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Containing the AIDS Virus ... Testing ... Reporting ... Confidentiality ... Quarantine ... Constitutional Considerations

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CONTAINING THE AIDS VIRUS . . . TESTING . . . REPORTING . . .
CONFIDENTIALITY . . . QUARANTINE . . . CONSTITUTIONAL CONSIDERATIONS

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I. INTRODUCTION

The right to privacy is the right to be left alone, a right to be free from unreasonable intrusion or interference with private affairs, a right to avoid public disclosure, even if truthful, of private facts.¹ The right of privacy which every individual possesses has more recently been acknowledged by the Supreme Court of the United States.² The advent of the Acquired Immunodeficiency Syndrome (AIDS) epidemic has placed a considerable strain on its victims' rights of privacy. If this right is not carefully protected, AIDS victims' constitutional rights of privacy may become illusory.³

The existence of AIDS was first discovered in 1981, mainly afflicting homosexual males and intravenous drug users.⁴ This problem is becoming more intensified every day as it spreads to the heterosexual community and, more importantly, to innocent newborn infants.⁵ Estimates of the future course of the epidemic illustrate that by the end of 1991 there will be a cumulative total of more than 270,000 cases of AIDS in the United States alone, with more than 74,000 of those occurring in 1991.⁶ The Public Health Service also projects that the vast majority of AIDS cases will continue to come from the currently recognized high-risk groups.⁷

¹ *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

² *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³ *See Privacy of AIDS Patients: Confidentiality Giving Ground to Society's Fears*, N.Y. Times, July 30, 1987, at A1, col. 2 [hereinafter *Privacy of AIDS Patients*].

⁴ Conte, Hadley & Sande, *Infection Control Guidelines for Patients with the Acquired Immunodeficiency Syndrome (AIDS)*, 309 NEW ENG. J. MED. 740 (1983).

⁵ W. DORNETTE, AIDS AND THE LAW ix (1987) [hereinafter AIDS AND THE LAW].

⁶ INSTITUTE OF MEDICINE NAT'L ACADEMY OF SCIENCES, CONFRONTING AIDS: DIRECTIONS FOR PUBLIC HEALTH, HEALTH CARE, AND RESEARCH 8 (1986) [hereinafter CONFRONTING AIDS]. *See also Tenfold Increase in Aids Death Toll is Expected by '91; Illness Likely to Rise Among Heterosexuals and Spread in Nation, U.S. Predicts*, N.Y. Times, June 13, 1986, at 1, col. 3.

⁷ CONFRONTING AIDS, *supra* note 6, at 8.

However, they estimate that the new AIDS cases acquired through heterosexual contact will increase from 1,100 in 1986 to almost 7,000 in 1991.⁸ The magnitude with which AIDS may affect our nation is severe. It has the potential for becoming a full-scale epidemic affecting all aspects of both our lives and our communities. While reviewing this article, the reader must keep in mind that the Centers for Disease Control (CDC) have estimated that 1 to 1.5 million people in the United States are infected with the AIDS virus.⁹ The risk of abuse of the constitutional rights of the AIDS carriers, therefore, should not be considered in the context of the 46,000 cases of AIDS patients presently diagnosed in the United States.¹⁰ Instead, it should be considered in the context of the 1.5 million people in the country who are believed to be infected with the AIDS virus.

In addition to illness, disability, and death, AIDS has evoked fear in the hearts and minds of most Americans: fear of the AIDS virus and fear of the unknown. This fear has caused many Americans to act irrationally towards AIDS and its victims.¹¹ Legislatures across the country are attempting to enact legislation which would place the rights of those afflicted with the AIDS virus in a very questionable position.¹² The Constitutional guarantees of AIDS carriers cannot be set aside in the face of arbitrary, oppressive or unreasonable legislation.¹³

This article will analyze the different legislative acts intended to curtail the spread of the disease and whether these enactments will aid or merely hinder the containment of the AIDS virus. It will illustrate potential conflicts this legislation poses to the AIDS victims' constitutional rights of privacy and liberty. At its conclusion, it will illustrate that with rational proposals, much more modified disclosures, education, and counseling, the AIDS epidemic can be curtailed much more successfully.

There have been various forms of legislation enacted in the different states which were intended to curb the spread of the AIDS epidemic and to help public officials analyze the course of the disease. This paper will

⁸ *Id.*

⁹ Centers for Disease Control, *Human Immunodeficiency Virus Infection in the United States*, 35 MORBIDITY & MORTALITY WEEKLY REPORT No. 49 (1987).

¹⁰ *Id.*

¹¹ *E.g.*, Author and editor William F. Buckley, Jr. has suggested that everyone detected with AIDS should be tattooed in their upper forearm and on their buttocks to protect unwitting needle users and homosexuals. Buckley, *Identify All the Carriers*, N.Y. Times, Mar. 18, 1986, at 27, col. 3. A professor at the University of Nebraska College of Law issued a controversial call for mandatory AIDS testing for the entire population of the United States. *Professor Stirs AIDS Controversy With a Call for Universal Testing*, Nat'l L.J., May 5, 1986, at 4, col. 2.

¹² *See Privacy of AIDS Patients*, *supra* note 3. Dozens of states have considered laws to identify and track both victims of the disease and carriers of the virus, a step rejected by the Federal Centers of Disease Control as intrusive and costly. *Id.* at D20, col. 2. The Illinois Legislature alone passed 17 AIDS-related measures, including several which require health care providers to report the names of all carriers to school officials and employers. *Id.* at D20, col. 6.

¹³ *See, e.g.*, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

be limited to the reporting and confidentiality statutes of various states. Also, it will analyze the potential for the imposition of mandatory public health measures which states may impose, in particular, mandatory testing and quarantine measures.

II. REPORTING AND CONFIDENTIALITY STATUTES

Every state requires health care providers to report selected identified patient information to state agencies.¹⁴ Reportable information may include venereal diseases, violent injuries (e.g., gunshot wounds) and injuries from child abuse or neglect. The principle of notifying authorities about cases of communicable diseases has been upheld since 1887.¹⁵ Those statutes reflect the state legislature's judgment that a patient's interest in the confidentiality of his medical condition is outweighed by another societal interest.¹⁶ Reporting statutes have rarely been challenged in the courts.¹⁷ A typical reporting statute concerning communicable diseases will list certain infectious diseases which must be reported and then include a catch-all phrase such as, "any other disease dangerous to the public health."¹⁸ Therefore, general statutes concerning the required reporting of communicable diseases have the potential for requiring physicians and other health care providers to report the identity of persons diagnosed as having the AIDS virus.¹⁹

Presently, in the United States, seven states have enacted statutes requiring a health care provider to report the identities of those people

¹⁴ Gellman, *Prescribing Privacy: The Uncertain Role of the Physicians in the Protection of Patient Privacy*, 62 N.C.L. REV. 255, 274 (1984) [hereinafter *Prescribing Privacy*].

¹⁵ Note, *The Constitutional Rights of AIDS carriers*, 99 HARV. L. REV. 1274, 1288 (1986).

¹⁶ *Prescribing Privacy*, *supra* note 14, at 274.

¹⁷ See Damme, *Controlling Genetic Disease Through Law*, 15 U.C. DAVIS L. REV. 801, 807 (1982).

¹⁸ *E.g.*, CONN. GEN. STAT. ANN. § 19a-215 (West 1986); IOWA CODE ANN. § 139.2 (West 1972); OHIO REV. CODE ANN. § 3707.06 (Baldwin 1982).

¹⁹ Query whether this would require physicians to report those people diagnosed as being, HIV antibody-positive, or to report those having the CDC's definition of AIDS.

The ELISA serum antibody test for the Human Immunodeficiency Virus (hereinafter HIV) is useful for screening purposes and in epidemiologic AIDS research. This test has no diagnostic, prognostic, or predictive value. A confirmed positive test indicates that a person may have been exposed to the virus and has mounted an immunologic response (the HIV antibody). This test must be supplemented by further testing to demonstrate that there are not antibodies to other viruses that cross-react in the test. Therefore, when a person has received a test result of HIV antibody-positive, this result could be a false positive result for the virus associated with AIDS and really be a result as to an antibody's reaction to another type of virus. See Landesman, Ginzberg & Weiss, *The AIDS Epidemic*, 312 NEW ENG. J. MED. 521 (1985).

The criteria for diagnosing AIDS is much more complicated and is being refined every day for the CDC. It is as follows:

diagnosed as carrying the HIV antibody.²⁰ The Colorado statute, enacted June 8, 1987, is believed to go the furthest with regard to reporting by physicians.²¹ It is the first reporting statute with criminal sanctions against doctors who do not forward the names of patients with the virus.²² Generally, these statutes require reporting the name, age, and address of those persons diagnosed as being HIV-antibody positive.²³ Reporting statutes have been highly criticized for deterring patients from seeking medical treatment, infringing upon the physician-patient relationship, advancing discrimination against those individuals reported, and ultimately causing the AIDS disease to become more widespread rather than fulfilling their purpose of containing the disease.²⁴

While seven states have enacted statutes which require reporting of every person diagnosed as having the HIV antibody, two states have gone further and enacted statutes which require the reporting of those patients

-
- 1) The presence of a reliably diagnosed disease at least moderately predictive of cellular immunodeficiency. Specific diseases are necessary to diagnose AIDS and these may include one or more of the following:
 - a) Certain malignant tumors, such as
 - (1) Kaposi's sarcoma in patients under 60 years of age; or
 - (2) non-Hodgkins lymphoma;
 - b) Certain infections by protozoa, such as
 - (1) *Pneumocystis carinii* pneumonia;
 - (2) cryptosporidium diarrhea; or
 - (3) toxoplasmosis gondii infection,
 - c) Certain infections with fungi, such as
 - (1) candida species; or
 - (2) cryptococcus neoformans;
 - d) Certain infections with viruses, such as
 - (1) cytomegalovirus;
 - (2) herpes virus;
 - (3) hepatitis virus;
 - e) Certain infections with bacteria, such as
 - (1) mycobacterium tuberculosis; or
 - (2) other atypical mycobacterium
 - 2) The absence of an underlying cause for the immunodeficiency or of any defined cause for reduced resistance to disease.

For a thorough explanation of the CDC's definition of full-blown AIDS, see Closen, *AIDS: Testing Democracy – Irrational Responses to the Public Health Crisis and the Need for Privacy in Serologic Testing*, 19 J. MARSHALL L. REV. 835, 861 (1986) [hereinafter *AIDS: Testing Democracy*].

Recently the CDC has expanded the criteria for diagnosing AIDS. However, it should be clear that a diagnosis of HIV antibody-positive and a diagnosis of AIDS are two very different things.

²⁰ AIDS AND THE LAW, *supra* note 5, at 349. Those states are Arizona, Colorado, Kentucky, Montana, Nevada, South Carolina and Wisconsin. *Id.*

²¹ See Armstrong, *AIDS Disclosure Hotly Debated*, Christian Science Monitor, June 18, 1987, at 3, col. 1.

²² COLO. REV. STAT. § 25-4-1409 (1987).

²³ *E.g.*, COLO. REV. STAT. § 25-4-1402 (1987); NEV. REV. STAT. § 441.210 (Supp. 1987).

²⁴ Gerberding, *Recommended Infection - Control Policies for Patients with Human Immunodeficiency Virus Infection*, 315 NEW ENG. J. MED. 1562 (1986); Lambert, *On AIDS: We Have More Answers than Questions*, N.Y. Times, July 12, 1987, at E30, col.1; Knudson, *Colorado Is Split on New AIDS Law*, N.Y. Times, June 15, 1987, at A13, col. 1.

who may be a "health threat to others."²⁵ A person who is a health threat to others is described as someone who has been diagnosed as having a communicable disease and negligently or willfully acts in such a manner as to promote spreading the disease.²⁶ These statutes appear to address the problem of reporting HIV antibody-positive individuals on a wide-scale basis by limiting the reporting to those individuals, who in the physician's good faith belief, seem to be recalcitrant or careless about the public health of others.

Many states have recognized the potential abuse that recorded medical information may pose to those affiliated with the AIDS virus. In response to this recognition, these states have enacted or are in the process of enacting confidentiality laws specifically addressing AIDS which are designed to protect the confidential nature of this medical information.²⁷ California and New York, the states with the highest caseload of AIDS patients, have declined to enact reporting statutes due to their potential for inciting discrimination.²⁸ Both of these states, however, have enacted legislation directed toward the confidentiality of medical information concerning individuals diagnosed as having AIDS or carrying the HIV antibody.²⁹

The reliability of these confidentiality statutes as well as the confidential nature of all medical information has been called into question repeatedly in the past decade.³⁰ The Executive Director of the American Medical Records Association told the Privacy Protection Study Commission that "a complete medical record [today] may contain more intimate details about an individual than could be found in any single document."³¹ The House Committee noted that there is a growing use of medical information by those who are not directly engaged in providing medical

²⁵ *E.g.*, MINN. STAT. § 144.4175 (Supp. 1988). These statutes are directed toward carriers of venereal disease, inasmuch as AIDS is a venereal disease and HIV antibodypositive individuals are presumed to be carriers, these regulations are construed so as to apply to AIDS carriers. See AIDS AND THE LAW, *supra* note 5, at 349.

²⁶ MINN. STAT. § 144.4172 (Supp. 1988).

²⁷ See *State Legislatures Grapple with Bills on AIDS*, American Med. News, July 26, 1987, at 35. There are presently eleven states which enacted statutes designed to protect the confidential nature of this information and twelve states which have introduced this type of legislation in 1987. *Id.*

Also, according to an American Medical Association legislative expert, confidentiality is governed in most states, if not all, by existing state regulations on sexually transmitted and communicable disease. *Id.* at 36. *E.g.*, IOWA CODE ANN. § 140.3 (West 1972); TEX. HEALTH AND SAFETY CODE ANN. art. 4419b-1, § 3.06 (Supp. 1988).

²⁸ Lambert, *On AIDS: We Have More Answers than Questions*, N.Y. Times, July 12, 1987, at E30, col. 1.

²⁹ CAL. HEALTH & SAFETY CODE § 199.20 (West Supp. 1988); N.Y. PUB. HEALTH LAW § 2776(2) (McKinney 1985). See also ME. REV. STAT. ANN. tit. 5, § 19203 (Supp. 1987).

³⁰ See H.R. REP. NO. 832, 96th Cong., 2d Sess., pt. 1 (1980) [hereinafter HOUSE REPORT]. See also *Prescribing Privacy*, *supra* note 14.

³¹ *Prescribing Privacy*, *supra* note 14, at 258.

services to patients.³² Also, most medical records today are kept on computer data recording systems, and, while these information systems are essential to the growth of the economy, it has been recognized that they can be misused to create a dangerously intrusive society.³³ This massive accumulation of personal medical information is a particular concern to many individuals today because of its potential to lead to abuse of this information by unauthorized disclosure.³⁴

The reasons for these fears in our society concerning the accumulation of medical information are not groundless. The House Committee has accumulated evidence suggesting that there has been nationwide trafficking in medical information.³⁵ They have found that at least one company, Factual Services Bureau, Inc., engaged in a nationwide business for over 25 years obtaining confidential medical information without the consent of the patient.³⁶ This company was based in Denver, Colorado.³⁷ A report made by the Denver grand jury issued to the Privacy Protection Study Commission noted that the evidence of the problem concerning the privacy of medical records in their jurisdictions also exists in many cities and jurisdictions across the nation.³⁸ This evidence leads to the conclusion that there can be no guarantee that medical information will remain confidential.

The effect that disclosure of medical information will have on a person related to the AIDS virus can be devastating. If this information is made known, AIDS victims have the potential of being discriminated against by forcing them from their schools, discharging them from their jobs (including military service), depriving them of custody or visitation with their children, refusing them insurance for life and health coverage, denying them medical and nursing home care, denying aliens permanent resident status, and the list goes on.³⁹ Compulsory reporting may also

³² HOUSE REPORT, *supra* note 30, at 19. Aside from medical care providers, medical information is used by private and governmental health insurance plans; public health agencies; medical and social researchers; rehabilitation and social welfare programs; employers; life and casualty insurers; federal, state, and local health planning agencies; schools; courts; law enforcement agencies; credit investigation companies; accrediting, licensing and certifying agencies; the press; and others. *Id.*

³³ *Id.*

³⁴ See Cooper, *Physician's Dilemma: Protection of the Patient's Right of Privacy*, 22 ST. LOUIS U.L.J. 397, 402 (1978) [hereinafter *Physician's Dilemma*].

³⁵ HOUSE REPORT, *supra* note 30, at 25.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *Doe v. Prudential Ins. Co.*, No. 87-CIV-2040 (S.D.N.Y. filed Mar. 25, 1987) (Plaintiff was denied life insurance on the basis of testing HIV antibody-positive); *Laredo v. Southwest Community Health Services, Inc.*, No. CIV 86-1313 (D. N.M. filed Oct. 29, 1986) (Nurse demoted after testing positive for HIV antibody); *Leckelt v. Terrebone Hosp.*, No. 86-4235 (E.D. La. filed Sept. 29, 1986) (Termination of nurse due to fear that she had or would develop AIDS); *C.C.'s Children v. Dade County School Bd.*, No. 86-1513-CIV (S.D. Fla. filed July 18, 1986) (Haitian triplets barred from classroom after being diagnosed with AIDS-related complex); *In re N*, No. 22656 (Cir. Ct., Escambia Cty., Fla., Juvenile Div.)

lead toward abuse due to the fact that the information will be accumulated over a number of years.⁴⁰ Victims of the AIDS virus should be able to have some guarantee that this confidential information will remain confidential.⁴¹ If no guarantee is available, the legislature ought to review its reasons for enacting these reporting statutes in light of the dangers of public disclosure. The main reasons cited for enacting reporting statutes are to curb the spread of the disease and to keep apprised of the progress of the disease.⁴² Yet, if people are aware of these reporting requirements, and are also at risk for possessing the HIV antibody, then most of those people will not seek treatment for fear of disclosure, discrimination and the social stigma placed upon their families.⁴³ The purpose of these statutes would be undermined by the nature of the statute itself.

A. *The Physician-Patient Relationship*

Another dilemma which arises due to the enactment of reporting statutes is the nature and extent of the physician-patient privilege. The physician-patient privilege did not exist at common law. It is strictly a

(A 14-year-old boy was confined to a mental ward to prevent him from spreading AIDS); *Keller v. Great White Bhd. of the Iron Fist*, No. 87 L 11807 (Cir. Ct., Cooke Cty., Ill. filed May 29, 1987) (neighbors and friends denounce petitioners due to their possibility of carrying the AIDS virus); *Doe v. Doe*, No. 78 D 5050 (Cir. Ct., Cooke Cty., Ill.) (Suit to deprive divorced father of visitation rights based on fear that he may be a carrier of the AIDS virus); *Doe v. Cinacola & Sons Excavating*, No. 86-320825NZ (Cir. Ct., Oakland Cty., Mich. filed Nov. 1986) (Plaintiff was terminated from employment and all his health and life insurance benefits were terminated after he was diagnosed with AIDS); *McEnancy v. Four Seasons Nursing Center*, No. 409241 (Dist. Ct., Travis Cty., Tex. filed Dec. 2, 1986) (An AIDS patient sought injunctions against a nursing home that refused him admission solely because of his medical condition.)

⁴⁰ Surgeon General C. Everett Koop has stated that there will be no cure or vaccine for AIDS in the foreseeable future. *Dr. Koop Warns of Spread of AIDS*, N.Y. Times, Jan. 20, 1987, at sec. III, p. 11, col. 1. Therefore, the number of people diagnosed as being HIV antibody-positive could become overwhelming considering the fact that presently 1.5 million people are estimated as being carriers of AIDS.

⁴¹ Confidentiality could be promoted by requiring anonymous reporting using a numerical system. States may also require reporting only those cases of actual AIDS patients applying the standards of the CDC. This method would require less reporting, less data and therefore less potential for abuse.

⁴² See Knudson, *Colorado Is Split on New AIDS Law*, N.Y. Times, June 15, 1987, at A13, col. 2; Bolfev, *Reagan Urges Wide AIDS Testing*, N.Y. Times, June 6, 1987, at A1, col. 2.

⁴³ See Landesman, Ginzburg, & Weiss, *supra* note 19, at 521. See also Gerberding, *Recommended Infection - Control Policies for Patients with Human Immunodeficiency Virus Infection*, 315 NEW ENG. J. MED. 1562, 1563 (1986); Lambert, *On AIDS: We Have More Questions than Answers*, N.Y. Times, July 12, 1987, E30, col. 1; Knudson, *Colorado is Split on New AIDS Law*, N.Y. Times, June 15, 1987, at A13, col. 1 (A Denver attorney representing a coalition of homosexual and civil rights groups remarked "[u]ltimately this bill [reporting statute] is going to kill people.").

statutory privilege.⁴⁴ This statutory privilege primarily prohibits courts from forcing a physician to divulge confidential information during judicial proceedings without the patient's consent.⁴⁵ We are not concerned here with the statutory privilege between patient and physician. Rather, we are concerned with the nature of the physician-patient relationship. The relationship between a physician and his patient has always been recognized as extremely confidential.⁴⁶ Protection of physician-patient communications is necessary to assure free and open disclosure by the patient to the physician of all information necessary to establish a proper diagnosis and to provide adequate medical treatment.⁴⁷ Protecting the confidential nature of such communications is also desirable to alleviate the patient's fear of possible humiliation, embarrassment or discomfort.⁴⁸ For this reason, the courts have characterized the relationship between physician and patient as fiduciary in nature.⁴⁹

A fiduciary relationship is founded on trust or confidence reposed by one person in the integrity and fidelity of another.⁵⁰ It may constitute a breach of the physician-patient relationship, a breach of confidence, or an invasion of privacy to divulge information acquired through the physician-patient relationship.⁵¹ However, this privilege is not absolute. The fiduciary relationship and its pledge of confidentiality has been qualified by exceptions from compulsory disclosure and protection of society as a whole.⁵² The confidentiality of the physician-patient relationship will be of utmost importance in helping to curtail and contain the spread of AIDS. Persons at risk of possessing the virus will be more likely to obtain medical advice and treatment if they are assured of non-disclosure.⁵³

The growing number of required reporting laws raises another dilemma for the physician. Does the legal requirement to disclose otherwise confidential patient information require the doctor to disclose to the patient the reporting requirements before any treatment ensues? If the physician informs the patient that he must report his name to the proper health authorities if he is diagnosed as being HIV antibody positive, the patient will most likely refuse treatment. The patient may also seek treatment, but only on the condition that the physician not report the disease, or he may not return for future treatments.⁵⁴ Avoidance of these undesirable consequences is a primary reason why confidentiality is important in the treatment process,⁵⁵ especially with the prospective AIDS patient whose disclosure may be devastating to his psychological as well as social character.

⁴⁴ R. MORRIS & A. MORITZ, *DOCTOR AND PATIENT AND THE LAW*, 141 (5th ed. 1971).

⁴⁵ *Id.*

⁴⁶ *AIDS AND THE LAW*, *supra* note 5, at 253.

⁴⁷ *Physician's Dilemma*, *supra* note 34, at 398.

⁴⁸ *Id.*

⁴⁹ *AIDS AND THE LAW*, *supra* note 5, at 253.

⁵⁰ *BLACK'S LAW DICTIONARY* 321 (5th ed. 1983).

⁵¹ *AIDS AND THE LAW*, *supra* note 5, at 254.

⁵² *Physician's Dilemma*, *supra* note 34, at 399.

⁵³ *See supra* notes 35-43 and accompanying text.

⁵⁴ *Prescribing Privacy*, *supra* note 14, at 274.

⁵⁵ *Id.*

Since the reporting statutes enacted in several states would constitute an exception to the physician-patient confidentiality standard, these statutes must be analyzed as to their constitutionality and their ability to achieve the purpose of containing the spread of the disease. The Supreme Court of the United States and various courts of the individual states have always upheld the principle that the state's police power in protecting the public health of its citizens will circumvent any individual constitutional guarantees. However, the state's action must be reasonable. It cannot be arbitrary, oppressive, or discriminatory.⁵⁶

B. The Constitutional Right of Privacy in Medical Information

The Supreme Court, in *Whalen v. Roe*, acknowledged a constitutional right of privacy in the disclosure of medical information.⁵⁷ In that case, patients and their physicians challenged the New York State Controlled Substance Act's requirement that the names and addresses of all recipients who had been prescribed certain drugs be recorded in a centralized computer file. The patients argued that the mere existence of the information in a readily available form violated their fourteenth amendment right of privacy because the possibility of the information being made public caused some patients to be reluctant to use the drugs and some doctors reluctant to prescribe the drugs.⁵⁸ The district court held that the doctor-patient relationship is one of the zones of privacy accorded constitutional protection and that the patient identification provisions of the Act invaded this zone with a "needlessly broad sweep."⁵⁹

The Supreme Court rejected the lower court's analysis.⁶⁰ The Supreme Court established that the cases characterized as protecting privacy have involved two different kinds of interests.⁶¹ The first is the right of an individual not to have his private affairs made public by the government.⁶² The second is the interest in independence in making certain kinds of important decisions.⁶³

In analyzing the first type of privacy interest, the Court illustrated three ways in which public disclosure of patient information could come about.⁶⁴ First, health department employees may violate the statute by failing either deliberately or negligently to maintain proper security. Second, a patient or a doctor may be accused of a violation and the stored

⁵⁶ See, e.g., *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

⁵⁷ 429 U.S. 589 (1976).

⁵⁸ *Id.* at 578-600.

⁵⁹ *Id.* at 596.

⁶⁰ *Id.* at 598.

⁶¹ *Id.* at 599.

⁶² *Id.* See also *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁶³ *Whalen v. Roe*, 429 U.S. 589, 599-600 (1976). See also *Roe v. Wade*, 410 U.S. 113 (1973).

⁶⁴ 429 U.S. at 600.

data may be offered in evidence in a judicial proceeding. Third, a doctor or the patient may voluntarily reveal information on a prescription form.⁶⁵ The Supreme Court found that the third possibility would exist under all types of reporting legislation and the possibility of its occurrence was not relevant to the validity of the statute.⁶⁶ The other two possibilities were dismissed by the Court based upon the lack of evidence in the record as to any improper administration of the security provisions of the reporting statute by the state of New York.⁶⁷

When analyzing the risks of public disclosure with respect to AIDS patients, these possibilities cannot be so easily discarded.⁶⁸ Most states do have confidentiality laws protecting unauthorized disclosure of medical information, some specifically directed toward AIDS medical information.⁶⁹ Therefore, one would hope that the second or third possibility would never occur in the United States.⁷⁰ The occurrence of the first possibility is a potential threat in the United States. Unlike *Whalen*, there has been documented evidence concerning the misuse of private medical information.⁷¹ Every American citizen, including the carriers of the AIDS virus, is entitled to privacy in their personal affairs, free from government intrusion.⁷² The devastating effects that public disclosure would have on an AIDS patient's life would render their right of privacy much more significant than a person's right to privacy concerning the knowledge of their drug prescription.⁷³ Therefore, the legislatures ought to be certain that this information will remain confidential. If confidentiality cannot be guaranteed, the courts must scrutinize the reporting statutes in light of the damaging effects which disclosure will have on the AIDS carriers' right to privacy.⁷⁴

⁶⁵ *Id.*

⁶⁶ *Id.* at 600-601.

⁶⁷ *Id.* at 601-602.

⁶⁸ The effects that disclosure may have on an AIDS patient may be devastating, therefore, these possibilities must be given serious consideration by the courts.

⁶⁹ See *supra* notes 27-29 and accompanying text.

⁷⁰ Most confidentiality statutes prohibit the use of this type of information in a judicial proceeding. Also, in the case of an AIDS victim, voluntary public disclosure is highly unlikely due to the devastating consequences.

⁷¹ See *supra* notes 35-38 and accompanying text.

⁷² The Supreme Court has characterized the right of privacy in making decisions free from unjustified governmental interference on matters relating to marriage, procreation, contraception, family relationships, child rearing and education. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

This right of privacy should extend to the right to make decisions concerning an individual's health and treatment, especially when considering a fatal disease such as AIDS which carries devastating effects if this information is disclosed.

⁷³ See *supra* note 39 and accompanying text. Being labeled a drug addict may place some stigma on a person's life, but this stigma is minimal compared to the disastrous effects which the AIDS stigma carries.

⁷⁴ See *Whalen v. Roe*, 429 U.S. 589, 607 (1976) (Brennan, J., concurring). Justice Brennan illustrates the thin line which reporting of the use of Schedule II drugs approaches with respect to the deprivation of the patient's right of privacy. If the drug reporting statute contained a risk of disclosure of confidential information, Justice Brennan concludes that this would amount to a deprivation and the state would have to prove a necessity to promote a compelling state interest.

The second type of privacy interest which the Court illustrates is the interest in independence of making certain kinds of important decisions.⁷⁵ Justice Stevens recognized that some patients will avoid needed medical attention due to concerns for their own privacy.⁷⁶ He states, however, that the number of people refusing to use Schedule II drugs was not significant enough to prove that the reporting statute had violated any interest in their independence of making important decisions.⁷⁷

The AIDS carriers' avoidance of needed medical attention is an entirely different scenario than the situation concerning the required reporting of the use of Schedule II drugs. Even though it would be difficult to prove the effect that reporting statutes would have on potential carriers of the AIDS virus,⁷⁸ it is evident that the knowledge of the reporting statutes would deter potential AIDS carriers from seeking medical diagnosis and treatment.⁷⁹ The consequence of deterrence would render the statute counterproductive in its efforts to curb the spread of the disease. This required reporting of HIV antibody carriers would deprive potential carriers of their privacy interest of independence in making the important decision of seeking medical diagnosis and treatment.

The Supreme Court in *Whalen* held the statute constitutional on the grounds that a state must be allowed to experiment with concerns of public health and, also, because the law was rationally related to the legitimate state interest of regulating drug abuse.⁸⁰ In doing so, the Court applied a minimum rationality test to reporting statutes. A minimum rationality test has been applied by the Court when there is an ordinary Constitutional right involved.⁸¹ In order for a statute to be held valid under a minimum rationality standard, the means employed by the state must be appropriate, the purpose must be legitimate, and the means must be rationally related to the end.⁸²

⁷⁵ *Whalen v. Roe*, 429 U.S. 589, 599 (1976).

⁷⁶ *Id.* at 602-603.

⁷⁷ *Id.* at 603.

⁷⁸ It would be difficult to prove because it requires proof of a negative. The nature of the proof would be the number of people who are in a high-risk group of having the virus, measured against those who refuse to seek diagnosis or treatment. Reports have shown, however, that over 46,000 cases of AIDS have been reported to the CDC since 1981 and between 1 million and 1.5 million people in the United States are estimated as being infected with HIV. Centers for Disease Control, *Human Immunodeficiency Virus Infection in the United States*, 36 MORBIDITY & MORTALITY WEEKLY REPORT No. 49 (1987). It would be impossible to determine how many of those estimated 1-1.5 million people fear having the virus but have a greater fear of information being disclosed and, therefore, will not seek treatment.

⁷⁹ See *supra* note 43.

⁸⁰ *Whalen v. Roe*, 429 U.S. 589, 597 (1976).

⁸¹ The minimum rationality test was first established by the United States Supreme Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The ordinary constitutional right governed by a minimum rationality standard can be contrasted with the strict scrutiny test applied by the Court when there is a fundamental constitutional right at issue. See *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). This two tiered standard of review was first enunciated in dictum in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

⁸² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

The *Whalen* Court held that the means employed were appropriate due to the extensive security precautions employed during the course of reporting the prescriptions.⁸³ The Court did recognize, however, that vast amounts of personal information in massive government files poses a definite threat to the privacy of individuals reported.⁸⁴ This possibility was held not to exist in the *Whalen* case.⁸⁵

The purpose of the statute in requiring reporting of specific drugs was also found by the Court to be legitimate.⁸⁶ The New York legislature was attempting to curtail the unlawful use of certain prescription drugs. The district court found that the state did not sufficiently demonstrate the necessity for the patient-identification requirement.⁸⁷ The Supreme Court, however, held that the means employed could attain the purpose of deterring the unlawful use of prescription drugs.⁸⁸ Emphasis was also placed on the state's broad latitude in experimenting with possible solutions to problems of vital local concern.⁸⁹

In applying the minimum rationality test to the reporting statutes presently enacted, the means would be to require physicians and other health care providers to report the identity of those patients testing HIV antibody-positive.⁹⁰ The purpose would be to protect the public health of the citizens of their respective states by curbing the spread of the disease and tracking the course of the epidemic.⁹¹ It is difficult, however, to conceive how the means and the end are rationally related. The evidence that this information cannot be guaranteed confidentiality,⁹² the social stigma which follows those associated with the AIDS virus⁹³ and human nature all lead to the conclusion that there is no rational relation. People will be more likely to avoid medical treatment if there is a possibility that they will be connected to the AIDS virus.⁹⁴ If this occurs, the statute will be counterproductive, causing more people at risk of having or contracting the disease to remain uninformed about AIDS and more likely to continue to spread the disease.⁹⁵

The courts, in analyzing the reporting statutes, could place emphasis upon the state legislatures' broad latitude in experimentation.⁹⁶ If the state is afforded broad latitude in experimentation concerning the AIDS epidemic, it could be disastrous for our society, especially potential AIDS carriers. Considering the estimate of the CDC that 1.5 million people are

⁸³ *Whalen v. Roe*, 429 U.S. 589, 602, 607 (1976).

⁸⁴ *Id.* at 605. See also *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 576 (1980).

⁸⁵ *Whalen v. Roe*, 429 U.S. 589, 605 (1976).

⁸⁶ *Id.* at 591.

⁸⁷ *Id.* at 596.

⁸⁸ *Id.* at 598.

⁸⁹ *Id.*

⁹⁰ See *supra* notes 22-25 and accompanying text.

⁹¹ *Id.*

⁹² See *supra* notes 35-38 and accompanying text.

⁹³ See *supra* note 39 and accompanying text.

⁹⁴ See *supra* note 43 and accompanying text.

⁹⁵ *Id.*

⁹⁶ See *FERC v. Mississippi*, 456 U.S. 742, 788 (1982); *Whalen v. Roe*, 429 U.S. 589, 597 (1976).

presently carrying the AIDS virus,⁹⁷ experimentation by the state legislatures could damage, maybe even destroy, the lives of an overwhelming number of people in our country. The *Whalen* Court points out that the legislative process remains available to terminate an unwise experiment.⁹⁸ The tragedy of the court's rationale is that several thousands of people's lives may have been adversely effected by this "experiment" before the legislature decides that they have made a mistake. Potential AIDS carriers deserve much broader protection of their constitutional rights.

The privacy right in medical information was analyzed more recently in *Hawaii Psychiatric Soc'y v. Ariyoshi*.⁹⁹ In this case, a group of psychiatrists were challenging the constitutionality of a state statute that authorized the inspection of offices and records of medical providers to detect evidence of fraud. The court determined that the statute unnecessarily intruded into the patient's right to make medical decisions and enjoined enforcement of the statute.¹⁰⁰

The significance of this court's decision is that, unlike *Whalen*, the court found the doctor-patient relationship to be within those fundamental rights guaranteed constitutional protection.¹⁰¹ The court recognized that the doctor-patient relationship, specifically the right of independence in making medical decisions, was within the bounds of fundamental rights because these communications often concerned areas that are already protected such as, marriage, procreation, family, parenthood, sexuality and physical problems. This automatically brought into question the second level of the two tier analysis employing a test of strict scrutiny.¹⁰² Strict scrutiny analysis requires the party asserting the validity of the statute to prove a compelling state interest.¹⁰³ If a compelling interest is found, the state must show that there were no less burdensome alternatives.¹⁰⁴

The court found that the state's interest of preventing medicaid fraud was legitimate but it was not compelling enough to significantly intrude into the patient's right to make decisions regarding medical care.¹⁰⁵ The court illustrated that much less burdensome alternatives could be implemented.¹⁰⁶

⁹⁷ Centers for Disease Control, *supra* note 9.

⁹⁸ *Whalen v. Roe*, 429 U.S. 589, 598 (1976).

⁹⁹ 481 F. Supp. 1028 (1979).

¹⁰⁰ *Id.* at 1043.

¹⁰¹ *Id.* at 1038.

¹⁰² *Id.* at 1043. *Cf. Schachter v. Whalen*, 581 F.2d 35 (2d Cir. 1978). The Schachter court emphasized security precautions to guard against disclosure of this information and did not consider the confidential nature of the physician-patient relationship.

¹⁰³ In regards to AIDS legislation, it may be very difficult to prove a compelling state interest at this time. Exactly what amounts to a compelling state interest is evolving in the court system. Each case must be analyzed according to its own facts. It must be guided by reason and justice and not by fear and anxiety. *See AIDS AND THE LAW*, *supra* note 5, at 135.

¹⁰⁴ *E.g.*, *Maine v. Taylor*, 477 U.S. 131 (1986); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

¹⁰⁵ *Hawaii Psychiatric Soc'y v. Ariyoshi*, 481 F. Supp. 1028, 1043 (1979).

¹⁰⁶ The court considered the alternative of having the physicians delete the confidential information from the file before it is reviewed. *Id.* at 1042.

The patient's right to make decisions concerning medical diagnosis and treatment should also be considered a fundamental right entitled to constitutional protection. The disclosures necessary to detect AIDS, the devastating effects the disease will have on one's personal life and the intimacy of the doctor-patient relationship in this situation all concern areas that the Supreme Court has already protected.¹⁰⁷ The grave importance for confidentiality coupled with the tragedies which accompany this disease mandate the protection of a citizen's constitutional guarantees.

Applying the strict scrutiny analysis to the compulsory reporting statutes concerning AIDS carriers, it is apparent that the state could employ less burdensome alternatives in an effort to further protect the AIDS victim's right of independence in making medical decisions. The compelling state interest of protecting public health can be preserved by other less intrusive means. The state could require reporting those cases of full-blown AIDS by applying the Center for Disease Control's criterion of diagnosis.¹⁰⁸ Further, compulsory reporting could be accomplished by a numerical system, thus avoiding any identity disclosure. This could preserve the intention of following the progress of the disease. The state could then follow the state of Minnesota's example and require reporting of the recalcitrant victims of AIDS.¹⁰⁹ This would help to curb the spread of the disease. Employing these less intrusive alternatives would give those people with a high-risk of having the disease more incentive to seek medical treatment. They would not have to fear public disclosure unless they were themselves careless and endangering the public health.

The intent of the legislature in enacting compulsory reporting of those who test positive for the HIV antibody is to be commended. They have the interest of the public health in mind. However, the nature of the AIDS virus has instilled fear in American society. Those individual rights inherent in the Constitution must not be carelessly set aside because the rationality and reason of American citizens has given way to this fear.

AIDS affects a variety of persons, including victims who are entitled constitutional guarantees and persons who must ultimately be responsible to one another to help fulfill those guarantees. If the federal or state governments seek to modify those guarantees through the legislative process, it is the duty of the citizens to be alert and to exercise their power at the ballot box. But if the legislature still promulgates statutes that fail to observe the quality of liberty guaranteed by the state and federal constitutions, it is the responsibility of the courts to review those statutes. The legislature and the courts were designed to work for persons, and they were designed to work together.¹¹⁰

¹⁰⁷ This disease concerns all aspects of a person's life, including, but not limited to, marriage, procreation, family, parenthood, sexuality and physical problems. See *Hawaii Psychiatric Soc'y v. Ariyoshi*, 481 F. Supp. 1028, 1038 (1979).

¹⁰⁸ See *supra* note 19.

¹⁰⁹ See *supra* note 25. A recalcitrant person is one who refuses to obey authority, custom, or regulation. WEBSTER'S NEW WORLD DICTIONARY 1184 (2d ed. 1974).

¹¹⁰ AIDS AND THE LAW *supra* note 5 at 133.

The disease can be contained, but the best way to do it is not by unnecessarily depriving citizens of their constitutional guarantees. It is through education, counseling and voluntary guidance which will help to stop the spread of this disastrous epidemic.¹¹¹

III. MANDATORY PUBLIC HEALTH MEASURES: COMPULSORY TESTING AND QUARANTINE

The fear which the AIDS epidemic has instilled in American society has given rise to far-reaching proposals by respected and influential people in our society. Senator Jesse Helms of North Carolina has called for the imposition of quarantine measures upon HIV antibody carriers.¹¹² A professor of law at the University of Nebraska, among others, is urging mandatory testing of AIDS victims on a wide-scale basis.¹¹³ These irrational proposals, implemented by well-respected people in the community, pose a serious threat to the liberty interests of the potential AIDS carriers. The threat can only increase as the epidemic becomes more wide-spread. The scope of this article cannot begin to encompass all the proposals directed toward the AIDS epidemic. This article will, however, discuss those proposals which seem to be the most far-reaching and intrusive. This portion of the article is devoted to the issues of whether the government has the power to order such mandatory measures, and, if so, what the limits of their authority are in restricting a person's right to liberty. The conclusion will be that the government can enforce mandatory testing and quarantine but their authority is not universal, rather it is limited to only those measures absolutely necessary.

Most, if not all jurisdictions, have given public officials the necessary authority to implement public health measures.¹¹⁴ The federal legislature has enacted laws which authorize the President, acting on the recommendation of the National Advisory Health Counsel and the Surgeon General, to designate communicable diseases for which mandatory examinations and quarantines may be implemented.¹¹⁵ On December 22, 1983, President Reagan designated the following as contagious diseases: cholera or suspected cholera, diphtheria, infectious tuberculosis, plague, suspected smallpox, yellow fever, and suspected viral hemorrhagic fevers (lassa, marburg, ebola, Congo-crimean, and others not yet isolated or named).¹¹⁶ AIDS has not yet been added to this list of infectious dis-

¹¹¹ See *AIDS: Testing Democracy*, supra note 19. See also Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274 (1986).

¹¹² Lambert, *On AIDS: We Have More Answers Than Questions*, N.Y. Times, July 12, 1987, at E30, col. 1.

¹¹³ Seib, *Debate Rages Over AIDS - Test Policy*, Wall St. J., June 18, 1987, at 33, col. 2; *Professor Stirs AIDS Controversy With a Call for Universal Testing*, Nat'l L.J., May 5, 1986, at 25; *Mandatory AIDS Testing Draws Fire*, Nat'l L.J., Mar. 9, 1987, at 3.

¹¹⁴ See, e.g., CAL. HEALTH & SAFETY CODE § 3195 (West 1979); CONN. GEN. STAT. ANN. § 19a-221 (West 1986); N.Y. PUB. HEALTH LAW § 2120 (McKinney 1985); TEX. HEALTH & SAFETY CODE ANN. art. 4419b-1. (Vernon Supp. 1988).

¹¹⁵ 42 U.S.C. § 264 (1982).

¹¹⁶ Executive Order No. 12,452, 3 C.F.R. 224 (1983), reprinted in 42 U.S.C. § 264, app. at 68 (Supp. 1987).

eases.¹¹⁷ The President's order consequently allows for the apprehension, examination, and quarantine of persons afflicted with these diseases.¹¹⁸

A. Compulsory Testing

Compulsory vaccination and immunization laws have been upheld by the courts since the early 1900's.¹¹⁹ The courts have repeatedly recognized the principle that the police power of the state to preserve the public health is not limited by the constitutional guarantees of life, liberty, and property, if this power is exercised reasonably and fairly and is not abused.

The Supreme Court has not reviewed the constitutionality of mandatory vaccination and immunization since *Jacobson v. Massachusetts* was decided in 1905.¹²⁰ The *Jacobson* Court found that the state maintained the power to enact mandatory vaccination laws based upon its inherent police power. The Court however, held that this police power cannot be exercised to contravene the Constitution of the United States, or infringe any right granted or secured by the Constitution.¹²¹ The Court held that the law in question applied equally to all citizens of Massachusetts and was based on the informed judgment of the appropriate health officials.

The laws concerning vaccination and immunization can be analogized to the laws concerning mandatory testing for possible carriers of the AIDS virus in that both scenarios concern an invasion of the body in times of a public health epidemic. Vaccination and immunization, however, are imposed to halt the spread of a disease. These actions virtually prevent disease from spreading in the community.¹²² Mandatory testing for the AIDS virus can only detect which persons may be infected with the disease.¹²³ Testing for the AIDS virus in itself can in no way prevent the disease from spreading.¹²⁴ It may help health officials educate and counsel those found to be HIV antibody positive, but even that may be a questionable rationale for imposing mandatory testing.¹²⁵

Furthermore, any wide scale mandatory testing for AIDS would not be based on the informed judgment of health officials. Many national health

¹¹⁷ AIDS is expected to be added to this list. See S. REP. NO. 88, 100th Cong., 1st Sess. (1987).

¹¹⁸ 42 U.S.C. § 264 (1982).

¹¹⁹ See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Brown v. City School Dist. of the City of Corning*, 104 Misc. 2d 796, 429 N.Y.S. 2d 355 (1980); *Veimeister v. White*, 179 N.Y. 235, 72 N.E. 97 (1904). Also, every state except two (Delaware and Iowa) requires immunization of public school students. See AIDS AND THE LAW, *supra* note 5, at 67.

¹²⁰ 197 U.S. 11 (1905).

¹²¹ *Id.* at 25.

¹²² The very nature of a vaccination or immunization is the resistance to a protection against a specified disease. It enables the body to build up immunities to prevent disease. WEBSTER'S NEW WORLD DICTIONARY 702, 1566 (2d ed. 1974).

¹²³ See AIDS AND THE LAW, *supra* note 5, at 66. The test to determine the presence of HIV antibodies was developed for the purpose of protecting the blood supply. Landesman, Ginzburg & Weiss, *supra* note 19, at 523.

¹²⁴ The test is merely used to determine if the HIV antibody is present.

¹²⁵ See *infra* note 157 and accompanying text.

officials have denounced mandatory testing for AIDS.¹²⁶ They claim that the procedure would be unmanageable and cost prohibitive.¹²⁷ Instead, national health officials urge spending this money on voluntary test sites where people who are at risk of carrying this disease may come for testing.¹²⁸ The proposals for imposing mandatory testing can therefore be deemed against the advice of the experts and ultimately unreasonable.¹²⁹

Proposals for mandatory testing to determine the existence of the HIV virus can be better analogized to the mandatory drug testing laws being imposed by the government at the present time. On September 15, 1986, President Reagan signed an Executive Order entitled the "Drug-Free Federal Workplace."¹³⁰ This order mandated the random administration of drug testing for all federal employees in sensitive positions involving national security, law enforcement, and public safety. As a result of the imposition of this random drug testing, the courts have been flooded with lawsuits denouncing this imposition of testing as a violation of the person's fourth amendment right.¹³¹ The courts have reviewed these actions on the basis of their reasonableness under the fourth amendment standards.¹³² The fourth amendment protection against unreasonable searches and seizures vests individuals with the right to be free from arbitrary and unreasonable government intrusions into their legitimate expectations of privacy.¹³³ The following analysis will focus on the illegality of mandatory screening for the HIV antibody applying the same method used by the courts when considering mandatory drug testing cases.

The Supreme Court has held that the involuntary taking of blood constitutes a search and seizure within the meaning of the fourth amend-

¹²⁶ S. REP. NO. 83, 100th Cong., 1st Sess. 5 (1987) [hereinafter SENATE REPORT].

¹²⁷ *Id.* at 10.

¹²⁸ *Id.* at 8.

¹²⁹ However, many states have legislation pending in their respective states for mandatory testing of certain groups such as, premarital testing, prenatal testing, prisoners, food handlers, hospital patients and others. See *State Legislatures Grapple with Bills on AIDS*, AMERICAN MED. NEWS, June 26, 1987, at 35.

Surgeon General C. Everett Koop promotes voluntary testing, claiming that most of these categories do not contain people at high risk for the disease, therefore, it would merely be an unnecessary waste of time and money. See SENATE REPORT, *supra* note 126, at 8. See also Landesman, Ginzburg & Weiss, *supra* note 19, at 523.

¹³⁰ Executive Order No. 12,564, 3 C.F.R. 224 (1987). President Reagan promulgated this Executive Order pursuant to the authority granted by Congress in 5 U.S.C. § 7301 (1982).

¹³¹ See, e.g., *American Fed'n of Gov't Employees v. Dole*, 670 F. Supp. 445 (D.D.C. 1987); *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986).

¹³² The 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.

¹³³ See *Katz v. United States*, 389 U.S. 347 (1967); *Schmerber v. California*, 384 U.S. 757 (1966); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986).

ment.¹³⁴ Therefore, one can conclude that the testing of persons for the HIV virus would constitute a search under the fourth amendment.¹³⁵

The fundamental requirement of the fourth amendment is that a search must be reasonable.¹³⁶ Ordinarily, a search requires both a warrant and probable cause in order to be deemed reasonable.¹³⁷ The Supreme Court, however, has held that the absence of either element would not automatically render the search unreasonable.¹³⁸ Instead, the Supreme Court has applied a balancing test¹³⁹ between the intrusiveness of the search and its promotion of a legitimate governmental purpose.¹⁴⁰

The Supreme Court has measured the degree of intrusion of a search by the individual's expectation of privacy.¹⁴¹ In determining a legitimate expectation of privacy, the Supreme Court has implemented a two-step analysis. First, the person must have exhibited an actual (subjective) expectation of privacy and, second, the expectation must be one that society is prepared to recognize as reasonable.¹⁴² As measured by the expectation of privacy, inspections of personal effects are generally less intrusive, while breaches of the "integrity of the body" result in the greatest invasions of privacy.¹⁴³ Justice Brennan found that the interests of human dignity and privacy compel the finding that mandatory blood extractions are greatly intrusive.¹⁴⁴ The extraction and analysis of blood forces people to divulge private, personal medical information unrelated to the government's interest in discovering the presence of drugs, alcohol or related substances.¹⁴⁵

¹³³ *Schmerber v. California*, 384 U.S. 757, 767 (1966).

¹³⁶ The reason is that the test is implemented by the taking of a blood sample and in mandatory testing cases this taking is involuntary.

¹³⁶ See *New Jersey v. TLO*, 469 U.S. 325 (1985); *Katz v. United States*, 389 U.S. 347 (1967).

¹³⁷ *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (1986). The Supreme Court has established some exceptions to the warrant and probable cause requirements. These exceptions are either exigency based exceptions, *Terry* stops, or the administrative and regulatory search exceptions. See Note, *A Proposal for Mandatory Drug Testing of Federal Civilian Employees*, 62 N.Y.U. L. REV. 322, 334 (1987). None of these exceptions would apply to the searches imposed for testing of the HIV antibody.

¹³⁸ See *New Jersey v. TLO*, 469 U.S. 325, 340 (1985); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986).

¹³⁹ Before the balancing test was established, the Court applied the traditional rule of probable cause plus a warrant. The essential requirement under this test was a reasonable suspicion directed at the person to be searched. See Note, *supra* note 137, at 337. Mandatory testing for the HIV antibody would fail under the traditional test as there would be no reasonable suspicion directed toward the particular person being tested.

¹⁴⁰ See *Illinois v. Lafayette*, 462 U.S. 650 (1983); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986).

¹⁴¹ See *Katz v. United States*, 389 U.S. 347, 361 (1967).

¹⁴² *Id.*

¹⁴³ See *Schmerber v. California*, 384 U.S. 757 (1966); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986).

¹⁴⁴ *Schmerber v. California*, 384 U.S. 757, 770 (1966).

¹⁴⁵ See *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1514 (D.N.J. 1986); *McDonnell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985) (The court notes that it is significant that both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom the sample is taken, including, but hardly limited to, recent ingestion of alcohol or drugs.)

The mandatory taking of blood for purposes of detecting the presence of the HIV antibody can also be considered a search and seizure under the fourth amendment.¹⁴⁶ There is a reasonable expectation of privacy inherent in one's blood content.¹⁴⁷ Even if the government were to restrict the analysis of blood to the presence of the HIV antibody, it would still violate this privacy expectation. Society will be prepared to recognize this expectation as reasonable,¹⁴⁸ unless the government can guarantee that this information will remain confidential.¹⁴⁹

The second aspect of this balancing approach is the promotion of the government's legitimate purpose in imposing the search.¹⁵⁰ The courts have repeatedly upheld state actions performed within their police power to protect the public health. However, this power must be exercised reasonably.

There are many drawbacks to imposing mandatory testing for the presence of the AIDS virus. The main drawback is that the test is not reliable.¹⁵¹ The AIDS test was established to prevent the spread of the AIDS virus through the blood supply. This test is best utilized to detect the presence of the AIDS virus in blood, tissue, donated organs, and sperm.¹⁵² The reason is that these items may be discarded without psychologically or socially endangering anyone. It has been recognized, however, that this test should not be used to screen people on a wide-scale basis for AIDS.¹⁵³ When it is imposed on a wide-scale basis, not within any high-risk groups, the number of false positive diagnoses increases.¹⁵⁴ Some people think the number of correct positives could equal the number of false positives.¹⁵⁵ This would cause needless psychological and emotional distress on those diagnosed falsely. Therefore, the experts believe that

¹⁴⁶ This is based on the Supreme Court conclusion that the involuntary taking of blood constitutes a search and seizure under the fourth amendment. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

¹⁴⁷ *Id.*

¹⁴⁸ Most public health officials denounce the idea of mandatory blood taking for the purposes of detecting the HIV antibody. See *supra* notes 126-129 and accompanying text.

¹⁴⁹ The elements of confidentiality have also been recognized as important in the random drug testing cases. See *American Fed'n of Gov't Employees v. Dole*, 670 F. Supp. 445, 449 (D.D.C. 1987); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1515 (D.N.J. 1986).

¹⁵⁰ *Illinois v. Lafayette*, 462 U.S. 640 (1983); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).

¹⁵¹ See SENATE REPORT, *supra* note 126, at 10; AIDS AND THE LAW, *supra* note 5, at 66; Gostin, Curran & Clark, *The Case Against Compulsory Casefinding in Controlling AIDS - Testing, Screening and Reporting*, 12 AM. J. OF L. AND MED. 7, 11 (1987); Okie, *AIDS 'False Positives': A Volatile Social Issue*, Wash. Post, July 23, 1987, at A3, col. 1.

¹⁵² AIDS AND THE LAW, *supra* note 5, at 66; Landesman, Ginzburg & Weiss, *supra* note 19, at 521.

¹⁵³ See SENATE REPORT, *supra* note 126; *AIDS: Testing Democracy*, *supra* note 19, at 874.

¹⁵⁴ See Landesman, Ginzburg & Weiss, *supra* note 19, at 521; Gostin, Curran & Clark, *supra* note 151, at 12.

¹⁵⁵ See SENATE REPORT, *supra* note 126, at 30, 42; Landesman, Ginzburg & Weiss, *supra* note 19, at 521.

this test should only be implemented on people who are believed to be at high-risk for the disease and then only on a voluntary basis.¹⁵⁶

The reason public health officials are calling for voluntary testing is due to their belief that people will avoid seeking medical diagnosis and treatment if it is imposed on a mandatory basis.¹⁵⁷ This would undermine the government's purpose of imposing mandatory testing. Instead of detecting more people who are carriers of the disease, these people will avoid the testing centers altogether. Thus, public health officials will be unable to determine the extent of this epidemic.

In employing the balancing test currently used by the Supreme Court to determine the reasonableness of the search,¹⁵⁸ it is apparent that mandatory testing for the AIDS virus would constitute an unreasonable search and seizure under the standards of the fourth amendment. The government is implicating a legitimate purpose in testing for the AIDS virus. However, mandatory testing would not promote the governmental interest in curbing the spread of the disease or in keeping up with the progress of the disease.¹⁵⁹ The test's tendency to indicate significant false positive results¹⁶⁰ and the subjects tendency to avoid mandatory testing will only render the government's actions counterproductive. The government's purposes would be much better served if they would put the money toward voluntary testing sites and enact measures toward keeping the results of the AIDS tests confidential.¹⁶¹

The public health benefit of such a mandatory screening program is likely to be minimal when compared to the personal and economic costs of implementing such a program.¹⁶² The objective of compulsory testing is to detect those people who may be carrying the HIV antibody in order to help them modify their behavior so as to stop the disease from spreading. This can be implemented in a much more efficient manner. The government should implement a comprehensive voluntary program of public health education, professional testing and counseling services. Those people in high risk groups are more likely to respond to cost-free, voluntary programs, thus promoting the governmental interest more efficiently. This type of voluntary program would achieve the same public health advantages as mandatory programs, however, none of the significant detriments of a compulsory program would be present.¹⁶³

¹⁵⁶ See *supra* notes 126-129 and accompanying text.

¹⁵⁷ See *AIDS AND THE LAW*, *supra* note 5, at 175.

¹⁵⁸ See *Illinois v. Lafayette*, 462 U.S. 640 (1983); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).

¹⁵⁹ See *supra* notes 150-56 and accompanying text.

¹⁶⁰ *Id.*

¹⁶¹ See SENATE REPORT, *supra* note 126; Colburn, *Illinois, Louisiana Become First State to Require AIDS Test Before Marriage*, Wash. Post, Jan. 1, 1988, at A11, col. 1. The federal Center for Disease Control and Surgeon General C. Everett Koop have opposed mandatory testing but favor voluntary testing, combined with public education and counseling.

¹⁶² The cost of the ELISA antibody test and associated expenses for donated blood products alone amount to approximately \$100 million per year. This amount does not include the expense of testing individual persons to detect the HIV antibody. Landesman, Ginzburg & Weiss, *supra* note 19, at 523.

¹⁶³ See Gostin, Curran & Clark, *supra* note 151, at 20.

B. Quarantine

Another means in which states have utilized their police power in protecting public health is through the use of quarantines.¹⁶⁴ Virtually every state, as well as the federal government, has enacted legislation which would give public health officials the power to impose quarantines.¹⁶⁵ With the onset of the AIDS epidemic, respected public officials are calling for the imposition of quarantine measures.¹⁶⁶ Therefore, a review of the state's power to impose quarantine is mandated.

Health officials began to use quarantine powers early in the history of the United States to prevent the spread of infectious disease.¹⁶⁷ One must remember that this use of quarantine was at a time in history when sanitation and medication were not as advanced as they are today. Later in our history, quarantines were imposed against prostitutes for the purpose of preventing the spread of venereal disease.¹⁶⁸ Today, quarantines or involuntary confinement are mainly imposed against those people who are found to be mentally unstable¹⁶⁹ or those found to be infected with a contagious disease and are recalcitrant or careless about spreading the disease to others in the community.¹⁷⁰

Quarantine in our society has never been held unconstitutional by the courts.¹⁷¹ The courts have always upheld the principle that the liberty of the individual must sometimes be restricted for the good of the community.¹⁷² However, the AIDS epidemic poses a new dilemma to the concept of quarantine.

¹⁶⁴ Quarantine measures have been imposed in the past for, among other things, scarlet fever, venereal disease, tuberculosis and mental instability. *See, e.g.*, *State v. Snow*, 230 Ark. 746, 324 S.W.2d 532 (1959) (tuberculosis); *Moore v. Draper*, 57 So. 2d 648 (Fla. 1952) (tuberculosis); *People v. Tait*, 251 Ill. 197, 103 N.E. 750 (1913) (scarlet fever); *Ex parte Caselli*, 62 Mont. 201, 204 P. 364 (1922) (venereal disease); *Greene v. Edwards*, 164 W. Va. 326, 263 S.E.2d 661 (1980) (tuberculosis).

¹⁶⁵ *E.g.* 42 U.S.C. § 264(d) (1982); CAL. HEALTH & SAFETY CODE § 3195 (West 1979); CONN. GEN. STAT. ANN. § 19a221 (West 1986); IOWA CODE § 139.5 (1972); N.Y. PUB. HEALTH LAW § 2120 (McKinney 1985).

¹⁶⁶ *See On AIDS, We Have More Answers Than Questions*, N.Y. Times, July 12, 1987, at E30, col. 1.; *AIDS and the New Apartheid*, N.Y. Times, Oct. 7, 1985, at A30, col. 1; *Quarantine Considered for AIDS Victims*, A.B.A. J., Mar. 1984, at 17.

¹⁶⁷ For a thorough discussion of the history of quarantine measures see *Parmet, AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53 (1985).

¹⁶⁸ *Id.* at 66.

¹⁶⁹ *E.g. Benham v. Ledbetter*, 785 F.2d 1480 (11th Cir. 1986); *Harris v. Ballone*, 681 F.2d 225 (4th Cir. 1982); *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973).

¹⁷⁰ *See State v. Snow*, 230 Ark. 746, 324 S.W.2d 532 (1959); *Moore v. Draper*, 57 So. 2d 648 (Fla. 1952); *Greene v. Edwards*, 164 W. Va. 326, 263 S.E.2d 661 (1980). Most state statutes authorizing quarantine today only apply to those persons who are infected with a communicable disease and are recalcitrant. *See supra* note 165 and accompanying text.

¹⁷¹ *See Parmet, supra* note 167, at 75.

¹⁷² *See, e.g., Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 134 N.E. 815 (1922).

In the past, quarantines have been imposed by the courts with the reservation of the right of the detained person to apply to the court for review after a significant period of incubation.¹⁷³ With most of these quarantines, the disease was such that the person confined would recover and be permitted to go free.¹⁷⁴ With AIDS carriers, however, the situation is quite different. At this point in time, there is no cure for AIDS.¹⁷⁵ There is not even the hope of a vaccine for AIDS in the foreseeable future.¹⁷⁶ Therefore, the imposition of quarantine on those people found to be HIV antibody-positive would be an extreme measure indeed, especially since the incubation period for the virus could be as long as seven years.¹⁷⁷ This would mean placing under quarantine people who are basically healthy and able to function in everyday life.¹⁷⁸ This deprivation of liberty would definitely be unconstitutional according to current standards.¹⁷⁹

The imposition of a quarantine on those AIDS patients who refuse to change their behavior after receiving notification of their infection would most likely not be viewed by the courts as an unconstitutional deprivation of liberty.¹⁸⁰ These AIDS carriers would pose a definite threat to the public health by carelessly spreading the disease.¹⁸¹ The state would have a compelling interest in protecting the public health by confining those people who refuse to change their behavior. Also, there would be no less burdensome alternatives if this person has already been educated and

¹⁷³ See, e.g., *Moore v. Draper*, 57 So. 2d 648 (Fla. 1952); *Varholy v. Sweat*, 153 Fla. 571, 15 So. 2d 267 (1943); *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 134 N.E. 815 (1922).

¹⁷⁴ But see *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 134 N.E. 815 (1922) (Woman confined to her home for an indefinite period of time due to infection of typhoid bacilli); *Kirk v. Wyman*, 83 S.C. 372, 65 S.W. 387 (1909) (woman afflicted with leprosy was to be under quarantine for the remainder of her life).

¹⁷⁵ *Koop, Surgeon General's Report on Acquired Immune Deficiency Syndrome*, 256 J.A.M.A. 2783, 2784 (1986).

¹⁷⁶ *Dr. Koop Warns of Spread of AIDS*, N.Y. Times, Jan. 20, 1988, at sec. III, p.11, col.1.

¹⁷⁷ Centers for Disease Control, *Human Immunodeficiency Virus Infection in the United States*, 36 MORBIDITY & MORTALITY WEEKLY REP. NO. 49 (1987).

¹⁷⁸ This would not be the first time a quarantine order had been issued for basically healthy people. See *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 134 N.E. 815 (1922); *Varholy v. Sweat*, 153 Fla. 571, 15 So. 2d 267 (1943). This would be an unrealistic goal, however, due to the projected 1.5 million people thought to be carrying the HIV antibody.

¹⁷⁹ The Supreme Court has applied strict scrutiny analysis to those state statutes which would deprive a person of a fundamental constitutional right. The state must prove the existence of a compelling state interest that could be accomplished by no less burdensome alternatives. Education and counseling of these individuals would be one less burdensome alternative.

¹⁸⁰ This would be in harmony with the Minnesota statute which requires reporting of those infected with a contagious disease who may be a threat to the public health. MINN. STAT. § 144.4175 (Supp. 1987).

¹⁸¹ Scientists have concluded that the disease can only be spread through sexual contact, the sharing of an unsterilized needle, from mother to fetus, and contaminated blood transfusions. AIDS AND THE LAW, *supra* note 5, at 7. Therefore, a person who has knowledge of their infection but continues to conduct himself in a careless manner, possibly spreading the disease to others, would constitute a threat to the public health.

counseled on the danger of the AIDS virus. Therefore, the imposition of quarantine measures against those AIDS carriers who refuse to modify their behavior seems like a probable action that states may implement in the near future.

In the midst of the fear and prejudice¹⁸² which the AIDS epidemic has instilled in many American citizens, it must not be forgotten that even recalcitrant AIDS victims are entitled to their constitutional rights of due process. One state Supreme Court has recently held that those people suspected of requiring quarantine are still entitled to their due process rights.¹⁸³ This court has found that a recalcitrant patient charged under the Tuberculosis Control Act must be afforded adequate written notice detailing the grounds and underlying facts on which the commitment is sought, the right to counsel, the right to be present, to cross-examine, confront and present witnesses, the standard of proof must be by clear, cogent, and convincing evidence, and the right to a verbatim transcript of the proceedings for purposes of appeal.¹⁸⁴ The deprivation of liberty in an AIDS situation is much more severe than most previous cases concerning the quarantine of infected individuals.¹⁸⁵ Therefore, the due process rights of AIDS patients should be afforded careful protection by the courts.

The imposition of quarantine in the case of AIDS carriers is a very extreme measure. Therefore, the proposals for the quarantining of AIDS carriers should be modified to only those cases in which the patient refuses to change his behavior and then only after they have been given appropriate counseling and education about the disease.

IV. CONCLUSION

Fear in a society can do many things. We must be careful in addressing the appropriate actions to be taken concerning the AIDS epidemic remembering our Constitution and what it stands for. It stands for liberty and justice. We must remember this and not let the fear and prejudice of the AIDS epidemic make us lose sight of it.

The reporting statutes which many states have imposed may work against the purpose of the legislature in enacting them. People will fear public disclosure and the devastating consequences this disclosure may bring. Experts are projecting that there will be 270,000 cases of full-blown AIDS by 1991. This may mean that over two million people will be carriers of the HIV virus. With numbers of this magnitude, it will be

¹⁸² Prejudice is usually directed toward homosexuals and intravenous drug users as they constitute the majority of AIDS carriers and make up the two highest risk groups. See Landesman, Ginzburg & Weiss, *supra* note 19, at 523.

¹⁸³ *Greene v. Edwards*, 164 W. Va. 326, 263 S.E.2d 661 (1980).

¹⁸⁴ *Id.* at 663.

¹⁸⁵ This deprivation of liberty would most likely be for the remainder of the person's life. See *supra* notes 175-179 and accompanying text.

quite difficult for public officials to keep the results of these reporting statutes confidential. Statutes, therefore, should be modified to require reporting only of those patients who are recalcitrant and report cases of HIV antibody-positive individuals by using a numerical system, thus preserving anonymity. In this way, confidentiality will be better protected and the purpose of the statutes will be preserved.

Mandatory testing on a wide-scale basis will not be successful in curbing the spread of the disease. This measure will do more harm than good due to the nature of the test itself and the violations it may have on the citizens' constitutional rights. Voluntary testing of those people who fear contagion will be more cost effective and will serve the government's purpose more efficiently.

The imposition of quarantine on a wide-scale basis would not be realistic, especially when considering that there will be millions of AIDS carriers in our society before there will ever be a cure. However, the use of quarantine for those individuals who refuse to change their behavior for the protection of the public health may be necessary. If quarantines are imposed, these people must be afforded their constitutional rights of due process.

In any case, the best route which society may take in preventing the spread of AIDS is through counseling, education and compassion for those who are afflicted.

At the beginning of the AIDS epidemic, many Americans had little sympathy for people with AIDS. The feeling was that somehow people from certain groups "deserved" their illness. Let us put those feelings behind us. We are fighting a disease, not people. Those who are already afflicted are sick people and need our care as do all sick patients. The country must face this epidemic as a unified society. We must prevent the spread of AIDS while at the same time preserving our humanity and intimacy.¹⁸⁶

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¹⁸⁶ AIDS AND THE LAW, *supra* note 5, at i.