Shortly after the CFI decided *A v. Commission*, the Commission stated that "[t]here is no compulsory or systematic HIV screening either at pre-recruitment medical examinations or at annual medical check-ups." Written Question E-2872/93 by Carole Tongue to the Commission, 1995 O.J. (C 17) 7, 8. At pre-recruitment medical exams, candidates are given information on the disease and how a positive result would affect their chances of recruitment. *Id.* According to the Commission, asymptomatic candidates are not rejected, but symptomatic candidates may be refused. This assessment can be derived from case history as well as the clinical exam. *Id.* While testing is not mandatory, the Commission clearly retains the power to test consenting candidates at will. See *id.*

32. EC Treaty art. 6.

33. *Id.* art. 48.

34. *Id.* art. 52.

35. *Id.* art. 119.

36. Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419, 425, [1970] C.M.L.R. 112 (1970).

37. Case 11/70, 1970 E.C.R. 1125, [1972] C.M.L.R. 255 (1972).

38. *Id.* at 1146.

39. Case 4/73, *Nold v. Commission*, 1974 E.C.R. 491, [1974] C.M.L.R. 338 (1974).



the Member States"<sup>40</sup> as well as international treaties, notably the European Convention for the Protection of Human Rights ("ECHR").<sup>41</sup> The Court therefore cannot "uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States."<sup>42</sup> The ECJ made clear, however, that such rights are not absolute and may be "subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched."<sup>43</sup> Because the European Community is principally concerned with economic fields of action, the Court has usually dealt with economic issues resulting in the recognition of economic rights, such as the right to property;<sup>44</sup> however, the ECJ has also recognized personal rights, including the right to privacy.<sup>45</sup> In 1977, the institutions issued a Joint Declaration adopting the protection of fundamental rights, and in particular those articulated in the ECHR.<sup>46</sup> This Declaration is not judicially binding, however,<sup>47</sup> and while all Member States are parties to the ECHR, the Community itself is not.<sup>48</sup> This limits the legal force with which the E.C. institutions may uphold the Convention's provisions. The institutions, however, have pursued a more formal recognition of those rights.

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40. *Id.* at 507.

41. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. The ECHR protects both civil rights (such as the right to liberty and security of person, and the right to a private and family life) and freedoms (freedom from torture, slavery, and forced labor as well as the freedom of expression, thought, conscience, and religion). See Dr. John Breslin, *Privacy—The Civil Liberties Issue*, 14 Dick. J. Int'l L. 455 (1996); Mary F. Dominick, *Toward a Community Bill of Rights: The European Community Charter of Fundamental Social Rights*, 14 Fordham Int'l L.J. 639 (1990-91) (discussing privacy under U.S. law and the ECHR); Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 Colum. L. Rev 537, 558-61 (1988) (same); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 Hastings L.J. 805 (1990) (same); Ronald J. Krotoszynski, Jr., Note, *Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law*, 1990 Duke L.J. 1398, 1415-20 (discussing the ECHR and Article 8(2)).

42. *Nold*, 1974 E.C.R. at 507.

43. *Id.* at 508.

44. See, e.g., Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727, 3745, [1980] 3 C.M.L.R. 42 (1980) (upholding the right to property under Community law).

45. See, e.g., Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419, 425 (upholding a Community provision as it contained "nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law"). The Court has also recognized the principle of equal treatment on religious grounds, Case 130/75, *Prais v. Council*, 1976 E.C.R. 1589, 1597-99, [1976] 2 C.M.L.R. 708 (1976), the freedom of expression, Case 100/88, *Oyowe & Traore v. Commission*, 1989 E.C.R. 4285, 4309, and the right to participate in trade unions, Case 193/87, *Maurissen v. Court of Auditors*, 1990 E.C.R. I-95, 118.

46. Joint Declaration by the European Parliament, the Council and the Commission of April 5, 1977, 1977 O.J. (C 103) 1.

47. See EC Treaty art. 189 (listing the force of legislative measures).

48. *Bermann et al.*, EC Law, *supra* note 27, at 146.

In 1976, the Commission ruled out the necessity of Community accession to the ECHR.<sup>49</sup> In 1979, however, the Commission issued a report endorsing the European Community's formal accession to the ECHR,<sup>50</sup> and, more recently, again advocated accession,<sup>51</sup> as did the European Parliament.<sup>52</sup> In 1992, the Treaty on European Union ("TEU") introduced Article F, which provides that the "Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law."<sup>53</sup> This political statement of adherence by the E.C. institutions to the doctrine developed by the ECJ formally makes human rights principles part of the Community's own "constitutional law."<sup>54</sup> In 1994, the Council requested an opinion from the Court on whether the Community's accession to the ECHR would be permissible under the EC Treaty.<sup>55</sup> The ECJ held that the Community did not have the competence to accede to the ECHR because there is no Treaty provision granting it power to "enact rules on human rights or to conclude international conventions in this field."<sup>56</sup> The Court also stated that it could not rule on the "compatibility of Community accession to the Convention" because the Council did not provide the Court with information regarding "the Community[']s submission] to the jurisdiction of an international court."<sup>57</sup> Still, the ECJ has already held that the Convention has "special significance" as a source of Community policy<sup>58</sup> and the ECJ has

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49. Case Comment, *Re the Accession of the Community to the European Human Rights Convention (Opinion 2/94)*, [1996] 2 C.M.L.R. 265, 273 (1996) [hereinafter Case Comment, *Opinion 2/94*].

50. See Commission of the European Communities, Thirteenth General Report on the Activities of the European Communities 276 (1979).

51. See Commission of the European Communities, Twenty-Fourth General Report on the Activities of the European Communities 354 (1990).

52. See Commission of the European Communities, Twenty-Seventh General Report on the Activities of the European Communities 347-48 (1993).

53. TEU art. F.

54. Bermann et al., EC Law, *supra* note 27, at 146. The justiciability of Article F is questionable, however, because it is not included in the list of those provisions to which the ECJ may exercise its powers of review. TEU art. L. See generally Lars B. Krogsgaard, *Fundamental Rights in the European Community After Maastricht*, 1993/1 Legal Issues of Eur. Integration 99 (discussing fundamental rights after entry into force of the TEU).

55. Commission of the European Communities, Twenty-Seventh Report of the Activities of the European Communities 347-48 (1994).

56. Case Comment, *Opinion 2/94*, *supra* note 49, at 290.

57. *Id.* at 289; see also Bermann et al., 1995 Supp.; *supra* note 27, at 46 (discussing the prospects for future accession to the ECHR); Giorgio Gaja, Case Comment, *Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 33 Common Mkt. L. Rev. 973 (1996) (discussing the ECJ's opinion on the Community's accession to the ECHR).

58. Case 5/88, Wachauf v. Germany, 1989 E.C.R. 2609, 2639, [1991] 1 C.M.L.R. 328 (1991) (stating that the ECHR "can . . . supply guidelines to which regard should be had in the context of Community law"); Case Comment, *Opinion 2/94*, *supra* note 49, at 291.

embraced many of the ECHR's rights already, including Article 8 of the ECHR, which concerns the right to privacy.<sup>59</sup>

The ECJ first recognized the right to privacy in *Stauder v. Ulm*.<sup>60</sup> A German veteran, Stauder, who received welfare benefits challenged a provision in the German-language version of a Council Decision that allowed the sale of butter at reduced prices to welfare recipients upon presentation of a coupon bearing the beneficiary's name.<sup>61</sup> Stauder argued that the name provision on the coupon required him to disclose his name and thus violated his right to privacy.<sup>62</sup> Based on its liberal interpretation of a discrepancy among the language versions of the Decision, the ECJ ruled that the disputed provision contained nothing "capable of prejudicing the fundamental human rights enshrined in the general principles of Community law."<sup>63</sup> The ECJ has also recognized the right to privacy in other cases, primarily in the field of competition law.<sup>64</sup>

## 2. Right to Medical Secrets

The ECJ has included the protection of medical information within the right to privacy. In *Commission v. Germany*,<sup>65</sup> the ECJ struck down a German law prohibiting imports of medicinal products prescribed by a doctor in another Member State unless ordered through a German pharmacy.<sup>66</sup> While Germany admitted that the statute constituted a restriction on the free movement of goods and was therefore incompatible with Article 30 of the EC Treaty,<sup>67</sup> it claimed that the statute was "essential in order to guarantee effective protection of the

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59. Article 8 reads: "There shall be no interference by a public authority with the exercise of [the right to respect for an individual's private and family life, his home and his correspondence] except such as is in accordance with the law and is necessary in a democratic society in the interests of . . . public safety or . . . for the protection of health or morals, or for the protection of the rights and freedoms of others." ECHR, *supra* note 41, art. 8(2).

60. Case 29/69, 1969 E.C.R. 419.

61. *Stauder*, 1969 E.C.R. at 421-22. Other language versions only stated that "a 'coupon referring to the person concerned' must be shown, thus making it possible to employ other methods of checking in addition to naming the beneficiary." *Id.* at 424.

62. *See id.* at 420-21.

63. *Id.* at 425.

64. *See, e.g., Case 5/85, Akzo Chemie v. Commission*, 1986 E.C.R. 2585, 2603, [1987] 3 C.M.L.R. 716 (1987) (stating in the Advocate General's opinion that the right to privacy "is available not merely to natural persons but also to legal persons in so far as it can be applied to them"); *Case 136/79, National Panasonic v. Commission*, 1980 E.C.R. 2033, 2057, [1980] 3 C.M.L.R. 169 (1980) (holding that Article 14(3) of Regulation 17, dealing with competition law, is in conformity with the ECHR's Article 8(2)).

65. Case 62/90, 1992 E.C.R. I-2575, [1992] 2 C.M.L.R. 549 (1992).

66. *Id.* at 2611. In practice, the statute affected only postal consignments. *Id.* at 2606.

67. Article 30 prohibits "[q]uantitative restrictions on imports and all measures having equivalent effect." EC Treaty art. 30.

health and life of humans."<sup>68</sup> Germany argued, *inter alia*, that it was impossible to ensure during border checks, without violating the rights of privacy and protection of medical secrets, that medicinal products were being imported only in quantities sufficient for personal use. Germany thus argued that a ban on such imports was justified by the objective of protection of health.<sup>69</sup>

The ECJ agreed that while the right to privacy and the right to protection of medical secrets in particular are fundamental within the Community, they are not absolute rights.<sup>70</sup> The Court held that a restriction on those rights may be justified by the objective of the protection of public health, provided the restriction actually promotes the objectives of the general interest *and* is not disproportionate to the extent that it would interfere with the very substance of those rights.<sup>71</sup> The ECJ then held the German measure illegal, concluding that Germany had failed to show that it would in fact be impossible to implement controls which would protect public health without also excessively interfering in the privacy of medical secrets.<sup>72</sup> This Note suggests that this area of protection should logically extend to one's HIV status.

### B. *Resolution and Conclusions on AIDS and the Workplace*

The Council has also recognized the importance of protecting privacy in individuals' medical information generally, and in HIV status in particular. In December 1988, the Council and the Ministers for Health of the Member States adopted Conclusions on AIDS and the workplace ("Conclusions").<sup>73</sup> The following year, the Council called for discussion of the implementation of the Conclusions in a Resolution on the fight against AIDS.<sup>74</sup>

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68. *Commission v. Germany*, 1992 E.C.R. at 2606. Protection of public health is a justification for such restrictions under Article 36 of the EC Treaty. EC Treaty art. 36.

69. *Commission v. Germany*, 1992 E.C.R. at 2606-08.

70. *See id.* at 2609.

71. *Id.*

72. *Id.* at 2609-10.

73. Conclusions of Dec. 15, 1988 of the Council and the Ministers for Health of the Member States Concerning AIDS and the Place of Work, 1989 O.J. (C 28) 2 [hereinafter Conclusions]. Conclusions are statements agreed upon by the Council and the Member State ministers, but do not have the force of Recommendations unless the Council then adopts a Resolution recommending implementation of the Conclusions.

74. Resolution of Dec. 22, 1989 of the Council and the Ministers for Health of the Member States on the Fight Against AIDS, 1990 O.J. (C 10) 3, 6 [hereinafter Resolution]. In the Community hierarchy of legal norms, the Council Resolution constitutes a recommendation, not legislation; hence the Resolution and the Conclusions are not binding. *See* EC Treaty art. 189. They are, of course, intended to influence Member States' laws and policy. P.J.G. Kapteyn & P. Verloren Van Themaat, Introduction to the Law of the European Communities: After the Coming into Force of the Single European Act 187-88 (2d ed. 1989). In addition, the Community institutions regard the Conclusions as stating rules of good practice that the Commission should follow in

The Conclusions state that because “[p]eople infected with the HIV virus or suffering from AIDS pose no danger to their colleagues at work, [t]here are hence no grounds for screening potential recruits for HIV antibodies.”<sup>75</sup> They also state that there is no risk of HIV infection in the field of “body treatments,” (presumably, medical procedures), if proper hygiene guidelines are followed.<sup>76</sup> Employees who are asymptomatic should be looked on and treated as fit for work and should be under no obligation to disclose their medical status to their employers.<sup>77</sup> The Conclusions also recommend that if knowledge of HIV status is obtained, the employer “should make every effort to protect that person from stigmatization and discrimination” and maintain medical confidentiality.<sup>78</sup> Finally, the Conclusions dictate that employees suffering from AIDS should be treated like employees with other serious illnesses that affect their performance, and “[w]here fitness is impaired, duties or working hours should be adjusted so that such employees may continue working as long as possible.”<sup>79</sup>

The Resolution called for elimination of “all forms of discrimination, particularly in recruitment [and] at the workplace.”<sup>80</sup> The Resolution also noted that “no public health reason justifies the systematic and compulsory screening of individuals, i.e. screening without prior information or consent of the persons tested,”<sup>81</sup> and that any discrimination against AIDS or HIV-infected individuals violates human rights.<sup>82</sup>

### C. Case Law Regarding HIV Testing by E.C. Institutions

Two candidates have brought cases against the Commission alleging that HIV testing during the recruitment procedure invaded their right

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internal staff matters. Case 10/93, *A v. Commission*, 1994 E.C.R. II-179, 205-06 (Ct. First Instance). Moreover, the ECJ has considered Council Resolutions in other cases such as *Defrenne v. Societe Anonyme Belge de Navigation Aerienn Sabena*. Case 149/77, 1978 E.C.R. 1365, 1376, [1978] 3 C.M.L.R. 312 (1978) (citing a Council Resolution for support of the principle of “elimination of discrimination based on the sex of workers”); Case 362/88, *GB-Inno v. Confederation du Commerce Luxembourgeois*, 1990 E.C.R. I-667, 687-88, [1991] 2 C.M.L.R. 801 (1991) (citing a Council Resolution to demonstrate link in Community policy between consumer protection and information); Cases C-241-42/91, *Radio Telefis Eireann v. Commission*, 1995 E.C.R. I-743, 790, [1995] 4 C.M.L.R. (Antitrust) 718 (1995) (citing in the Advocate General’s opinion the Council Resolution on Member State accession to the Berne Convention to demonstrate Community interest in protecting intellectual property rights to the same extent as the Convention).

75. Conclusions, *supra* note 73, at 2.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 3.

80. Resolution, *supra* note 74, at 4.

81. *Id.*

82. *Id.*

to privacy and violated Article 8 of the ECHR: *X v. Commission*<sup>83</sup> and *A v. Commission*<sup>84</sup>.

### 1. *X v. Commission*

In *X v. Commission*,<sup>85</sup> a prospective employee appealed a Commission staff decision finding that the Commission did not violate his right to privacy.<sup>86</sup> X was a Portuguese national who had worked on a freelance basis for the Commission and then applied for a temporary post of six months as a typist in the Portuguese Translation Division.<sup>87</sup> As part of the application procedure, X underwent a medical examination, at which he declined to submit to an HIV test.<sup>88</sup> After considering the results of the clinical examination, the medical officer ordered supplementary blood tests,<sup>89</sup> from which he concluded that X was suffering from "a significant immune deficiency which rendered him unfit to perform the duties of a member of the temporary staff."<sup>90</sup> X pursued all relevant administrative avenues to protest this decision and eventually brought the action to the CFI<sup>91</sup> and then the ECJ.

The CFI accepted X's argument that performing an HIV test without the patient's informed consent is an interference with physical integrity and hence violates the right to privacy.<sup>92</sup> The court refused to find, however, that X had in fact been subjected to an HIV test or a dissimulated HIV test because the T4/T8 tests cannot determine seropositivity.<sup>93</sup> Thus, the CFI concluded that X's right to privacy had not been breached.

On appeal to the ECJ, the Court benefitted from a long and detailed analysis by Advocate General Van Gerven.<sup>94</sup> In his opinion, the

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83. Case 404/92, 1994 E.C.R. I-4737.

84. Case 10/93, *A v. Commission*, 1994 E.C.R. II-179 (Ct. First Instance).

85. For commentary on *X v. Commission*, see Eddy De Smijter, Case Comment, Case "X," 1 Colum. J. Eur. L. 332 (1995); Twomey, *supra* note 13; Jane Moorman, *Legal Update: How Mr. X Kept His Privacy and Lost His Job*, The Guardian, July 15, 1995, at 2, available in LEXIS, NEWS library, CURNWS file.

86. The CFI affirmed the Commission Decision, essentially holding that the Commission violated neither Article 8 of the ECHR nor the Conclusions since the applicant had not been subjected to an HIV test or a dissimulated HIV test and that, as a result, there was no invasion of privacy. Joined Cases T-121/89 and T-13/90, *X v. Commission*, 1992 E.C.R. II-2195, 2218 (Ct. First Instance).

87. Written Question No. 1751/90 by Mr. Joaquim Miranda Da Silva to the Commission of the European Communities of July 12, 1990, 1991 O.J. (C 115) 10.

88. *X v. Commission*, 1994 E.C.R. at 4739-40.

89. The results of these tests, determining X's T4 and T8 lymphocyte counts, can provide "sufficient information to conclude that the candidate might be" HIV-positive. *Id.* at 4791.

90. *Id.* at 4740.

91. Joined Cases T-121/89 and T-13/90, 1992 E.C.R. II-2195 (Ct. First Instance).

92. *X v. Commission*, 1994 E.C.R. at 4791.

93. *Id.* at 4748.

94. The Advocate General's function is to conduct an independent examination of the case and present an opinion to the ECJ. Bermann et al., *EC Law, supra* note 27, at 71.

Advocate General noted that while “the [ECHR] does not form a direct part of Community law,” the basic rights and fundamental freedoms protected by the ECHR are “enforceable as general principles of Community law.”<sup>95</sup> The Advocate General cited Article 8(2) of the ECHR, which provides:

There shall be no interference by a public authority with the exercise of [the privacy right] except such as is in accordance with the law and is necessary in a democratic society in the interests of . . . public safety or . . . for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>96</sup>

The Advocate General then identified two primary issues following the two-prong test established in *Commission v. Germany*:<sup>97</sup> whether the tests carried out in the prerecruitment exam constituted an interference with X’s private life; and if so, whether such interference was justified by the public interests referred to in Article 8(2).<sup>98</sup> As to the first prong, the Advocate General considered the interference in light of the principle of informed consent.<sup>99</sup> Although the Commission argued that X could not invoke his right to privacy because he voluntarily participated in a recruitment procedure that included a medical exam, the Advocate General nonetheless held that X’s privacy right had been infringed upon in these circumstances.<sup>100</sup> The Advocate General found that the medical officer, the medical committee, and the Commission all attached far-reaching consequences to the outcome of the supplementary tests that were not normally part of the medical exam.<sup>101</sup> For instance, the medical officer determined on the basis of the results that X suffered from full-blown AIDS and was therefore physically unfit for recruitment.<sup>102</sup> By ordering a supplementary exam in order to reach indirectly the same result as an HIV test, the medical officer violated X’s privacy right. On these facts, the Advocate General concluded that X should have been informed of

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[T]he parties [of the case] do not comment on the Advocate General’s opinion and the Court is in no respect bound to follow or be influenced by it. Traditionally, however, the opinion carries great weight in the Court’s deliberations and often the Court will reach the same conclusion, though perhaps on different grounds. The opinion of the Advocate General . . . is cited by academic writers and is likely to influence the later evolution of the case law.

*Id.* at 72.

95. *X v. Commission*, 1994 E.C.R. at 4750; see also *supra* part I.A. (discussing case law and the TEU’s Article F).

96. ECHR, *supra* note 41, art. 8(2).

97. See *supra* notes 70-71 and accompanying text (discussing the two-prong balancing test).

98. *X v. Commission*, 1994 E.C.R. at 4763.

99. The Advocate General did not establish a broad rule regarding when informed consent is necessary. He considered only the question whether informed consent was necessary in the circumstances of the case at hand. *Id.*

100. *Id.* at 4761.

101. *Id.*

102. *Id.*

both the proposal to submit him to T4/T8 tests and the scope and possible consequences of undergoing or refusing to undergo the tests.<sup>103</sup>

The Advocate General then considered the second prong of the balancing test: whether the restriction furthered an objective of general interest pursued by the Community without constituting an intolerable infringement on the substance of the rights guaranteed.<sup>104</sup> The Advocate General agreed with the Commission's assertion that its objective was the protection of health—a medical exam which might prevent the candidate from being recruited to a post that could possibly endanger his state of health did in fact “protect health.”<sup>105</sup> Mr. Van Gerven also accepted as a legitimate concern the assertion that a test to screen out such candidates would protect the health of other employees because the appointment of a candidate who could not properly perform his duties might result in “overwork and additional stress” for his colleagues.<sup>106</sup>

Although the Commission's conduct passed the test's two prongs, the Advocate General found that the T4/T8 tests failed the proportionality requirement. While a general prerecruitment exam with a candidate's general consent “is undeniably proportionate” to the objective of protection of health, a more searching exam demands the candidate's informed consent.<sup>107</sup> This is particularly true when the supplementary exam is an immune deficiency test and the candidate has already refused to undergo an HIV test.<sup>108</sup>

In its judgment, the ECJ reaffirmed the balancing test it established in *Commission v. Germany*.<sup>109</sup> The Court found that while the prerecruitment examination served a legitimate interest, X's right to privacy mandated that the Commission respect his refusal to submit to an HIV test in its entirety. The ECJ stated that “[s]ince the [candidate] expressly refused to undergo an AIDS screening test, that right precluded the administration from carrying out any test liable to point to . . . that illness, in respect of which he had refused disclosure.”<sup>110</sup> The Court annulled the Commission's decision that X did not satisfy the conditions as to physical fitness for recruitment.<sup>111</sup>

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103. *Id.*

104. *Id.* at 4762.

105. *Id.* at 4763.

106. *Id.*

107. *Id.* at 4764.

108. *Id.*

109. Case 62/90, 1992 E.C.R. I-2575, 2609; *supra* notes 70-71 and accompanying text (discussing the two-prong balancing test).

110. *X v. Commission*, 1994 E.C.R. at 4791.

111. Procedurally, after annulment of both the CFI's opinion and the Commission Decision, the case is “remanded” to the Commission, which would either reconsider X for the temporary post, or settle for damages.



The Court added in dicta, however, that the institutions are not required to take the risk of recruiting a candidate who refuses to undergo tests that the medical officer believes to be necessary to determine eligibility for the post.<sup>112</sup> This language seriously hampers the protection of the individual's right to privacy that the Court seemed to guarantee in the case and is not consistent with the Court's role as guarantor of fundamental rights in the Community.<sup>113</sup>

## 2. *A v. Commission*

The candidate in *A v. Commission*<sup>114</sup> underwent the same pre-recruitment medical exam as X, but instead of refusing an HIV test, A voluntarily informed the medical officer that he was HIV positive and willingly submitted to the test.<sup>115</sup> The medical officer concluded that A was unfit for the "nature of the post,"<sup>116</sup> an administrative position in the African, Caribbean, and Pacific ("ACP") region.<sup>117</sup> A argued that the purported objective of the Commission's prerecruitment exam—to avoid major future costs—was economic in character and unjustified under any of the objectives listed in Article 8 of the ECHR.<sup>118</sup> A also argued that the test violated his right to privacy because his voluntary disclosure made the test superfluous.<sup>119</sup>

The CFI applied *Commission v. Germany's* balancing test. The CFI first determined that the objective of the exam was to enable the Commission either to avoid hiring a candidate unsuitable for the duties of that post or to assign duties compatible with a hired candidate's physical condition.<sup>120</sup> The CFI then looked to the Member State traditions and found that such objectives were lawful "within any system of public administration," particularly because prerecruitment medical exams were common to most Member States.<sup>121</sup> The CFI therefore concluded that the exam "cannot be regarded as . . . contrary to the principle of respect for a person's private life."<sup>122</sup>

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112. *Id.* at 4790. By articulating this conclusion, the ECJ did not expressly permit the institutions to discriminate against HIV-positive candidates; this may be the result, however, because medical determinations are generally beyond the scope of judicial review. See *infra* notes 123, 130 and accompanying text.

113. See *infra* part III.B.2.

114. Case 10/93, *A v. Commission*, 1994 E.C.R. II-179 (Ct. First Instance).

115. *Id.* at 185.

116. *Id.* at 186.

117. The ACP is a trade bloc made up of 70 countries in the three regions. The *Courier*, Mar./Apr. 1997, at xvi.

118. *A v. Commission*, 1994 E.C.R. at 200; ECHR, *supra* note 41.

119. *A v. Commission*, 1994 E.C.R. at 200.

120. *Id.* at 201 (implicitly rejecting A's argument that the Commission's objective was to avoid future costs).

121. *Id.*

122. *Id.* The CFI did not examine whether the restriction was proportionate to the objective.

The CFI then examined A's claim that the nature of the HIV test was superfluous. The CFI determined that the medical officer's decision that such a test was necessary, or at least useful, constituted an assessment of an exclusively medical nature and that as a medical finding it was beyond the court's review.<sup>123</sup> In addition, the court stated that the medical officer may base his assessment of a candidate's fitness "not only on the existence of actual disorders but also on a medically justified prognosis of future disorders capable of jeopardizing in the foreseeable future the normal performance of the duties in question."<sup>124</sup>

The CFI next addressed the issue of whether A's seropositivity made him unfit for the post. The Commission argued that A was unfit because he had gone beyond mere seropositivity to a condition of active illness. As a result, A's projected duties would be dangerous to his health, since they would be in " 'high-risk countries', given the dangers of infections and the lack of appropriate health-care infrastructures."<sup>125</sup> A objected to the medical determination that his disease had gone beyond seropositivity and added that he had previously worked in Mexico, a "developing countr[y] with only limited medical infrastructures," further supporting his assertion that he was physically fit to work in the ACP region.<sup>126</sup> He also claimed that because he was not symptomatic, the Commission violated the Council Conclusions, which state that an asymptomatic employee should be treated as fit for work.<sup>127</sup>

The CFI noted that the Conclusions were not provisions of Staff Regulations or Community legislation and thus were not legally bind-

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123. *Id.* at 202.

124. *Id.* at 206 (citing *Miss M v. Commission* and its decision in *X v. Commission*). Miss M was a former Commission official who had successfully passed an entrance exam and who underwent the requisite medical examination. Following a neuro-psychiatric exam, the medical officer concluded that Miss M was unfit for any secretary-level post. Miss M argued, *inter alia*, that the Commission may only consider physical deficiencies when determining fitness for duty, not "psychical" or psychological disorders. The Commission disagreed. Case 155/78, *Miss M v. Commission*, 1980 E.C.R. 1797.

The ECJ held that the medical officer may take into account all relevant medical criteria, including both physical and mental disorders to the extent that they "affect the fulfillment by the candidate of his duties as an official." *Id.* at 1809. The Court also stated that "it is even possible to envisage that a finding of unfitness may be based not only on the existence of actual disorders but also on a medically justified prognosis of future disorders capable of jeopardizing in the foreseeable future the normal performance of the duties in question." *Id.* The ECJ found for Miss M on other grounds. *Id.* at 1811-12 (annulling the Commission's decision of unfitness because it improperly withheld from the court information on the medical committee's conduct in examining Miss M on confidentiality grounds despite Miss M's authorization of release).

125. *A v. Commission*, 1994 E.C.R. at 205.

126. *Id.* at 203.

127. *Id.* at 205-06; Conclusions, *supra* note 73, at 2.

ing.<sup>128</sup> Nonetheless, the CFI held that the Conclusions functioned as rules of practice that should not be deviated from without full explanation.<sup>129</sup> Although the CFI decided it could not alter a medical opinion, because it was a finding of fact, the court found it did have the power to determine “whether there is a comprehensible link between the medical findings . . . and the conclusion drawn” from those findings.<sup>130</sup>

The CFI found that the medical exam had revealed certain symptoms that would be classified as “symptomatic” of “associated infections.”<sup>131</sup> The CFI therefore concluded that there was a comprehensible link between the medical findings and the conclusion drawn regarding the candidate’s fitness for duty, “particularly as those duties were to be performed in developing countries where . . . the risks of infection are greater than in Europe.”<sup>132</sup> The CFI rejected A’s claim that he had worked in Mexico without any medical problems on the grounds that Mexico is not an ACP country and that the medical infrastructure in the ACP region is more rudimentary than Mexico’s system.<sup>133</sup> The CFI also determined that it was not necessary to decide whether the Commission had complied with the Conclusions because A was symptomatic and the Conclusions’ provision regarding fitness for work applies only to asymptomatic carriers.<sup>134</sup> Thus, the CFI held that A was not fit for duty because he had become symptomatic.<sup>135</sup>

Accordingly, current E.C. case law indicates that the institutions may subject a candidate to a medical exam, performing supplementary tests so long as they obtain the candidate’s informed consent to both the test and the implications the results might have on the candidate’s recruitment.<sup>136</sup> If the candidate refuses to submit to a test, the medical officer may not perform related tests, but the institutions can possibly reject the candidate based on his refusal.<sup>137</sup> As discussed below, such a limitation hampers full protection of an individual’s right to privacy and violates the provisions of the ECHR’s Article 8.<sup>138</sup> U.S. law, at least under its statutory protection, has better protected an individual’s right to privacy.

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128. *A v. Commission*, 1994 E.C.R. at 205-06.

129. *Id.* at 205 (noting that the Commission “regards itself as bound by [the] Conclusions”).

130. *Id.* at 206.

131. *Id.* at 207.

132. *Id.*

133. *Id.* at 208.

134. *Id.* at 208-09.

135. *Id.* at 208. This case was not appealed to the ECJ.

136. Case 404/92, *X v. Commission*, 1994 E.C.R. I-4737, 4790.

137. *Id.*

138. See *infra* part III.B.2.

## II. UNITED STATES LAW

Like the European Community, the United States respects privacy and protection of medical information. In addition, the United States has implemented statutory provisions limiting the use of HIV testing by employers and protecting workers from discrimination in the HIV/AIDS context. Both the constitutional and statutory protection have given rise to a growing body of case law.<sup>139</sup>

A. *Foundation for the Right to Privacy*

Under U.S. law, an individual's right to privacy stems from three main sources: the Due Process clauses of the Fifth and Fourteenth Amendments, Fourth Amendment protection from government intrusions, and statutory protection from public and private employers. This part will discuss the constitutional rights and the establishment of the respective balancing tests later used in the HIV/AIDS context.

## 1. Due Process Right to Privacy

While nothing in the U.S. Constitution specifically refers to an individual's right to privacy, the Supreme Court has derived a privacy right from various constitutional sources.<sup>140</sup> In *Griswold v. Connecticut*,<sup>141</sup> a majority of the Court recognized a set of "penumbral pri-

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139. Roger Ricklefs, *AIDS Cases Prompt a Host of Lawsuits*, Wall St. J., Oct. 7, 1987, at 37 (stating that "day by day, the caseload grows").

140. See Ellen Alderman & Caroline Kennedy, *The Right to Privacy* (1995); Jon D. Bible & Darien A. McWhirter, *Privacy in the Workplace: A Guide for Human Resource Managers* 33-54 (1990); *AIDS Law Today: A New Guide for the Public* 131-34, (Scott Burris et al. eds., 1992); Richard C. Turkington et al., *Privacy: Cases and Materials* (1992); Gerald G. Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy,"* 34 Vand. L. Rev. 1289 (1981); G. Sidney Buchanan, *The Right of Privacy: Past, Present, and Future*, 16 Ohio N.U. L. Rev. 403 (1989) (presenting extensive discussion on the right of privacy during the 25th anniversary of *Griswold v. Connecticut*, 381 U.S. 479 (1965)); David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 Harv. J.L. & Pub. Pol'y 795, 843-48 (1996) (discussing the derivation of privacy rights from the text of the Constitution); Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. Pa. L. Rev. 1 (1991) (discussing the interest in disclosing personal information); Don Mayer, *Workplace Privacy and the Fourth Amendment: An End to Reasonable Expectations?*, 29 Am. Bus. L.J. 625 (1992).

141. 381 U.S. 479 (1965).

vacy" rights.<sup>142</sup> In *Whalen v. Roe*,<sup>143</sup> the Supreme Court characterized the due process privacy right as involving at least two types of interests: "the individual interest in avoiding disclosure of personal matters and . . . the interest in independence in making certain kinds of important decisions."<sup>144</sup> The Supreme Court implied that the right to private medical information falls under the former category.<sup>145</sup> Although the Court upheld the state statute requiring central recording of prescriptions and sales of dangerous drugs, the Court suggested that government disclosure of a person's medical records might invade a constitutional right to privacy.<sup>146</sup> Several circuit courts have used *Whalen* as a foundation for recognition of a qualified privacy right of medical information.<sup>147</sup>

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142. The Court based these rights on the First Amendment's freedom of association, the Third Amendment's prohibition against quartering of soldiers in any house, the Fifth Amendment's self-incrimination clause, the Ninth Amendment provision that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," and the Fourth and Fifth Amendment provisions regarding "protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.'" *Id.* at 483-84 (quoting the Ninth Amendment and *Boyd v. United States*, 116 U.S. 616, 630).

143. 429 U.S. 589 (1977). See generally *Turkington et al.*, *supra* note 140, at 59-60; Lawrence O. Gostin, *Health Information Privacy*, 80 *Cornell L. Rev.* 451, 495-97 (1995).

144. *Whalen*, 429 U.S. at 599-600.

145. *Id.* at 600.

146. See *id.* at 605-06 (noting that New York State law and possibly the Constitution require a duty to avoid unwarranted disclosures of personal information and at least "evidence a proper concern with, and protection of, the individual's interest in privacy"); *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995) (stating that the "strongest precedent in the Supreme Court for recognizing a constitutional right to conceal one's medical history is *Whalen v. Roe*").

147. The Third Circuit was the first to affirm that an employee's medical records are private and therefore are entitled to some degree of protection. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (involving a government agency's request for Westinghouse employees' medical records for the purpose of an occupational health investigation). The court also held that this right is not absolute and some intrusions may be justified where "the societal interest in disclosure outweighs the privacy interest on the specific facts of the case." *Id.* at 578. After taking into account the public policy interests in the government's comprehensive statutory scheme concerning occupational health and safety as well as its interest in conducting a study to better this system, the instituted safeguards ensuring against nonconsensual disclosure, and the fact that the employees' records primarily contained results from routine medical tests, the Third Circuit ruled that Westinghouse's blanket refusal to disclose to the government the information in their employees' medical files was unjustified. *Id.* at 580. Nevertheless, the court also noted that an individual employee could raise a private action if he thought that his information was of such a sensitive nature that it outweighed the federal agency's interest in its research. *Id.* at 581. The court accordingly mandated a sufficient period of notice of disclosure so that the employee would have time to make this determination. *Id.* Other Circuits have cited *Westinghouse* and *Whalen* as a basis for upholding a privacy right in medical information. See, e.g., *F.E.R. v. Valdez*, 58 F.3d 1530, 1535 (10th Cir. 1995); *Doe v. City of N.Y.*, 15 F.3d 264, 267 (2d Cir. 1994); *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1322 n.19 (7th Cir. 1988). But see *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994) (expressly rejecting this right).

## 2. Fourth Amendment Right to Privacy

The Supreme Court uses a balancing test in Fourth Amendment challenges to unreasonable searches, which employees have raised when contesting blood tests in a variety of contexts, including HIV screening in the workplace.<sup>148</sup>

### a. Fourth Amendment Privacy and Blood Testing

The Supreme Court has held that the “overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”<sup>149</sup> In applying Fourth Amendment protection against unreasonable searches in the workplace, the Supreme Court uses a balancing test that weighs the nature and quality of “the invasion of the employees’ legitimate expectations of privacy against the government’s need for supervision, control, and the efficient operation of the workplace.”<sup>150</sup>

In *Schmerber v. California*,<sup>151</sup> the Court examined Fourth Amendment protection against involuntary blood testing.<sup>152</sup> Schmerber was brought to the hospital following a car accident. The investigating police officer suspected Schmerber was under the influence of alcohol, arrested him, and arranged for the hospital to take a blood sample.<sup>153</sup> The Supreme Court first stated that the Fourth Amendment protects individuals from “intrusions which are not justified in the circumstances, or which are made in an improper manner.”<sup>154</sup> The Court held that in the case of bodily intrusions, unless there is some clear indication that evidence will be found, the individual’s privacy interest outweighs the risk that such evidence may disappear.<sup>155</sup> The Court then determined that the officer could “reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant . . . threatened ‘the destruction of evidence,’ ” because the body eliminates alcohol from the bloodstream shortly after

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148. See, e.g., *Leckelt v. Board of Comm’rs of Hosp. Dist. No. 1*, 909 F.2d 820 (5th Cir. 1990); *Glover v. Eastern Neb. Community Office of Retardation*, 867 F.2d 461 (8th Cir.), cert. denied, 493 U.S. 932 (1989); *Local 1812, Am. Fed’n of Gov’t Employees v. United States Dep’t of State*, 662 F. Supp. 50 (D.D.C. 1987).

149. *Schmerber v. California*, 384 U.S. 757, 767 (1966). The Fourth Amendment states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV.

150. *O’Connor v. Ortega*, 480 U.S. 709, 719-20 (1987).

151. 384 U.S. 757 (1966).

152. *Id.* at 766.

153. *Id.* at 758.

154. *Id.* at 768.

155. *Id.* at 770.

drinking stops.<sup>156</sup> Lastly, the Court decided that the test chosen to measure the level of alcohol in the blood was a reasonable one because blood tests are “commonplace” and that “for most people the procedure involves virtually no risk, trauma, or pain.”<sup>157</sup> While holding that the blood test was a justified invasion of privacy, the Court also underlined that it reached a judgment only on the facts of the case, as “[t]he integrity of an individual’s person is a cherished value of our society.”<sup>158</sup> Although the Supreme Court has not decided a case directly on point, several circuit and district courts have addressed privacy and Fourth Amendment searches in the context of HIV testing.

b. *Fourth Amendment Privacy and HIV Testing*

In *Local 1812, American Federation of Government Employees v. United States Department of State*,<sup>159</sup> an employee union challenged the government’s mandatory HIV testing policy as an unreasonable search in violation of the Fourth Amendment and a substantive privacy right stemming from the Fifth Amendment’s Due Process clause.<sup>160</sup> In November 1986, the State Department included an HIV test in the list of routine blood tests given to all candidates and employees.<sup>161</sup> As justification, the State Department argued that service at many posts would pose a “serious hazard” to HIV-infected individuals, due to the insufficient level of medical care available to treat HIV-related problems and the “health and sanitary conditions” that

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156. *Id.* at 770 (citations omitted). This is not a concern when testing for HIV, thus an unauthorized search based on this premise alone would probably violate the Fourth Amendment.

157. *Id.* at 771.

158. *Id.* at 770-72.

159. 662 F. Supp. 50 (D.D.C. 1987).

160. *Id.* at 53. The union also claimed that the testing policy violated the Rehabilitation Act. *Id.* at 53-54; see discussion *infra* note 227. Because the union represented only some of the Foreign Service employees, the court took “cognizance of the possibility that plaintiff may lack organizational standing to represent its members[,] . . . recognizing the highly individualized nature of the problem and possible conflicts between Foreign Service employees or within their families.” *Id.* at 55 (citations omitted).

161. *Id.* at 52. On February 10, 1996, President Clinton signed the National Defense Authorization Act for Fiscal Year 1996, which included a provision requiring the discharge of all HIV-positive military personnel. The President opposed this provision, which is “blatantly discriminatory and highly punitive to service members and their families.” Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 32 Weekly Comp. Pres. Doc. 260, 260-61 (Feb. 19, 1996). On March 20, 1996, “the Senate unanimously supported repeal” of that provision. *Retreat from HIV Law: Senate: Repeal Discharge Policy*, *Newsday*, Mar. 20, 1996, at A56. The House also dropped the provision later in the year. *Congress Kills Bill to Boot All with HIV from Military*, *S.F. Examiner*, Aug. 1, 1996, at A10, available in Westlaw, 1996 WL 3715166.

would be "particularly hazardous to carriers of the virus."<sup>162</sup> HIV-positive individuals were barred from employment because they "are impaired and medically unfit for worldwide service."<sup>163</sup>

The union argued that the testing program was unreasonable because many experts assert that "mandatory testing has little, if any, impact on the spread of HIV-related disease."<sup>164</sup> Judge Gesell rejected this argument, finding the purpose of the testing policy to be evaluation of fitness for duty, not prevention of HIV infection.<sup>165</sup> Because no additional taking of blood was necessary, presumably making the test reasonable at its inception, and because the tests were conducted in a reasonable manner to protect privacy, the court found that the HIV test was "rational and closely related to fitness for duty."<sup>166</sup> The court also did not find any constitutional privacy issue in the potential psychological impact of discovering the results of an HIV test, particularly because other serious diseases detectable by a blood test may present similar concerns.<sup>167</sup>

In contrast to *Local 1812*, the Eighth Circuit struck down a health services agency's policy of testing its employees for HIV in *Glover v. Eastern Nebraska Community Office of Retardation*.<sup>168</sup> A class of employees at the mental health institution claimed that the agency's policy violated their Fourth Amendment rights against unreasonable searches. The agency's purpose for the testing was ostensibly to protect clients engaging in violent behavior, including biting and scratching, from contracting HIV from a seropositive employee.<sup>169</sup> After reviewing extensive evidence, the district court found that "[t]he medical evidence is undisputed that the disease is not contracted by casual contact,"<sup>170</sup> noting that the risk of infection from scratching or biting "is extraordinarily low, . . . approaching zero."<sup>171</sup> Thus, the district court found that "from a medical viewpoint, this policy is not necessary to protect clients from any medical risks."<sup>172</sup> Based on these findings, the Eighth Circuit affirmed the conclusion that the agency's

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162. *Local 1812*, 662 F. Supp. at 52; see also *supra* note 132 and accompanying text (discussing a similar rationale in *A v. Commission*).

163. *Local 1812*, 662 F. Supp. at 52. The policy further stated that current symptomatic employees would be limited to domestic service, asymptomatic employees would be eligible for service in those countries whose medical care was considered adequate and where unusual health hazards were not present, and no employee would be dismissed by a finding of HIV infection. *Id.*

164. *Id.* at 53.

165. *Id.* The court stated that the Fourth Amendment and due process privacy claims are "closely related in their focus on the reasonableness of the testing program," and did not address them separately. *Id.*

166. *Id.*

167. *Id.*

168. 867 F.2d 461 (8th Cir.), cert. denied, 493 U.S. 932 (1989).

169. *Id.* at 462-63.

170. *Id.* at 463

171. *Id.*

172. *Id.*



policy was unreasonable and did not justify an intrusion on its employees' Fourth Amendment rights.<sup>173</sup> The court added, however, that because of the severity of the disease at issue, it did not intend a "broad-based rule with regard to testing public employees for any infectious disease, including AIDS."<sup>174</sup>

In contrast to *Glover*, the Fifth Circuit found that a hospital's infection control policy requiring disclosure of test results did not constitute an unreasonable invasion of its employees' right to privacy. In *Leckelt v. Board of Commissioners of Hospital District No. 1*,<sup>175</sup> a nurse was discharged for violating hospital policy when he refused to submit the results of an HIV test he voluntarily underwent outside his course of employment.<sup>176</sup> The court dismissed Leckelt's claim that forcing him to divulge the results violated his right to privacy under the Fourth Amendment.<sup>177</sup> Noting the hospital's detailed infection control policies, the court found that Leckelt had a "diminished expectation of privacy in the results of his HIV antibody test."<sup>178</sup> In addition, the court considered the hospital's strong interest in protecting the health of its employees and patients by preventing the spread of infectious diseases and the circumstances surrounding Leckelt himself, such as "his apparent homosexuality, medical condition, . . . long-term relationship with a man" who died from AIDS-related complications, and his duties as a licensed nurse which might provide for an opportunity for transmission.<sup>179</sup> In applying the balancing test, the court concluded that the hospital's interest "in maintaining a safe workplace through infection control outweighed the limited intrusion on any privacy interest Leckelt had in the results of his HIV antibody test."<sup>180</sup>

### B. *Statutory Protection of the Right to Privacy in the Workplace*

Unlike the European Community, the United States has a comprehensive system of statutory law protecting disabled employees from discrimination in the workplace. Both HIV seropositivity and AIDS are now considered disabilities, and therefore benefit from protection under two main acts: the Rehabilitation Act and the ADA.

#### 1. The Statutory Provisions

The Rehabilitation Act was adopted in 1973 and was the first Act to protect handicapped individuals from discrimination in the workplace.

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173. *Id.* at 464.

174. *Id.*

175. 909 F.2d 820 (5th Cir. 1990).

176. *Id.* at 824.

177. *Id.* at 833.

178. *Id.*

179. *Id.*

180. *Id.*

The ADA was adopted in 1990 and is similar to the Rehabilitation Act except that it applies to private and municipal employers while the Rehabilitation Act covers federal employers. The two statutes provide adequate protection in most instances from discrimination by both public and private employers.

a. *Rehabilitation Act of 1973*

The Rehabilitation Act<sup>181</sup> covers federal employers and contractors as well as those receiving financial assistance from the federal government.<sup>182</sup> It provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of . . . his disability, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance or . . . conducted by any Executive agency.”<sup>183</sup> An individual with a disability may fall under any of three categories: (a) one who has a physical impairment which substantially limits any major life activity, (b) one who “has a record of such an impairment,” or (c) one who “is regarded as having such an impairment.”<sup>184</sup> The Rehabilitation Act also prohibits preemployment medical exams and inquiries into an applicant’s disability, but does permit inquiries into an applicant’s ability to perform job-related functions.<sup>185</sup> Thus, an HIV test, for example, would not be permitted unless the employer could demonstrate that the results reflected the applicant’s ability to perform a job-related function.<sup>186</sup>

While the Rehabilitation Act does not specifically state that individuals with an infectious disease fall under its scope, the Supreme Court has held that the Rehabilitation Act does in fact apply to such individuals. In *School Board of Nassau County v. Arline*,<sup>187</sup> a teacher who suffered several relapses of tuberculosis was discharged by the school board “solely on the basis of her illness.”<sup>188</sup> The Supreme Court

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181. 29 U.S.C. §§ 701-797 (1994).

182. Laura F. Rothstein, *Disability Law: Cases, Materials, Problems* 71 (1995).

183. 29 U.S.C. § 794(a).

184. § 706(8)(B). The Rehabilitation Act also requires an employer to provide reasonable accommodation to the disabled individual unless such accommodation would cause undue hardship. 45 C.F.R. § 84.12(a) (1995). Reasonable accommodation may include making facilities more accessible or usable, job restructuring, modified work schedules, or modification of equipment or devices. 45 C.F.R. § 84.12(b).

185. 45 C.F.R. § 84.14(a).

186. Young & Wells, *supra* note 21, at 53.

187. 480 U.S. 273 (1987). For further discussion of this case, see Michael E. Hilton, *Recent Developments, Civil Rights—Rehabilitation Act of 1973—Individual Affected with Contagious Disease Held “Handicapped” and Entitled to Protection of Section 504* (29 U.S.C. § 794), 19 St. Mary’s L.J. 231 (1987); M.E. Lally-Green, *Is AIDS a Handicap Under the Rehabilitation Act of 1973 After School Board v. Arline and the Civil Rights Restoration Act of 1987?*, 19 U. Tol. L. Rev. 603 (1988); Gary Lawson, *AIDS, Astrology, and Arline: Towards a Casual Interpretation of Section 504*, 17 Hofstra L. Rev. 237 (1989); Robert P. Wasson, Jr., *AIDS Discrimination Under Federal, State, and Local Law After Arline*, 15 Fla. St. U. L. Rev. 221 (1987).

188. *Arline*, 480 U.S. at 276.

found that Arline had a record of impairment and therefore qualified as handicapped under the Rehabilitation Act.<sup>189</sup> The Supreme Court rejected the school's argument that Arline was dismissed not because of her physical capabilities, but because she posed a threat to the health of others,<sup>190</sup> stating it would be unfair to allow an employer to use "the distinction between the effects of a disease on others and the effects of a disease on a patient" to justify discrimination.<sup>191</sup> The Court also found that such a distinction would defeat the purpose of the Rehabilitation Act, which is to ensure that individuals with disabilities are not denied jobs simply because of the "prejudiced attitudes or the ignorance of others."<sup>192</sup> Noting that to exclude such persons from the Rehabilitation Act would be to deny them "the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were 'otherwise qualified,'" the Court concluded that a person with a record of a physical impairment cannot be excluded from coverage solely because of his contagiousness.<sup>193</sup> Despite recognizing that "[f]ew aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness,"<sup>194</sup> and that the purpose of the Rehabilitation Act is to replace such reactions with "reasoned and medically sound judgments,"<sup>195</sup> the Court still issued a disclaimer regarding the applicability of its judgment to HIV/AIDS.<sup>196</sup>

The Supreme Court then examined whether Arline was "otherwise qualified" for the position of an elementary schoolteacher.<sup>197</sup> The basic factors to consider were later codified in a federal regulation, which states that an otherwise qualified person is one "who, with reasonable accommodation, can perform the essential functions of the job."<sup>198</sup> The Court agreed with amicus American Medical Association that the inquiry should include findings of fact about "'(a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.'"<sup>199</sup>

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189. *Id.* at 281.

190. *Id.* at 281-82.

191. *Id.* at 282.

192. *Id.* at 284.

193. *Id.* at 285-86.

194. *Id.* at 284 (footnote omitted).

195. *Id.* at 285.

196. In a footnote, the Court said it was not addressing whether a person with HIV could be considered to have a physical impairment, or whether such a person could be considered handicapped solely on the basis of his contagiousness. *Id.* at 282 n.7.

197. *Id.* at 287.

198. 45 C.F.R. § 84.3(k)(1) (1995).

199. *Arline*, 480 U.S. at 288 (quoting Brief for American Medical Association as Amicus Curiae at 19).

The Court further advised that "courts normally should defer to the reasonable medical judgments of public health officials."<sup>200</sup>

Since the Court's decision, the Department of Justice<sup>201</sup> and most courts<sup>202</sup> have found both symptomatic and asymptomatic individuals to be handicapped under the Rehabilitation Act despite their contagiousness. In September 1988, Congress amended the definition of a handicapped individual to provide that the Rehabilitation Act does not include an individual

who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.<sup>203</sup>

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200. *Id.*

201. *Justice Department Memorandum on Application of Rehabilitation Act's Section 504 to HIV-Infected Persons*, Daily Lab. Rep. (BNA) No. 195 (Oct. 7, 1988), available in Westlaw, BNA-DLR database, 195 DLR D-1, 1988 (finding symptomatic carriers and asymptomatic carriers to be physically impaired; the former, because their clinical symptoms have substantially limiting effects on major life activities, and the latter, because either they are limited in their ability to procreate, or others who know of their status will treat them in a way which will limit their activities).

202. *See, e.g., Harris v. Thigpen*, 941 F.2d 1495, 1523 (11th Cir. 1991) (agreeing with district court's assumption "that the HIV-infected prisoners are 'handicapped individuals' within the meaning of Section 504 of the Rehabilitation Act"); *Severino v. North Fort Myers Fire Control Dist.*, 935 F.2d 1179, 1182 n.4 (11th Cir. 1991) (stating that "[t]he contagiousness of the disease brings AIDS within the definition of a handicap," that others regarded this HIV-positive firefighter as handicapped, and that as a victim of AIDS, he suffered an impairment of major life activities); *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820, 825 (5th Cir. 1990) (assuming "that seropositivity to HIV antibodies is an impairment" under the Rehabilitation Act); *Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990) (noting "that it is well established that infection with AIDS constitutes a handicap for purposes of the Act" in the case of an asymptomatic HIV-infected Naval reserve member), *cert. denied*, 499 U.S. 904 (1991); *Martinez v. School Bd.*, 861 F.2d 1502, 1506 (11th Cir. 1988) (holding that each of an AIDS-afflicted, mentally handicapped child's conditions results in a physical or mental impairment which substantially limits a number of her major life activities); *Chalk v. United States Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701, 704, 709 (9th Cir. 1988) (holding that HIV is a contagious disease covered under the Act in the case of an HIV-infected teacher who had been re-assigned to an administrative position); *Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992) (holding that a firefighter who was withdrawn from instatement due to his HIV status was an individual with a handicap "because he has a physical impairment that substantially limits major life activities such as procreation, sexual contact, and normal social relationships"); *Cain v. Hyatt*, 734 F. Supp. 671, 678 (E.D. Pa. 1990) (holding that infection with HIV or AIDS is a handicap under the state analogue to the Rehabilitation Act); *Shuttleworth v. Broward County*, 639 F. Supp. 654, 660 (S.D. Fla. 1986) (finding a county employee with AIDS able to bring a claim under the Rehabilitation Act).

203. Pub. L. No. 100-259, 102 Stat. 28, 31-32 (codified at 29 U.S.C. § 706(8)(D) (1994)); *see also Connolly & Marshall, supra* note 20, at 567 (stating that the Department of Justice concluded that the Rehabilitation Act "protects all HIV-infected individuals, symptomatic or asymptomatic, who are not a direct threat to the health and safety of others").

Thus, people infected with HIV/AIDS do benefit from protection under the Rehabilitation Act, provided they do not pose a "direct threat" that cannot be eliminated by "reasonable accommodation."<sup>204</sup>

b. *Americans with Disabilities Act of 1990*

The Americans with Disabilities Act<sup>205</sup> prohibits any private or public employer of fifteen or more employees<sup>206</sup> from discriminating against a qualified individual on the basis of his disability.<sup>207</sup> The ADA's definition of "disability"<sup>208</sup> and "qualified individual with a disability"<sup>209</sup> are virtually the same as under the Rehabilitation Act.<sup>210</sup> "Discrimination" under the ADA, however, includes medical exams and inquiries.<sup>211</sup> The ADA prohibits all pre-employment medical exams that determine whether an applicant has a disability or the nature or severity of such a disability;<sup>212</sup> only inquiries into the candidate's ability to perform job-related functions are permitted.<sup>213</sup> Once an employer has made an offer of employment, it may require a medical exam and even make the offer conditional on the results if: (1) all offerees are subject to the exam and (2) the results are considered confidential and maintained in separate medical files.<sup>214</sup> Post-employment medical tests are prohibited unless the test is "job-related and consistent with business necessity."<sup>215</sup> An employer's qualification standards may also require that an individual "not pose a direct threat to the health or safety of other individuals in the workplace."<sup>216</sup> The Equal Employment Opportunity Commission's ("EEOC") implementing regulations<sup>217</sup> list factors to consider when determining

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204. See *infra* part II.B.2.

205. 42 U.S.C. §§ 12101-12213 (1994).

206. § 12111(5)(A); 29 C.F.R. § 1630.2(e)(1) (1996).

207. 29 C.F.R. § 1630.4. The federal government and corporations wholly owned by the federal government are excluded from the scope of the ADA. 42 U.S.C. § 12111(5)(B)(i).

208. 29 C.F.R. § 1630.2(g).

209. § 1630.2(m).

210. 29 U.S.C. § 706(8)(B) (1994); 45 C.F.R. § 84.13(k)(1).

211. 42 U.S.C. § 12112(d)(1). The EEOC's regulations implementing the Rehabilitation Act cover medical exams less extensively than the ADA provisions. See 45 C.F.R. § 84.14(a) (1996).

212. 42 U.S.C. § 12112(d)(2)(A).

213. § 12112(d)(2)(B).

214. § 12112(d)(3). If the tests "screen out an employee . . . with [a disability] . . . the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation." 29 C.F.R. § 1630.14(b)(3) (1996).

215. 42 U.S.C. § 12112(d)(4)(A). Voluntary medical exams may be offered provided the information is kept confidential and maintained in separate files. § 12112(d)(4)(B)-(C).

216. § 12113(b).

217. The ADA grants the EEOC authority to issue implementing regulations and develop procedures to handle administrative claims. 42 U.S.C. §§ 12111(1), 12116, 12117(b). The ADA also gives the EEOC the power to prevent unlawful employment

whether an individual poses a direct threat are listed,<sup>218</sup> and are virtually the same as the criteria the Supreme Court identified in *Arline*.<sup>219</sup> The regulations also state that the assessment should be based on "a reasonable medical judgment that relies on the most current medical knowledge."<sup>220</sup> Finally, as under the Rehabilitation Act,<sup>221</sup> the employer must attempt to make reasonable accommodation, such as job restructuring, modified work schedules, or reassignment to a vacant position, in order to assist the disabled individual in performing the essential functions of the job.<sup>222</sup>

Like the Rehabilitation Act, the ADA does not refer to HIV in any of its provisions. The EEOC, however, stated in its interpretive guidelines that HIV infection is "inherently substantially limiting"<sup>223</sup> and therefore is covered under the ADA. Four circuit courts<sup>224</sup> and several district courts<sup>225</sup> have also found HIV seropositivity to be a disability under the ADA.

Based on the case law discussed above and the EEOC guidelines implementing the ADA, HIV seropositivity is a handicap under both the Rehabilitation Act and the ADA. Hence, qualifying private or public employers may not require an HIV test as a prerequisite of employment unless they can show that it is related to the candidate's ability to do the job.<sup>226</sup>

practices, bring a civil action for such practices, and investigate any charges filed. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8.

218. 29 C.F.R. § 1630.2(r) (including duration of the risk, nature and severity of potential harm, likelihood that harm will occur and imminence of the potential harm).

219. See *supra* note 199 and accompanying text.

220. 29 C.F.R. § 1630.2(r).

221. 45 C.F.R. § 84.12.

222. 29 C.F.R. § 1630.2(o).

223. 29 C.F.R. app. § 1630.2(i) at 402.

224. *Abbott v. Bragdon*, No. 96-1643, 1997 WL 85096, at \*2 (1st Cir. Mar. 5, 1997); *Ennis v. National Ass'n of Bus. & Educ. Radio*, 53 F.3d 55, 60 (4th Cir. 1995) (stating that HIV seropositivity is not a per se disability because the statute requires "case-by-case determinations of whether a given impairment substantially limits a major life activity, whether an individual has a record of such a substantially limiting impairment, or whether an individual is being perceived as having such a substantially limiting impairment"); *Doe v. University of Md. Medical Sys. Corp.*, 50 F.3d 1261, 1265, 1267 (4th Cir. 1995) (finding, however, that Doe, a resident neurosurgeon, was not otherwise qualified since he posed a significant risk to his patients' health that could not be eliminated by reasonable accommodation); *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994) (finding no distinction between asymptomatic and symptomatic HIV carriers and holding that the "regulations implementing the ADA include, as a physical or medical impairment, 'HIV disease (whether symptomatic or asymptomatic)' ") (quoting 28 C.F.R. § 35.104(4)(l)(ii) (1994)). For further discussion of *Doe*, see *infra* notes 255-56 and accompanying text.

225. *Dean v. Knowles*, 912 F. Supp. 519, 521 (S.D. Fla. 1996) (finding HIV seropositivity a disability under the ADA since it is a handicap under the Rehabilitation Act and the standards of the Rehabilitation Act are applicable to cases under the ADA); *D.B. v. Bloom*, 896 F. Supp. 166, 170 (D.N.J. 1995) (stating that an individual is, "by virtue of his HIV status, a person with a disability" under the ADA).

226. *Young & Wells*, *supra* note 21, at 53.

## 2. Cases Under the Acts

Several courts evaluating challenges under the Rehabilitation Act and the ADA have addressed whether seropositive individuals pose a "direct threat" and therefore are not "otherwise qualified."<sup>227</sup> This section first discusses cases involving casual contact, and then examines cases involving health care workers ("HCWs") in which the Acts have been applied differently.

### a. Cases Involving Casual Contact

In *Chalk v. Orange County Superintendent of Schools*,<sup>228</sup> the Ninth Circuit held that HIV was a contagious disease covered under the Rehabilitation Act in the case of an HIV-infected teacher who had been re-assigned to an administrative position.<sup>229</sup> The district court had applied *Arline*'s four criteria, finding the probability of harm minimal, the duration of the risk long, the severity fatal, but transmission highly unlikely.<sup>230</sup> The district court concluded that the consequences of the possibility of a risk were too great to ignore and denied the teacher's motion for preliminary injunction, reinstating him to classroom duties.<sup>231</sup> The Ninth Circuit criticized the lower court's skepticism about the current state of medical knowledge, to which *Arline* specifically says deference should be granted, and held, after examining all the medical evidence indicating extremely low risk, that the HIV-positive schoolteacher was otherwise qualified.<sup>232</sup>

The D.C. district court in *Doe v. District of Columbia*<sup>233</sup> also applied the *Arline* criteria to examine whether an HIV-positive firefighter would "pose a 'direct threat' to the health or safety of others."<sup>234</sup> The court found that there was no measurable risk of transmission in the case of a firefighter and noted that one medical expert "compared the risk to that of being struck by a meteor."<sup>235</sup> The court also found that because the "risk of transmission [is] ex-

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227. Prior to the inclusion of the "direct threat" provision in the Rehabilitation Act, the *Local 1812* court addressed the employee union's claim that asymptomatic individuals are "otherwise qualified" under the Rehabilitation Act. *Local 1812, American Fed'n of Gov't Employees v. United States Dep't of State*, 662 F. Supp. 50 (D.D.C. 1987). The court summarily rejected the union's claim, stating that the "Act does not require the Department of State to ignore the obvious relevance of HIV infection to its qualification of Foreign Service employees for long terms of worldwide duty abroad." *Id.* at 54. The court further found that "the record is devoid of any purpose or intention to discriminate." *Id.*

228. *Chalk v. United States Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701 (9th Cir. 1988).

229. *Id.* at 704-09.

230. *Id.* at 707.

231. *Id.*

232. *Id.* at 709.

233. 796 F. Supp. 559 (D.D.C. 1992).

234. *Id.* at 568.

235. *Id.* at 568-69.

tremely remote, the duration and severity of the risk warrant little weight by the [c]ourt."<sup>236</sup> By taking into account medical testimony, the court concluded that the risk of transmission was so small that Doe's HIV seropositivity did not make him a direct threat to his colleagues or to the public.<sup>237</sup>

Similarly, in *EEOC v. Dolphin Cruise Line, Inc.*,<sup>238</sup> a Florida district court held that an HIV-positive entertainer, Sievers, did not pose a "direct threat" to others.<sup>239</sup> Dolphin rescinded an offer of employment when the results of Sievers's mandatory HIV test indicated he was seropositive.<sup>240</sup> Dolphin argued that "allowing Sievers to work on the ship . . . 'pose[s] a significant risk of harm to himself and to others' because he is HIV positive."<sup>241</sup> The court rejected this argument, finding Sievers did not pose a significant risk of harm because current medical opinion maintains that HIV cannot be transmitted through casual contact and because defendants "failed to demonstrate, by other than speculation and stereotyping, that the health risk posed by Sievers in the particular work environment was significant."<sup>242</sup>

One court took issue with the EEOC's interpretation of "direct threat" in its regulations implementing the ADA. An Illinois district court concluded in a Memorandum Opinion and Order that the EEOC's interpretation was "untenable," because "the ADA clearly and unambiguously refers to 'a direct threat to the health or safety of other individuals in the workplace,' " not to himself *and* to others.<sup>243</sup> The court found that the EEOC's reading would make certain words in the statute superfluous, contrary to the law of statutory interpretation.<sup>244</sup> In making this observation, the court raised an interesting point upon which both *Local 1812*<sup>245</sup> and *A v. Commission*<sup>246</sup> relied when they made findings of unfitness for duty based on the work envi-

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236. *Id.* at 569.

237. *Id.*

238. 945 F. Supp. 1550 (S.D. Fla. 1996).

239. *Id.* at 1555.

240. *Id.* at 1552-53.

241. *Id.* at 1554 (alteration in original) (citations omitted). Oddly, the EEOC did not challenge Dolphin's mandatory testing policy nor the inclusion of an HIV test in the medical exam.

242. *Id.* at 1555. Defendants recently settled the case, a development deemed important by the EEOC " 'because it says that an employer cannot assume that someone who is HIV positive is going to be a direct threat in the workplace.' " *Entertainer, Denied Job Because He Has HIV, Settles Case*, N.Y. Times, Dec. 19, 1996, at A15 (quoting Peggy Mastroianni, associate legal counsel for the EEOC).

243. *Kohnke v. Delta Airlines Inc.*, 932 F. Supp. 1110, 1111 (N.D. Ill. 1996). The EEOC's regulations define "direct threat" as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r) (1996).

244. *Kohnke*, 932 F. Supp. at 1111-12.

245. See *supra* notes 159-67 and accompanying text.

246. See *supra* notes 125-35 and accompanying text.



ronment's threat to the health of the afflicted individuals rather than the threat the individuals' posed to others.

b. "Direct Threat" and Health Care Workers

Many courts examine the "direct threat" question differently in cases involving HCWs. Following the news story of Kimberly Bergalis and four others who were presumably infected with HIV by their dentist, David Acer, the CDC adopted guidelines on HIV testing and HCWs ("CDC Guidelines").<sup>247</sup> The CDC recommended adherence to universal precautions such as the use of protective barriers and voluntary HIV testing of HCWs who perform exposure-prone procedures.<sup>248</sup> The CDC Guidelines note that "[c]urrently available data provide no basis for recommendations to restrict the practice of HCWs infected with HIV . . . who perform invasive procedures not identified as exposure-prone," and specifically do not recommend mandatory testing.<sup>249</sup> They also state that medical institutions should identify which procedures are exposure-prone and should establish an expert review panel that will decide on a case-by-case basis whether seropositive HCWs should continue such procedures.<sup>250</sup> Patient consent is also suggested.<sup>251</sup> Thus, using the CDC Guidelines as current medical opinion, a court might weigh a public medical institution's interest in protecting health more heavily than an employee's right to privacy where the individual in question is performing exposure-prone invasive medical procedures.

In a case involving a HCW, the Fifth Circuit held in *Bradley v. University of Texas M.D. Anderson Cancer Center*<sup>252</sup> that an HIV-positive surgical technician was not otherwise qualified due to the "cognizable risk of permanent duration with lethal consequences."<sup>253</sup> The court focused on the probability of transmission given Bradley's duties and found that "[w]hile the risk is small, it is not so low as to nullify the catastrophic consequences of an accident."<sup>254</sup> Some courts have considered any risk of transmission too significant, such as the Fourth Circuit in *Doe v. University of Maryland Medical Systems Corp.*,<sup>255</sup> a case

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247. Robert J. Fitzgibbon, *AIDS: Medical Groups Balk at Naming High-Risk Procedures*, Medical Laboratory Observer, Oct. 1, 1991, at 9, available in Westlaw, 1991 WL 2965612. See generally Centers for Disease Control, U.S. Dep't of Health and Human Servs., *Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures*, 40 Morbidity & Mortality Wkly. Rep. 1 (July 12, 1991) [hereinafter *HCW Guidelines*] (recommending practices for HCWs in light of HIV/AIDS).

248. *HCW Guidelines*, supra note 247, at 4.

249. *Id.*

250. *Id.*

251. *Id.*

252. 3 F.3d 922 (5th Cir. 1993) (per curiam), cert. denied, 510 U.S. 1119 (1994).

253. *Id.* at 924.

254. *Id.*

255. 50 F.3d 1261 (4th Cir. 1995).

involving a former resident in neurosurgery. The court held that Dr. Doe was not otherwise qualified because "even if [he] takes extra precautions . . . some measure of risk will always exist because of the type of activities in which Dr. Doe is engaged."<sup>256</sup>

The *Leckelt* case also concerned a HCW who submitted a Rehabilitation Act claim.<sup>257</sup> In considering risk of transmission, the court found that "[e]ven though the probability that a [HCW] will transmit HIV to a patient may be extremely low and can be further minimized through the use of universal precautions . . . the potential harm of HIV infection is extremely high."<sup>258</sup> In other cases a seropositive surgeon<sup>259</sup> and a surgical technician<sup>260</sup> were also found not otherwise qualified due to the risk of transmission, however slight.

In sum, under U.S. constitutional protections, an employer may test candidates for HIV to determine fitness for duty and reject seropositive candidates for jobs that might endanger their health.<sup>261</sup> In addition, in certain instances employers may test candidates in order to protect the health of others.<sup>262</sup> Under the statutory provisions, employers may not reject candidates on the basis of seropositivity unless they can demonstrate that the illness affects the candidates' ability to do the job.<sup>263</sup> Courts must take into account *Arline's* criteria, but often find, however, that HCWs pose a "direct threat" due to a perceived risk of transmission.<sup>264</sup>

### III. EVALUATION OF THE E.C. AND U.S. SYSTEMS

As a whole, U.S. law is more fully developed in the area of protection of HIV-infected workers than E.C. law, having adopted statutory protection to supplement its traditional constitutional protections.

256. *Id.* at 1266.

257. This case is also discussed in part III.B.1.a *infra*, dealing with the Fourth Amendment claim.

258. *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820, 829 (5th Cir. 1990).

259. *Scoles v. Mercy Health Corp.*, 887 F. Supp. 765, 769 (E.D. Pa. 1994) (holding that a surgeon was not otherwise qualified as his seropositivity posed a direct threat to patients).

260. *Mauro v. Borgess Medical Ctr.*, 886 F. Supp. 1349, 1353 (W.D. Mich. 1995) (stating that "[b]ecause there is a real possibility of transmission, however small, and because the consequence of transmission is invariably death, the threat to patient safety posed by plaintiff's presence in the operating room performing the functions of a surgical technician is direct and significant").

261. *Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State*, 662 F. Supp. 50, 53 (D.D.C. 1987); see *supra* notes 159-67 and accompanying text.

262. See *Leckelt*, 909 F.2d 820; *supra* notes 175-80 and accompanying text.

263. 42 U.S.C. § 12112(d)(2) (1994); 45 C.F.R. § 84.14(a) (1996).

264. *Doe v. University of Md. Medical Sys. Corp.*, 50 F.3d 1261, 1266 (4th Cir. 1995); *Bradley v. University of Tex. M.D. Anderson Cancer Ctr.*, 3 F.3d 922, 924 (5th Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994); *Leckelt*, 909 F.2d at 829-30; *Mauro*, 886 F. Supp. at 1352-53; *Scoles v. Mercy Health Corp.*, 887 F. Supp. 765, 772 (E.D. Pa. 1994); see *supra* part II.B.2.b.

Both systems have protected the individual's right to privacy in certain cases, but neither has protected privacy to the extent actually guaranteed by the respective frameworks. This part evaluates the two regions' tests and analyzes the application of those tests in the HIV context. This part concludes with recommendations for both the United States and the European Community.

### A. *The Balancing Tests*

The European Community and the United States have similar systems for protecting the rights of privacy and the protection of medical information. Both regions use a balancing test, weighing the intrusion on the individual's privacy against the governmental interest served; however, the criteria to consider in balancing the two interests are particular to each test. In the European Community, the ECJ must ensure that the restriction on a privacy right actually promotes the public objective and is proportionate to its aim.<sup>265</sup> The United States has three balancing tests, reflecting Due Process, Fourth Amendment, and statutory protection, and thus three sets of criteria. When evaluating the due process privacy right, courts should examine specifically whether the measure is " 'achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' "<sup>266</sup> Fourth Amendment protection mandates that the individual's expectation of privacy, as well as the nature and inception of the search, be reasonable, and courts applying the test under the Rehabilitation Act and the ADA must consider the *Arline* criteria, codified in the EEOC's implementing regulations.<sup>267</sup> To date, both regions' courts have recognized similar government objectives as legitimate: the protection of health and determination of fitness for duty. In balancing these interests against the individual's right to privacy, the United States more consistently guarantees the right to privacy, although problems remain in the context of HCWs.

### B. *Application of the Tests*

At first glance, both the U.S. and E.C. tests appear to protect adequately an individual's right to privacy in the context of HIV/AIDS. In evaluating the tests' various criteria, however, courts have differed in the extent of protection actually guaranteed to workers. While there have been more cases handled in the United States than those involving the E.C. institutions, the two judicial systems have applied their respective tests to similar cases yielding comparable results.

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265. See *supra* notes 70-71 and accompanying text.

266. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (citations omitted).

267. See *supra* note 199 and accompanying text.

## 1. U.S. Cases

Individuals alleging an invasion of privacy often plead violations of both the constitutional and statutory schemes. In cases regarding HIV testing in the employment context, courts have better guaranteed protection under the statutory scheme, with the exception of cases involving HCWs.

a. *Fourth Amendment Cases*

Only one court has upheld Fourth Amendment privacy protection, examining risk of transmission as a factor when evaluating the individual's privacy interest. In other cases, courts have substituted fear and paternalism for rational medical opinion, finding that the individual's right to privacy did not outweigh the government's interest.

In *Local 1812, American Federation of Government Employees v. United States Department of State*,<sup>268</sup> the court held that the State Department's HIV testing policy did not constitute an invasion of the employees' privacy, taking a paternalistic approach by accepting that seropositive individuals are not qualified for overseas positions because they might endanger their health.<sup>269</sup> The court first addressed the two constitutional claims of the employee union together<sup>270</sup> and then discussed the union's statutory claim.<sup>271</sup> The court's decision turned on its determination that the purpose of the government's HIV testing policy was to assess fitness for duty, a legitimate objective, rather than to prevent HIV infection. The district court admitted that screening was not a valid method of preventing the spread of AIDS, implying testing would not serve the objective of protection of health of the candidate's colleagues, but found that the State Department's testing program was rational and closely related to the stated purpose.<sup>272</sup>

The court cited the dangers HIV-infected employees would face in countries whose medical facilities might be less sophisticated than those in the United States or whose staff might be less familiar with AIDS, and the possibility of increased medical risk that employees would face when stationed worldwide for long periods of time.<sup>273</sup> These are issues that any individual would weigh, whether they are HIV-positive or not, when deciding whether to accept an overseas po-

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268. 662 F. Supp. 50 (D.D.C. 1987); see *supra* notes 159-67 and accompanying text.

269. 662 F. Supp. at 53.

270. The union alleged a violation of both the Fourth Amendment and the substantive privacy right stemming from the Due Process Clause of the Fifth Amendment. *Id.*

271. See *infra* notes 305-07 and accompanying text for discussion of the Rehabilitation Act claim.

272. *Local 1812*, 662 F. Supp. at 53.

273. *Id.*

sition, and require personal judgment.<sup>274</sup> The court seemed to accept that an employer should be in the position to make such decisions on behalf of its seropositive employees, a paternalistic approach that should be reconsidered.

While the government could have argued that the cost of replacing an HIV-positive candidate who becomes ill on the job makes that candidate unfit for duty, it did not present any argument that the risk of having to replace HIV-positive candidates is significantly higher than for other candidates to justify their discriminatory policy.<sup>275</sup> Risks are associated with most jobs, and applicants must weigh them against the benefits of the position they seek.<sup>276</sup> Neither the court nor the government should be involved to the extent that the individual is no longer able to exercise his personal judgment.<sup>277</sup>

Such a paternalistic approach effectively permits discrimination against HIV-infected individuals while masking the negative results with a beneficent appearance. This magnanimous rule-making is in stark contrast to the U.S. Supreme Court's identification of a privacy interest in independence in deciding personal matters, one of the two

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274. See generally *Other Facets of Remote Medicine*, Oil & Gas J., Apr. 29, 1996, at 47 (discussing the risks travellers and expatriates face at "remote sites"); Alan Kline, *Concentra Wants to Know if Workers Have Their Shots*, Baltimore Bus. J., Oct. 4-10, 1996, at 10 (describing a company which helps prepare employees for overseas travel); Alan Pike, *Call for Company Crisis Plans for Overseas Staff*, Fin. Times, Sept. 27, 1990, at 8 (listing Africa as the "toughest overseas location, followed by the Far East" due to its "poor health facilities").

275. See *Local 1812*, 662 F. Supp. at 52-53.

276. "[H]ealth care and social service workers are disproportionately affected by job-related violence," facing an incidence rate of "47 cases per 10,000 workers for residential care settings, and 38 cases per 10,000 workers for nursing and personal care facilities," compared with 3 cases per 10,000 workers for the private industry. *Health Care: OSHA Releases Non-Mandatory Guidelines for Health Care, Social Service Employers*, O.S.H. Daily (BNA), at d2 (Mar. 15, 1996), available in Westlaw, BNA-OSHD database, 3/15/96 OSD d2; see also Ellen I. Carni, *Stress and Productivity: For Better or Worse*, N.Y. L.J., Nov. 26, 1996, at 5 (reporting that attorneys are twice as likely to suffer from clinical depression than the general population); Laura Meckler, *Cab Driver Leads National List of Dangerous Jobs*, Los Angeles Daily News, July 9, 1996, at B2, available in Westlaw, 1996 WL 6565197 (describing workplace violence for taxi drivers and retail workers); *NIOSH, OSHA Conference Focuses on Musculoskeletal Injuries*, Bus. Ins., Jan. 27, 1997, at 13 (reporting on a seminar on the ergonomic risks at workplaces like offices, factories, construction sites, and farms); Julie-Anne Ryan, *Good Health at the Office*, The Times (London), May 9, 1996, at 14 (describing occupational health as a way to combat workplace health risks to employees); Peter Busowski, *Stress: American Workers Face "Time Crunch" Reducing Job Performance and Satisfaction*, Empl. Pol'y & L. Daily (BNA), at d9 (Jan. 9, 1997), available in Westlaw, BNA-EPLD database, 1/9/97 EPLD d9 [hereinafter *Time Crunch*] (categorizing the high levels of stress faced by workers in high-performance workplaces as a problem).

277. See Gerald Dworkin, *The Theory and Practice of Autonomy* 6 (1988) (equating autonomy with "dignity, integrity, individuality, independence, responsibility, and self-knowledge"); Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 Notre Dame L. Rev. 445, 446-90 (1983) (describing different notions of privacy).

privacy interests recognized in *Whalen v. Roe*.<sup>278</sup> To hold that an employer may decide for the employee that the risks of a given position are too high goes beyond the determination of whether the employee is fit for duty and approaches the issue of whether the employee is willing to accept the risk of the duties involved, a personal decision.<sup>279</sup> The court should have recognized that protection of the individual's own health does not outweigh his interest in autonomy, an interest that is central to an individual's sense of dignity.<sup>280</sup>

Another troubling aspect of the fitness determination in *Local 1812* is the court's consideration of the likelihood of future illness. The district court took into account that the majority of HIV-infected individuals develop AIDS or AIDS-related complex.<sup>281</sup> While most seropositive individuals do eventually develop AIDS-related complex, they are not the only employees who face future illnesses. Smokers,<sup>282</sup> overweight or obese people,<sup>283</sup> even people who do not exercise,<sup>284</sup> also run a higher risk of future illness than the average

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278. 429 U.S. 589, 599-600 (1977).

279. Two commentators agree with the courts, stating that "[i]f the work environment were a place which was unusually rich in such infections or malignancies such employees would not be otherwise qualified for that job." Connolly & Marshall, *supra* note 20, at 571.

280. See Dworkin, *supra* note 277, at 6 (stating that autonomy is often associated with dignity).

281. *Local 1812, American Fed'n of Gov't Employees v. United States Dep't of State*, 662 F. Supp. 50, 52 (D.D.C. 1987).

282. Lewis Cope, *The Risks of Smoking*, Chi. Trib., May 25, 1993, at 11 (listing the health dangers for which smokers have an increased risk of contracting).

[C]igar smokers have 4 to 10 times the risk of dying from laryngeal, oral and esophageal cancers as nonsmokers. Overall cancer death rates among men who smoke cigars are 34 percent higher than cancer death rates among nonsmokers. Men who smoke five or more cigars a day are two to three times more likely to die of lung cancer than nonsmokers.

Erin Hoover, *Potential Health Danger Hides in Trendy Smoke of Cigar Craze*, The Oregonian (Portland), Feb. 13, 1997, at E1; see also *Smoking: Supreme Court Refuses to Hear Smokers Screened from Job Interviews in Florida*, Empl. Pol'y & L. Daily (BNA), at d2 (Jan. 11, 1996), available in Westlaw, BNA-EPLD database, 1/11/96 EPLD d2 (discussing a case in which the city of North Miami argued that "employees who use tobacco cost as much as \$4,611 per year more than nonsmokers").

283. "Health risks related to obesity include coronary heart disease, . . . diabetes, and [certain] cancers." In addition, "[o]besity-related medical conditions are the second leading cause of death in America (after smoking-related illnesses), resulting in 300,000 lives lost each year." *Position of the American Dietetic Association: Weight Management*, 97 J. Am. Dietetic Ass'n, Jan. 1997, at 71; see C. Everett Koop, M.D., *Disease Prevention Through Weight Loss*, Wall St. J., Jan. 6, 1997 (Letters to the Editor), at A13 ("In the past, doctors treated the health risks associated with obesity—diabetes, cardiovascular disease, high cholesterol. But now, doctors are treating obesity in order to prevent the development of these related risks.").

284. David Steen, *Invest in a Healthy Future by Staying Fit*, The Toronto Star, Feb. 13, 1997, at B12, available in Westlaw, 1997 WL 3821394 (stating that "[p]eople who don't exercise face the same health risks as those who smoke a pack of cigarettes a day," including heart disease, diabetes, and respiratory illness).

person.<sup>285</sup> The right to privacy of seropositive employees should not be outweighed by future costs solely because of society's general fear of HIV/AIDS and the moral judgments attached to some of the modes of transmission.

In addition to fitness for duty, U.S. courts have also recognized the protection of health as a legitimate government objective. In *Glover v. Eastern Nebraska Community Office of Retardation*,<sup>286</sup> the public health institution asserted that its HIV testing policy served this objective.<sup>287</sup> The court recognized the agency's interest in providing a safe training and living environment for its clients, but still found for the employees.<sup>288</sup> Similarly, in *Leckelt*,<sup>289</sup> the Fifth Circuit recognized a hospital's strong interest in a safe and efficient workplace and in the protection of health of its employees and patients; in this case, however, the court found that the invasion of the nurse's privacy was justified.<sup>290</sup> The *Glover* court evaluated the risk of transmission as an important consideration while the *Leckelt* court did not seem to place much weight on the low risk.<sup>291</sup> The *Glover* court found that the "risk of disease transmission has been shown to be negligible in [this] environment . . . [thus the government's] articulated interest in requiring testing does not constitutionally justify" the protection of health objective.<sup>292</sup> The *Leckelt* court, however, focused primarily on Leckelt's expectation of privacy while assuming that the transmission risk was grave enough to warrant an invasion of privacy. Although *Leckelt* did not address the issue, the difference in Leckelt's duties from those of the employees in *Glover* may have added to the weight of the medical institution's interest.<sup>293</sup>

*Leckelt* mentioned *Glover* in a footnote, stating that the facts of the two cases were "materially different," because the testing in *Glover* was "much broader" than that in *Leckelt* and because *Leckelt* was "a

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285. See generally Dr. Hugh Stallworth, *Controlling Risk Factors Can Reduce Chance of Heart Attack*, Orange County Register, July 19, 1996, at E3, available in Westlaw, 1996 WL 7037307 (discussing the health risks associated with smoking, obesity, physical inactivity, high blood pressure, and high cholesterol).

286. 867 F.2d 461 (8th Cir.), cert. denied, 493 U.S. 932 (1989); *supra* notes 168-74 and accompanying text.

287. *Glover*, 867 F.2d at 462-63.

288. *Id.* at 464.

289. *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820 (5th Cir. 1990).

290. *Id.* at 833.

291. The *Leckelt* court did consider risk of transmission in its discussion of the Rehabilitation Act. See *id.* at 829; *supra* text accompanying note 258.

292. *Glover*, 867 F.2d at 464.

293. Due to the severity of HIV infection and the fact that there is currently no cure for AIDS, the argument has been made that individuals who perform invasive medical procedures should notify their employers of HIV seropositivity, or at least after they pass the stage of mere seropositivity. This type of examination arises most often in statutory cases involving health care workers, when the courts must determine whether the individual poses a "direct threat" to others. See *infra* part III.B.1.b.

case of particularized, reasonable suspicion as to a specific individual," rather than a policy of testing all employees.<sup>294</sup> This distinction is not very persuasive given that the issue in each case was the extent of the invasion of the employee's privacy right compared with the government's need to promote legitimate interests. In both *Leckelt* and *Glover*, the governmental interest was the protection of health of the medical institutions' patients. The real distinction was that in *Leckelt*, the privacy interest concerned the disclosure of test results to which *Leckelt* independently submitted,<sup>295</sup> not a mandatory testing policy instituted by the employer like in *Glover*.<sup>296</sup> This difference may be a better justification for the court's judgment than the superficial difference of the broadness of testing. Violation of one individual's privacy because of suspicions about his lifestyle is no better than a blanket invasion of privacy of all employees.

Thus, under Fourth Amendment protection, only in one instance has a court upheld an individual's right to privacy in the context of HIV testing. Although the results are discouraging, statutory enactments discussed in the next section have provided a better guarantee to HIV-positive workers.

#### b. *Statutory Cases*

Both the Rehabilitation Act and the ADA protect from discrimination "otherwise qualified" individuals with disabilities.<sup>297</sup> Risk of transmission should play an integral role in the evaluation of whether a candidate is "otherwise qualified" because in the case of an individual with an infectious disease, the Acts provide that he will not be "otherwise qualified" if reasonable accommodation will not eliminate any "direct threat" to the health of others.<sup>298</sup> Courts have accorded different weight to current medical opinion regarding the risk of HIV transmission when examining the four *Arline* criteria, often depending on whether the case involves casual contact or HCWs.<sup>299</sup>

In *Chalk v. United States District Court Central District of California*,<sup>300</sup> the Ninth Circuit criticized the district court's skepticism of the medical community's knowledge of AIDS, particularly because to hold otherwise would be to require the impossible standard of scientific certainty.<sup>301</sup> The court gave significant weight to the medical community's view that there was an extremely low risk of transmis-

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294. *Leckelt*, 909 F.2d at 833 n.23.

295. See *supra* note 176 and accompanying text.

296. *Glover*, 867 F.2d at 462.

297. See *supra* notes 183, 207 and accompanying text.

298. See *supra* notes 203, 216 and accompanying text.

299. The criteria are: nature, duration, and severity of the risk, and the probability of transmission. Courts are further instructed to defer to reasonable medical opinion. See *supra* note 199 and accompanying text.

300. 840 F.2d 701 (9th Cir. 1988); *supra* notes 228-32 and accompanying text.

301. 840 F.2d at 707-08.



sion when determining whether the HIV-positive schoolteacher was otherwise qualified.<sup>302</sup> Similarly, in *EEOC v. Dolphin Cruise Line, Inc.*,<sup>303</sup> the court found that because HIV cannot be transmitted through casual contact and because “the risk of HIV transmission in an employment setting is remote,”<sup>304</sup> the HIV-positive employee was “otherwise qualified.”

In *Local 1812, American Federation of Government Employees v. United States Department of State*,<sup>305</sup> a case also involving casual conduct, the court did not consider the low risk of transmission. Although the union charged that the testing policy violated the Rehabilitation Act, the court never addressed *Arline*'s criteria and therefore the issue of risk of transmission. This is puzzling because *Arline* was decided six weeks before *Local 1812*. Possibly, the court did not see the relevance of *Arline*'s holding to a case involving HIV-infected employees since the *Arline* Court issued a disclaimer regarding the issue of HIV and AIDS under the Rehabilitation Act.<sup>306</sup> Still, the *Local 1812* court should have evaluated seropositive employees' fitness for duty by taking into account the low risk of transmission in casual contact work environments, rather than simply concluding that “[i]t does not appear . . . that HIV-infected persons are ‘otherwise qualified’ for worldwide Foreign Service duty.”<sup>307</sup>

Many courts weigh risk of transmission differently in the HCW context. For example, in *Leckelt*, the court found that the nurse was not “otherwise qualified,” because “at least some of [Leckelt's] duties provided potential opportunities for HIV transmission to patients.”<sup>308</sup> While it would appear that the court relied on current medical opinion,<sup>309</sup> the *Leckelt* court itself noted that “none of Leckelt's duties apparently fell within the technical definition of an invasive procedure.”<sup>310</sup> The CDC Guidelines clearly state that HCWs who do not perform exposure-prone invasive procedures and who adhere to

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302. *Id.*

303. 945 F. Supp. 1550 (S.D. Fla. 1996); *supra* notes 238-42 and accompanying text.

304. 945 F. Supp. at 1555; *see also* *Doe v. District of Columbia*, 796 F. Supp. 559, 569 (D.D.C. 1992) (joining “other courts that have refused to regard the theoretical or remote possibility of transmission of HIV as a basis for excluding HIV-infected persons from employment or educational opportunities”). *But see* *Anonymous Fireman v. City of Willoughby*, 779 F. Supp. 402, 412 (N.D. Ohio 1991) (finding that the City's mandatory HIV testing policy for firefighters and paramedics was not an unreasonable search since they are “at a higher risk than persons in hospitals for contracting or transmitting the HIV virus”).

305. 662 F. Supp. 50 (D.D.C. 1987); *supra* notes 159-67 and accompanying text.

306. *See supra* note 196 and accompanying text.

307. 662 F. Supp. at 54.

308. *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820, 829 (5th Cir. 1990).

309. *Id.*

310. *Id.*

universal precautions pose *no* risk for HIV transmission;<sup>311</sup> thus, the *Leckelt* court did not properly follow *Arline's* criteria.<sup>312</sup>

In *Doe v. University of Maryland Medical System Corp.*,<sup>313</sup> an expert panel reviewed the issue of Dr. Doe's seropositivity in accordance with the CDC Guidelines and recommended that he be allowed to return to practice with certain exceptions.<sup>314</sup> The hospital administrators, however, decided in their own wisdom to "err on the side of caution"<sup>315</sup> and suspended Dr. Doe permanently.<sup>316</sup> The Fourth Circuit upheld this decision, putting its own evaluation of the risk of transmission over the medical experts' recommendation. This approach is not consistent with *Arline*, in which the Supreme Court specifically instructed courts to defer to medical opinion.<sup>317</sup> In addition, the court defeated its own purpose of protecting the health of patients by taking action that would discourage other HIV-positive HCWs from coming forward.<sup>318</sup>

Instead of the *Arline* criteria, courts seem to have taken into account public paranoia and ignorance. Studies show that 80-90% of the U.S. public say they want to know their HCWs' HIV status and that more than half would choose not to be treated by an HIV-infected surgeon or dentist.<sup>319</sup> The medical reality, however, is revealed by another study showing that out of 19,000 patients operated on by

311. See *supra* note 249 and accompanying text.

312. See *Leckelt*, 909 F.2d. at 829.

313. 50 F.3d 1261 (4th Cir. 1995).

314. *Id.* at 1266.

315. *Id.*

316. *Id.* at 1262-63. The hospital may have taken other issues into account, such as liability. Liability in the area of AIDS law can fall under: (1) tort law, such as wrongful death actions and infliction of emotional distress, see *Marchica v. Long Island R.R.*, 810 F. Supp. 445, 451-53 (E.D.N.Y. 1993), *aff'd*, 31 F.3d 1197 (2d Cir. 1994) (surveying state cases addressing whether "fear of AIDS" is a viable cause of action); Joseph Loparco, Note, *Marchica v. Long Island R.R.: "AIDS-Phobia" Recovery Under the Federal Employers' Liability Act*, 15 Pace L. Rev. 575 (1995) (discussing both courts' decisions as well as common law developments in the area of AIDS-phobia); (2) employment discrimination, see *infra* part II.B; and (3) criminal law, see Lori A. David, *The Legal Ramifications in Criminal Law of Knowingly Transmitting AIDS*, 19 Law & Psychol. Rev. 259 (1995); Michael L. Closten et al., Discussion, *Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws*, 46 Ark. L. Rev. 921 (1994) (discussing prosecutions under traditional criminal statutes as well as HIV-specific statutes); see also John R. Austin, *HIV/AIDS and Health Care Industry Liability: An Annotated Bibliography*, 27 J. Marshall L. Rev. 513 (1994) (presenting a bibliography of AIDS/HIV liability in the health care industry).

317. 480 U.S. 273, 288 (1986).

318. Symposium, *Job Restrictions and Disclosure Requirements for HIV-Infected Health Care Professionals: Whose Privacy Is It Anyway?*, 41 N.Y.L. Sch. L. Rev. 5, 22-23 (1996) [hereinafter Symposium].

319. *Id.* at 29. Closten argues that the medical evidence overwhelmingly supports the conclusion that a genuine and serious risk of HIV transmission from surgeons/dentists to their patients exists during the course of invasive procedures (referring to HCWs' testimony in various cases that needle-sticks occur during invasive procedures and that not all HCWs observe barrier precautions all of the time). *Id.*

known HIV-positive surgeons, only 92 were found "to be HIV-infected, but the evidence did not support transmission from [HCWs]." <sup>320</sup> In addition, the CDC calculated the odds of HIV transmission from HCW to patient and, using rates of transmission from patients to HCWs, estimated that the risk is "between 1 in 42,000 and 1 in 420,000, . . . less than the risk of mortality due to general anesthesia." <sup>321</sup> Medical opinion today clearly indicates that the risk of HIV transmission from most HCWs is minuscule. <sup>322</sup> Despite the admittedly terrifying threat of the disease itself, the law requires courts to be objective when evaluating these cases and to rely on experts who can accurately assess the risks involved. <sup>323</sup>

In sum, courts have generally been successful in eliminating from the balancing test the unfounded fear and paranoia of AIDS transmission from casual contact. Courts should do the same in the medical field. After all, if courts would take into account the CDC Guidelines and current public health opinion when reviewing the direct threat of a HCW, only those HCWs who actually pose a significant risk would be affected. Courts would thereby maintain a safe workplace and still protect HIV-infected HCWs from blanket discrimination. <sup>324</sup>

## 2. E.C. Cases

Although the ECJ upheld a candidate's right to privacy, this protection was undermined when the Court suggested that the institutions could reject candidates who refuse to submit to an HIV test. In *A v. Commission*, <sup>325</sup> the CFI did not uphold the candidate's right to privacy and took a paternalistic approach to justify the invasion. Both decisions violate the spirit of the privacy protection extended in the ECHR's Article 8 and the Conclusions dealing with AIDS and the workplace.

In *X v. Commission*, <sup>326</sup> the Advocate General, similar to the courts in *Leckelt* <sup>327</sup> and *Glover*, <sup>328</sup> recognized the objective of protection of

320. *Id.* at 19, n.73.

321. Bernard Lo & Robert Steinbrook, *Health Care Workers with the Human Immunodeficiency Virus: The Next Steps*, 267 JAMA 1100, 1100 (1992).

322. Most of the opposing arguments are based on an analogy to Hepatitis, which is similar to HIV except that HIV is much more "difficult to transmit compared to other similar bloodborne viruses." Symposium, *supra* note 318, at 21.

323. *See* School Bd. of Nassau County v. Arline, 480 U.S. 273, 288 (1987).

324. American Bar Association AIDS Coordinating Committee, *Calming AIDS Phobia: Legal Implications of the Low Risk of Transmitting HIV in the Health Care Setting*, 28 U. Mich. J.L. Ref. 733, 748-49 (1995).

325. Case 10/93, 1994 E.C.R. II-179 (Ct. First Instance).

326. Case 404/92, 1994 E.C.R. I-4737.

327. *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820, 833 (5th Cir. 1990); *supra* note 179 and accompanying text.

328. *Glover v. Eastern Neb. Community Office of Retardation*, 867 F.2d 461, 462-63 (8th Cir.), *cert. denied*, 493 U.S. 932 (1989); *supra* note 169 and accompanying text.

health of the individual and his potential colleagues.<sup>329</sup> However, the Advocate General's reasons for concluding that the objective was justifiably protection of health were much weaker than that of the medical institutions in *Leckelt*<sup>330</sup> and *Glover*.<sup>331</sup> The Advocate General was concerned that possible repeated absenteeism due to illness would result in added work and stress for X's colleagues, even for the mere six months that X would be employed.<sup>332</sup> *Leckelt* and *Glover* were concerned, respectively, about transmission of the disease to patients during medical treatment and transmission during the handling of its patients. These concerns are arguably more valid as health concerns than a few staff members' possible fatigue. In addition, other candidates who might also experience frequent absenteeism, such as single parents with small children, are not subject to such discrimination while posing a similar "risk" to their fellow colleagues.<sup>333</sup> While the ECJ did uphold X's right to privacy,<sup>334</sup> acceptance of such a limited health concern could hinder the protection of a candidate's privacy right in a different factual situation.

A critical problem in *X v. Commission* is the ECJ's dicta suggesting that the institutions are not obliged to hire a candidate who refuses to undergo an HIV test.<sup>335</sup> This decision essentially makes the HIV test mandatory, because the hiring institution can reject a candidate solely on the basis of his refusal. It also violates the spirit of the ECHR's Article 8, which mandates no intrusions on an individual's privacy except, among others purposes, for the protection of health.<sup>336</sup> As one commentator noted, by failing to "set some justiciable limits to the examinations that can be required,"<sup>337</sup> the ECJ grants "the Community institutions with considerable discretionary power to choose the method of examination for determining a candidate's physical[ ] situa-

329. Case 404/92, *X v. Commission*, 1994 E.C.R. I-4737, 4763-64. Both the Advocate General and the ECJ also recognized fitness for duty as a legitimate purpose. *Id.* at 4763-64, 4790. The ECJ further found that the medical exam, including the HIV test, properly served this objective. *Id.* at 4790.

330. See *supra* notes 175-80 and accompanying text.

331. See *supra* notes 168-74 and accompanying text.

332. *X v. Commission*, 1994 E.C.R. at 4763.

333. "[A]bsenteeism is generally higher among women than men, . . . [and] the average employee with latchkey children' misses work on average 40 percent more often than other workers." *Time Crunch*, *supra* note 276, at d9 (alteration in original) (citations omitted); see also Jessica Primoff Vistnes, *Gender Differences in Days Lost from Work Due to Illness*, 50 *Indus. & Labor Rel. Rev.* 304, 321 (1997) (finding that a woman's probability of missing work as well as the length of her absence is increased if she has young children).

334. The Court ruled that the Commission's HIV test in this instance was not proportional to the objective of protection of health because X had explicitly refused to undertake such a test. The Court never reached the issue of risk of transmission, like the courts in *Glover* and *Leckelt*. See *supra* notes 291-92 and accompanying text.

335. See 1994 E.C.R. at 4790.

336. ECHR, *supra* note 41, art. 8(2).

337. De Smijter, *supra* note 85, at 336.

bility for a given position."<sup>338</sup> Applicants will suffer either an invasion of privacy or loss of the ability to obtain a job with the institutions, a result that violates the essence of Article 8's privacy right, which the ECJ has undertaken to ensure.<sup>339</sup>

The ECJ's dicta is also inconsistent with the Conclusions, which clearly state that there are "no grounds for screening potential recruits for HIV antibodies," and that employees should not be under any obligation to notify their employers of HIV infection.<sup>340</sup> While protection of health is a legitimate objective in general, according to the Conclusions it is not legitimate in the case of HIV/AIDS because "[i]n work settings, there is no risk of HIV infection or of acquiring AIDS."<sup>341</sup> The inevitable result of this policy is discrimination, which the Council and the Member State Ministers for Health have deemed a violation of human rights.<sup>342</sup> In addition, refusal to hire a candidate who may or may not be seropositive solely because he declines to submit to an HIV test is not proportional to the objective of determining fitness for duty.<sup>343</sup>

Although the ECJ did not expressly identify the risk the institutions would be taking in hiring a candidate who refused to submit to an HIV test, one possible inference is future costs.<sup>344</sup> As the Advocate General noted in his opinion, the Commission argued that pre-recruitment medical examinations correspond "to a social choice generally accepted in Europe with regard to the distribution of social burdens[,] . . . namely that an employer does not have to bear the economic cost of sickness . . . resulting from a risk which the employee incurred before his recruitment."<sup>345</sup> The Advocate General found the argument unpersuasive as a defense to not hiring an applicant and pointed out that this societal choice is better reflected by a policy of permitting

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338. *Id.*

339. See Case 11/70, IHG, 1970 E.C.R. 1125, 1134 (stating that the ECJ protects general principles of Community law, including respect for fundamental rights); Case 5/88, Wachauf v. Germany, 1989 E.C.R. 2609, 2639 (noting that "fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the [ECJ]").

340. Conclusions, *supra* note 73, at 2.

341. *Id.* The Council did adopt Conclusions on health care workers, which includes a provision regarding risk of HIV infection. Conclusion of the Council and the Ministers for Health of the Member States Meeting Within the Council of May 16, 1989 on Awareness Measures for Health Care Personnel, 1989 O.J. (C 185) 6 (noting that "the risk of HIV infection is slight and virtually non-existent if protective measures appropriate to the channels of HIV transmission are observed").

342. Resolution, *supra* note 74, at 4.

343. See Case 62/90, Commission v. Germany, 1992 E.C.R. I-2575, 2609 (applying the proportionality principle to the measure restricting the right to privacy).

344. The *Local 1812* court also considered this factor when deciding whether HIV-positive employees are fit for duty. *Local 1812, Am. Fed'n of Gov't Employees v. United State Dep't of State*, 662 F. Supp. 50, 52 (D.D.C. 1987); *supra* note 281-85 and accompanying text.

345. Case 404/92, *X v. Commission*, 1994 E.C.R. 4737, 4763.

the employer to opt to exclude from reimbursement expenses arising from a pre-existing condition.<sup>346</sup> In the case of X, however, the risk of significant future costs seems minimal since X was only applying for a six month post,<sup>347</sup> and thus the cost of any health care problems would have been minor.

In *A v. Commission*, the CFI also found legitimate the objective of fitness for duty, as it "is perfectly lawful within any system of public administration" and thus not contrary to the principle of respect of an individual's private life.<sup>348</sup> This decision violates the spirit of the Conclusions, which the CFI did not consider once they found A symptomatic. The CFI took advantage of a loophole that the Conclusions seem to leave in the protection of symptomatic applicants. While they state that asymptomatic employees should be treated as fit for work,<sup>349</sup> they do not expressly state the same conclusion regarding symptomatic employees.<sup>350</sup> The Conclusions do state, however, that all HIV-positive individuals pose no danger to their colleagues and that there is no basis for HIV screening regarding risk to fellow workers.<sup>351</sup> Thus, it would seem reasonable to treat symptomatic employees similar to individuals with other serious illnesses.

Also, the aim of the Conclusions is to protect HIV-infected individuals from discrimination, stigmatization, and invasions of privacy; the Resolution even states that discrimination on the basis of seropositivity violates human rights.<sup>352</sup> As one of the E.C. institutions, the CFI should regard the Conclusions as rules of good practice and not use this loophole to avoid compliance, especially when its decision results in discrimination—precisely what the Conclusions attempt to prevent.

Like the *Local 1812* court,<sup>353</sup> the CFI took a very paternalistic approach when deciding that A was unfit. Although the ECJ has not detailed the nature of privacy interests to the same extent as the Supreme Court in *Whalen v. Roe*,<sup>354</sup> the ECHR mandates that interference in the privacy right should only be as "necessary in a democratic society in the interests of [*inter alia*] . . . the protection of health."<sup>355</sup> Arguably, the ECHR was referring to the public entity's interest in protecting the health of others from identified risks under the entity's control, not in deciding for an individual what protection

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346. *Id.*

347. *Id.* at 4783.

348. Case 10/93, *A v. Commission*, 1994 E.C.R. II-179, 201 (Ct. First Instance).

349. Conclusions, *supra* note 73, at 2.

350. *Id.*

351. *Id.*

352. Resolution, *supra* note 74, at 4.

353. *Local 1812*, *Am. Fed'n of Gov't Employees v. United States Dep't of State*, 662 F. Supp. 50, 52 (D.D.C. 1987); *supra* notes 268-79 and accompanying text.

354. 429 U.S. 589, 599-600 (1977); *supra* note 144 and accompanying text.

355. ECHR, *supra* note 41, art. 8(2).

he requires considering his private health status.<sup>356</sup> A had already worked in a country with an inferior health infrastructure and a higher risk of contracting infectious diseases and was willing to take the risk of continuing such service. Whether some of the ACP countries posed a greater risk than Mexico should be left for A to decide, not for the courts. One could argue that the Commission has a valid concern for efficiency if it has to replace A in mid-term; but the Commission always faces this risk when staffing offices in third world regions. Employees often do not fully anticipate the hardships of living in such a region and ask to leave before the end of their term.<sup>357</sup> Moreover, employees who are not HIV-positive are also susceptible to diseases endemic to the region.<sup>358</sup>

In addition to weighing the government's objective against the individual's right to privacy, the E.C. courts must also consider whether such a measure is proportional to the objective.<sup>359</sup> The CFI did not discuss whether HIV testing is a proportionate means of achieving the purpose of determining fitness for duty, perhaps because A voluntarily submitted to the HIV test after having disclosed his seropositivity. This might have made the difference in judgment in *X v. Commission*, where dissimulated HIV tests did constitute a disproportionate invasion of privacy because X had specifically refused an HIV test. If the objective of the testing is to determine fitness for duty, denying only HIV-positive candidates the opportunity to work in such locations seems discriminatory, not proportional. The aim of the Conclusions and Article 8 is to protect the privacy of the individual so that he is free to exercise his autonomy. The CFI violated the purpose of these instruments by making that decision for A, against his wishes.

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356. Advocate General Van Gerven, in *X v. Commission*, agreed with the Commission's generally paternalistic view that an HIV test would protect health "in so far as the obligation . . . prevents his being recruited to a post which might damage his state of health." Case 404/92, 1994 E.C.R. I-4737, 4763.

357. Jeffrey P. Katz & David M. Seifer, *It's a Different World out There: Planning for Expatriate Success Through Selection, Pre-Departure Training and On-Site Socialization*, 19 Hum. Resource Planning 32, 32 (1996) (stating that many "firms have been plagued by the problem of premature return of expatriate managers"); Charlene M. Solomon, *CEO Mom: The Tie that Binds a Global Family*, Personnel J., Mar. 1996, at 82 (alteration in original) (stating that the "significant majority of failed expatriate assignments [fail] because of the family").

358. Cathryn Creno, *In a World of Hurt: Preventing Health Crises Begins at Home for Globe-Trotters*, Arizona Republic, July 7, 1996, at T1 (stating that "60 to 75 per cent of travellers to Asia, Africa or Latin America and the Caribbean will get some sort of illness or injury during their trips"); *Emerging Pathogens: Hepatitis E and Denguevirus Antibody Prevalence in Long-Term Expatriates*, Infectious Disease Weekly, Feb. 5, 1996, available in LEXIS, NEWS library, CURNWS file, (stating "[d]iseases such as yellow fever and hepatitis A and B are well known as major health risks to travellers to endemic regions"); Betsy Wade, *Health, Too, Is Part of Planning a Trip*, N.Y. Times, May 29, 1988, §5, at 3 (discussing the dangers of getting sick when travelling to third world countries).

359. See *supra* notes 70-71 and accompanying text.

C. *How the Two Systems Can Be Improved*

As seen above, a seropositive individual whose privacy has been violated by an employer has recourse in both U.S. and E.C. law; his right to privacy is more likely to be protected, however, under the U.S. system. First, there are two avenues of protection in the United States, constitutional and statutory. In addition, courts are supposed to take into account objective medical opinion regarding the more difficult elements of cases involving HIV, such as risk of transmission.<sup>360</sup> Although the United States has more fully defined an individual's privacy interests,<sup>361</sup> the European Community can surely recognize that these interests do not change at a geographical border. The United States has taken the lead in protecting HIV-positive workers;<sup>362</sup> the European Community could follow suit, codifying the provisions of the Council Conclusions into binding legislation. In the meantime, both regions could work to resolve the remaining problematic areas where protection is still not guaranteed.

One problem in the United States is in the Fourth Amendment area. U.S. courts have not consistently protected the right to privacy with respect to seropositive individuals,<sup>363</sup> mainly due to how courts consider risk of transmission. The primary reason the courts in *Local 1812*<sup>364</sup> and *Leckelt*<sup>365</sup> did not provide adequate protection to the employees' privacy while the *Glover* court did was because *Glover* took into account risk of transmission.<sup>366</sup> While not a required criterion under current Fourth Amendment analysis,<sup>367</sup> courts should still evaluate the risk of transmission when balancing the government's interest against the individual's right in order to ensure that fear and paranoia are not taken into account and to provide full protection of the privacy rights. The balancing test would continue to require weighing the invasion of the individual's privacy right against the government's purpose served by the restriction; courts would simply add the *Arline* factors, including risk of transmission, to the list of criteria which currently includes reasonability of the search and the individual's expectation of privacy.

Under the Rehabilitation Act and the ADA, courts must take into account risk of transmission, and currently seem to provide adequate

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360. See *supra* note 199 and accompanying text.

361. *Supra* note 144 and accompanying text.

362. See *supra* part II.B.1.

363. See *supra* part II.A.2.b.

364. *Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State*, 662 F. Supp 50 (D.D.C. 1987); see *supra* notes 159-67 and accompanying text.

365. *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820 (5th Cir. 1990); see *supra* notes 175-80 and accompanying text.

366. *Glover v. Eastern Neb. Community Office of Retardation*, 867 F.2d 461 (8th Cir.), cert. denied, 493 U.S. 932 (1989); see *supra* notes 170-73, 291 and accompanying text.

367. *Supra* note 150 and accompanying text.



protection of the individual's right to privacy in most work environments. The remaining area where violations still occur is in the medical context. As one commentator sadly notes, "[t]his is a situation where we are fighting fear itself."<sup>368</sup> Courts have been unwilling to heed medical opinion where in other circumstances they have triumphed over the fear and prejudice associated with HIV/AIDS.<sup>369</sup> Unless the Supreme Court answers in the affirmative "[t]he important question . . . [of] whether we shape policy based on extraordinarily rare circumstances,"<sup>370</sup> courts will have to make a greater effort to put aside unfounded fears and examine objectively medical opinion in order to determine the true risk of transmission in any given case.

While the current E.C. system offers some protection of a seropositive individual's privacy, there remains considerable potential for violations, given the ECJ's dicta that institutions may reject a candidate who refuses to submit to an HIV test and the CFI's paternalistic treatment of HIV-infected individuals.<sup>371</sup> The ideal solution would be for the institutions to adopt a binding legislative measure, similar to the U.S. statutes,<sup>372</sup> that would fully protect the right to privacy.<sup>373</sup> In the meantime, however, E.C. courts could improve protection under the current scheme by following *Arline's* approach.<sup>374</sup>

While a Directive would address the Member States, it would also form part of Community law, which the institutions should respect and uphold.<sup>375</sup> The Directive could loosely follow the provisions of

368. Symposium, *supra* note 318, at 31.

369. *Discrimination: Policy-Makers Tend to View HIV-Positive Health Workers as Risk*, *ABA Forum Told*, 3 BNA's Health L. Rep. 26, June 30, 1994, at d4, available in Westlaw, BNA-HLR database, 3 BHLR 26 d4 (stating that most hospital decisions to discriminate against seropositive HCWs are based more often on "exaggerated notions of risk than on actual risk of transmission"); Ansberry, *supra* note 13, at 6 (alteration in original) (The article quotes a doctor who says that doctors and nurses refuse to treat AIDS patients not only out of fear but also because "[t]hey're making a value . . . judgment about AIDS victims. They're saying they won't treat people [they find] disgusting.").

370. Marc E. Elovitz, *Why the Debate on Restricting Health Care Workers with HIV Should End: A Response to Professor Closen*, 41 N.Y.L. Sch. L. Rev. 141, 145 n.8 (1996); see also Symposium, *supra* note 318, at 43 (asking whether we can "make our public policy decisions on [the] basis [of the public's fear of transmission] if we believe that the risk of transmission from an HIV-positive health care worker is negligible at best").

371. See *supra* notes 335-43, 354-58 and accompanying text.

372. See *supra* part II.B.1.

373. Other commentators have also suggested a Directive in this area. See Dworkin & Steyger, *supra* note 13, at 324-28.

374. See *supra* notes 190-200 and accompanying text.

375. To guarantee the institutions' protection of candidates' right to privacy, the Commission should amend its Staff Regulations to provide that: HIV testing is not mandatory; there will be no negative repercussions from a refusal to submit to an HIV test on a candidate's application; there will be no discrimination against seropositive candidates, symptomatic or asymptomatic, who are fit for work; fitness for work will include the requirement that the Commission make reasonable efforts to accommodate disabled candidates. The Commission should also add "disability" to

the two U.S. statutes. The measure should cover "any person with an impairment of a physical, sensory, mental, or intellectual nature who faces obstacles to participation on equal and equally effective terms with all others in all aspects of the life of the community."<sup>376</sup> Its purpose would be to guarantee equal opportunity to all individuals including those in the field of employment via anti-discrimination measures and remedies<sup>377</sup> and would ensure protection of fundamental human rights, including the right to privacy. Also, the Directive would include the principle of "reasonable accommodation."<sup>378</sup>

The European Community has already taken a few steps in the right direction. First, the 1989 Resolution calling for implementation of the Conclusions regarding AIDS and the workplace recommended that Member States respect the aims and provisions of the Conclusions. The European Parliament and the Council issued a Decision in 1995 establishing a plan of action which included a Community analysis of actual and potential discriminatory situations in Member States in the field of employment as well as a study of Member State implementation of the 1989 Council Resolution.<sup>379</sup> In 1996, the Commission proposed a Council Resolution on equality of opportunity for people with disabilities.<sup>380</sup> Finally, in its contribution to the 1996 Intergovernmental Conference,<sup>381</sup> the European Parliament proposed "inclusion of an explicit reference in the Treaty to the principle of equal treatment irrespective of [*inter alia*] handicap."<sup>382</sup>

All of these steps move in the direction of added protection, although a Directive would most directly guarantee the rights of seropositive employees. Recognizing, however, that measures falling under social policy often reveal cultural differences, making adoption difficult,<sup>383</sup> the European Community could still better protect the

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its list of traits which will not be considered during the selection process. Commission of the European Communities, Staff Regulations: Regulations and Rules Applicable to Officials and Other Servants of the European Communities 14 (1993) (on file with the *Fordham Law Review*) (currently listing race, creed, and sex).

376. This is the Commission's definition of a disabled person. Communication of the Commission on Equality of Opportunity for People with Disabilities: A New European Community Disability Strategy, COM(96) 406 final, at 21 [hereinafter Disability Strategy].

377. *Id.* at 24-25.

378. *Id.* at 25.

379. European Parliament and Council Decision 1729/95/EC of June 19, 1995 on the Extension of the "Europe Against AIDS" Programme, 1995 O.J. (L 168) 1, 5.

380. Disability Strategy, *supra* note 376, at 18-22.

381. IGC is a meeting to discuss amending the founding treaties for various purposes. Bermann et al., EC Law, *supra* note 27, at 16-18. For further discussion on the 1996 IGC, see David O'Keefe, *From Maastricht to the 1996 Intergovernmental Conference: The Challenges Facing the Union*, 1994/2 Legal Issues of Eur. Integration 135.

382. Preparation CIG 1996: Contribution du Parlement Européen, Info-Note 26/95, May 31, 1995, at 5 (on file with *Fordham Law Review*).

383. Bermann et al., EC Law, *supra* note 27, at 1155.

right to privacy by improving the courts' treatment of HIV-infected individuals under the current human rights framework.<sup>384</sup>

One way the courts could better respect the right to privacy in the context of HIV testing is to follow the U.S. example of examining the four *Arline* criteria, and the risk of transmission in particular, in light of current medical opinion. Neither the CFI nor the ECJ addressed this risk in their decisions.<sup>385</sup> If the courts had taken into account the Conclusions' provisions, they might have considered this factor since the Conclusions do address the risk of transmission.<sup>386</sup>

The courts also could have better considered the aims of the ECHR's Article 8. As argued above, Article 8 protects an individual's right to privacy with interferences permitted for certain government objectives such as the protection of health. The ECHR could not reasonably mean that a government's interest in protecting the individual's own health at the expense of his right to privacy would be legitimate. The privacy interest relates to an individual's autonomy, and thus such a decision should be made by the individual himself.<sup>387</sup>

#### IV. CONCLUSION

Both the European Community and the United States have frameworks to protect the right to privacy, and have recognized the protection of medical information as part of that right. Their respective balancing tests are similar, weighing the intrusion on the individual's right against the governmental interest served. The United States, however, has added significant protection to this right through its statutory system of safeguarding disabled employees from discrimination. The European Community's Conclusions are not nearly as extensive, but do cover the same basic principles of non-discrimination by employers on the basis of HIV seropositivity. Although Congress, the Council of the European Union, the Member State Health Ministers, and even some of the courts acknowledge the need to counter the unfounded but prevalent fear of infection via casual contact, the European Community and the United States have not successfully achieved the aims of eliminating discrimination on the basis of HIV

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384. See *supra* part I.A.

385. The ECJ did not need to address the risk once it found that the measure was not proportionate to the aims. The CFI also did not address this issue, perhaps because it did not deem this factor relevant in determining A's fitness for duty and instead focused primarily on the impact of the working conditions on the candidate. The Advocate General, however, could have discussed risk of transmission when evaluating the threat X might pose to his colleague's health. The Advocate General only cited as a concern the possible fatigue of other employees if X were repeatedly absent, missing the ripe opportunity to comment on the issue of risk of transmission.

386. Conclusions, *supra* note 73, at 2.

387. See Dworkin, *supra* note 277, at 12-13; Feinberg, *supra* note 277, at 446-92; Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 Wash. L. Rev. 683, 722-23 (1996).

seropositivity and maintaining a safe workplace while still protecting the privacy interests of employees. Because of the growing number of individuals afflicted with HIV, until current medical opinion achieves greater weight in the courts' balances, discrimination on the basis of HIV seropositivity remains a significant risk in the employment sector.