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Protecting HIV Confidentiality After Urbaniak v. Newton: Will California's Constitution Provide Adequate Protection?

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PROTECTING HIV CONFIDENTIALITY AFTER *URBANIAK V. NEWTON*: WILL CALIFORNIA'S CONSTITUTION PROVIDE ADEQUATE PROTECTION?

INTRODUCTION

The United States has been hit hard by the AIDS epidemic.[1] Current figures estimate that over 200,000 Americans have developed AIDS[2] and over one million are believed to be HIV-infected.[3] By March 1991, over 105,000 Americans had died from AIDS with up to 215,000 more deaths expected by the end of 1993.[4]

HIV-positive persons, those who are HIV-infected, face almost certain death and are often confronted with prejudice and discrimination.[5] HIV

1. Acquired Immune Deficiency Syndrome (AIDS) results from infection with the Human Immunodeficiency Virus (HIV). HIV can be passed to another person through certain body fluids, such as blood and semen. Persons with HIV may have no outward signs of illness, but still be capable of transmitting the virus. HIV infection refers to all persons with the virus, while AIDS refers to those in the final stage of infection who have specific illnesses and conditions. SHARON RENNERT, AIDS/HIV AND CONFIDENTIALITY, MODEL POLICY AND PROCEDURES 1 (A.B.A. 1991).

"A World Health Organization official estimates that 11-13 million people globally have been infected since the beginning of the epidemic and that a new infection occurs every 15 seconds." *Amsterdam Hosts Conference*, AIDS UPDATE (Lambda Legal Defense and Education Fund, Inc., New York, N.Y.) Oct. 1992, at 11 [hereinafter *Amsterdam Conference*]. Some international experts believe as many as 110 million people worldwide will be infected with HIV by the year 2000. *Id.*

2. According to the World Health Organization, as of July 1, 1992, 218,301 AIDS cases had been reported in the United States, up from 213,641 on April 1, 1992. *World AIDS Cases Total 500,000; True Figure Said Far in Excess*, AIDS POLICY & LAW, July 10, 1992, at 8.

According to the U.S. Centers for Disease Control and Prevention (CDC), "[a]pproximately 58,000 persons were diagnosed with AIDS in the United States during 1991." During the period 1992-1994, the number of persons newly diagnosed with AIDS is expected to reach approximately 60,000-70,000 per year. *Projections of the Number of Persons Diagnosed With AIDS and the Number of Immunosuppressed HIV-Infected Persons—United States, 1992-1994*, MORBIDITY AND MORTALITY WEEKLY REPORT—RECOMMENDATIONS AND REPORTS, Dec. 25, 1992, at 1.

3. THE UNIVERSAL ALMANAC 268 (John W. Wright ed., 1992).

4. *Id.* "Researchers at the Centers for Disease Control (CDC) project that 165,000 to 215,000 more Americans will die of AIDS by the end of 1993. Yet this devastating disease was unknown until 1981." *Id.*

5. ROBERTA COHEN & LAURIE S. WISEBERG, DOUBLE JEOPARDY—THREAT TO LIFE AND HUMAN RIGHTS DISCRIMINATION AGAINST PERSONS WITH AIDS 3 (Human Rights Internet, March 1990) "Persons with HIV/AIDS face double jeopardy: they face death, and while they are fighting for their lives, they often face discrimination." *Id.* "Although HIV can remain in the body for years before any visible symptoms show up, once AIDS develops, the patient has no chance to survive. The virus disables the immune system, leaving the body vulnerable to almost any infection, frequently pneumonia and tuberculosis . . . AIDS patients suffer a protracted period of illness and disease before death." *Id.* at 4.

infection can lead to discrimination in medical treatment,[6] housing,[7] employment,[8] education,[9] travel,[10] and insurance.[11] Women[12] and chil-

6. In New York City, 1988, an HIV-positive young man in critical need of dialysis could not get treatment because several hospitals wrongly believed he would contaminate their dialysis units. *Id.* at 12. In December 1991, the Los Angeles Times reported that AIDS bias is greater among doctors who practice in communities of color. *Policy Briefs*, AIDS UPDATE (Lambda Legal Defense and Education Fund, Inc., New York, N.Y.), May 1992, at 38 [hereinafter *Policy Briefs*]. In March 1992, the New York Newsday reported that a Baltimore drug suspect was denied medical attention after he told police he was HIV-infected. *Id.*

7. A 1988 survey by the Harvard School of Public Health (covering 1983-1988) found 40% of Americans were opposed to housing AIDS patients in their neighborhoods. COHEN & WISEBERG, *supra* note 5, at 23. In 1989, it was estimated over 8,000 people with AIDS were homeless in New York City. *Id.* at 23. The Fair Housing Amendments Act of 1989 prohibits discrimination against people with HIV and AIDS in the sale or rental of private housing. This Act should afford greater protection to persons with AIDS. *Id.* at 23.

8. The 1988 Report of a Presidential Commission on AIDS confirmed that barriers and prejudices against HIV-infected persons in the workplace are common. *Id.* at 25. Although the Supreme Court ruling in School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987), extended the protection of laws barring discrimination against handicapped persons (The Federal Rehabilitation Act of 1973) to include persons with AIDS, discrimination continues. COHEN & WISEBERG, *supra* note 5, at 26.

In February 1992, the American Journal of Public Health reported that many Americans are still wary of working with someone infected with HIV. *Policy Briefs*, *supra* note 6, at 38. In July 1992, a woman filed suit in San Bernardino against her employer, a medical laboratory, charging she was fired shortly after an office sponsored blood test revealed she was HIV positive. John L. Mitchell, *Suit Alleges Firing of HIV Positive Woman*, L.A. TIMES, July 22, 1992, at A3.

The American With Disabilities Act (ADA) employment section went into effect July 26, 1992. The ADA prohibits discrimination against persons with HIV infection or AIDS in public accommodations, employment (public and private), transportation, state and local government services, and telecommunications. A significant increase in litigation is expected. *Employment Section of ADA Taking Effect; A Wide Range of Litigation Is Foreseen*, AIDS POLICY & LAW *supra* note 2, at 1.

9. Polls show that Americans have become more tolerant toward HIV-infected children in school. A survey by the Harvard School of Public Health found, compared to 39% in 1985, in 1988 only 18% believed infected children should be prohibited from attending school. While this figure is encouraging, it does indicate that prejudice still continues. COHEN & WISEBERG, *supra* note 5, at 28.

10. HIV-positive foreigners seeking temporary or permanent residency are denied entry into the United States. *Id.* at 37. Over 55 countries have imposed restrictions on travelers with HIV infection or AIDS. *Id.* at 36. A March 1992 State Department cable informed American consulates that due to the high cost of treatment, HIV-infected aliens are more likely to be subjected to the public charge provision and denied access to the United States because of the high cost of treatment. *Policy Briefs*, *supra* note 6, at 38.

11. In the United States more and more health insurance companies are denying coverage to HIV-positive persons or are charging them prohibitive premiums. A 1988 Congressional study on "AIDS and Health Insurance" found that 86% of U.S. health insurance companies tried to screen applicants for the HIV virus. "On January 1, 1990, the George Washington University Health Plan limited coverage to $3,000 a year under the plan which includes AIDS patients." COHEN & WISEBERG, *supra* note 5, at 38-39.

12. Women who contract AIDS are often subjected to physical abuse by their partners, denied medical assistance, and rejected by their family and friends. *Id.* at 30. Two out of three cases of HIV infection have been in men. However, since the beginning of 1992, nearly one-half of all new infections among adults have been in women. By the year 2000, women are expected to lead men in the rate of new infections. *Amsterdam Conference*, *supra* note 1, at 11. While HIV-positive women have a similar disease pattern to HIV-positive men, they are less likely to be offered standard HIV-related treatments. *Id.* at 14.

dren[13] are particularly vulnerable.

Confidentiality of HIV status is a primary concern of infected individuals who seek to minimize discrimination and maintain a reasonable quality of life.[14] There is also a strong public interest in protecting confidentiality in order to encourage individuals to seek and to receive treatment.[15] Another compelling reason for protecting confidentiality is to encourage HIV-positive individuals to disclose their status when another person's safety is at risk.[16]

In response to the public interest in encouraging HIV-infected individuals to seek treatment, the California Legislature passed Chapter 1.11 of the Health & Safety Code in 1985.[17] Chapter 1.11 section 199.21 provides for civil and criminal liability for wrongful disclosure of AIDS test results.[18] Section 199.21 subdivision (a) provides up to a one thousand dollar penalty for negligent disclosure.[19] Other sections of 199.21 cover willful disclosures,[20] criminal sanctions,[21] and damages liability.[22] As enacted in 1985 and amended in 1991, Chapter 1.11 appeared to be a comprehensive HIV

13. Many children born with AIDS are abandoned and placed in institutions where they receive little love and attention. They are born into poverty and their families can not afford treatment. Many HIV-infected children do not receive a proper education due to discrimination and to retarded mental or motor skills. Eighty percent of children with AIDS risk severe damage of the central nervous system. COHEN & WISEBERG, *supra* note 5, at 29. In 1988, 3,000 children were born with HIV in the United States. *Id.* at 29. At the VIII International Conference on AIDS (held in Amsterdam July 19-24, 1992) a clinician from the National Institutes of Health reported "AIDS is quickly becoming a leading cause of childhood death in the United States." *Amsterdam Conference*, *supra* note 1, at 11.

14. RENNERT, *supra* note 1, at 1.

15. A.B.A., *Report of the Aids Committee*, 21 U. TOL. L. REV. 9, 36 (1989).

16. Jeff Glenney, *Aids: A Crisis In Confidentiality*, 62 S. CAL. L. REV. 1701, 1702 (1989). "[T]he most probable means of transmission (other than sexual contact or use of an infected IV needle) is contact between an AIDS patient and a health care worker." *Id.* at 1707.

17. CAL. HEALTH & SAFETY CODE §§ 199.20-199.29 (Deering & Supp. 1992). 199.20 states the purpose of the code: "To protect the privacy of individuals who are the subject of blood testing for antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS). . ." Unless otherwise indicated, all further statutory references are to the Health & Safety Code.

18. *Id.* § 199.21.

19. *Id.* § 199.21(a). Section 1991.21(a) provides: "Any person who negligently discloses results of an HIV test . . . to any third party . . . shall be assessed a civil penalty in an amount not to exceed one thousand dollars ($1,000). . ."

20. *Id.* § 199.21(b). Section 199.21(b) provides: "Any person who willfully discloses the results of an HIV test . . . to any third party . . . shall be assessed a civil penalty in an amount not less than one thousand dollars ($1,000) and not more than five thousand ($5,000). . ."

21. *Id.* § 199.21(c). Section 199.21(c) provides: "Any person who willfully or negligently discloses the results of an HIV test . . . which results in economic, bodily, or psychological harm to the subject of the test, is guilty of a misdemeanor, punishable by imprisonment in the county jail for a period not to exceed one year or a fine of not to exceed ten thousand dollars ($10,000)."

22. *Id.* § 199.21(d). 199.21(d) provides: "Any person who commits any act described in subdivision (a) or (b) shall be liable to the subject for all actual damages, including damages for economic, bodily, or psychological harm which is a proximate result of the act."

confidentiality statute.[23]

In 1991, the First District Court of Appeal in *Urbaniak v. Newton*,[24] narrowly construed section 199.21 to apply only to disclosures by persons having access to the actual record of the results of a blood test.[25] Although the court recognized a public interest in voluntary disclosure to health care workers,[26] the court refused to apply 199.21 in situations where a patient voluntarily discloses his or her HIV status in order to warn a health care worker to take safety precautions.[27]

In order to satisfy the public's interest in voluntary disclosure, the court held disclosure of HIV-positive status, or the fact an individual is HIV-infected, "may under appropriate circumstances" be entitled to protection under article I, section 1, of the California Constitution.[28] The court severely limited the scope of the statute, but at the same time provided apparently broad constitutional protection. The question remains whether the constitutional "right to privacy" action will actually ensure confidentiality and satisfy the public interest in encouraging HIV-positive individuals to disclose their status for the protection of others.[29]

This Note begins with a discussion of the *Urbaniak* decision interpreting section 199.21, including the court's policy reasons for its narrow construction of the statute. Part II investigates the broad right to privacy protection now available under article I, section 1 of the California Constitution. Part III proposes that, despite *Urbaniak's* provision for broad privacy protection, the court's decision may be insufficient to ensure confidentiality and encourage voluntary disclosure when safety precautions are needed. The

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23. Section 199.21 has often been cited as providing broad protection for privacy rights in HIV status.

Privacy rights are protected by medical confidentiality laws such as CAL. HEALTH & SAFETY CODE § 199.21(c). A.B.A., AIDS THE LEGAL ISSUES 103 (1988).

"The level of protection of confidentiality of HIV-related medical records varies from state to state. California is representative of those states that have provided broad protection to HIV-related records." ROBERT M. JARVIS ET AL., AIDS LAW IN A NUTSHELL 164 (1991).

"[T]he California statutes are quite broad. They provide for civil sanctions up to $1,000 plus court costs for the negligent disclosure of the identity of a person who has AIDS." Glenney, *supra* note 16, at 1724.

"California has been in the forefront of legislation on AIDS since 1985. Current state law has extensive provisions governing consent, confidentiality, and release of patient-specific information regarding HIV antibody testing." Mark. A. Kadzielski, *California Legislation of AIDS in the Health Care Setting*, 10 WHITTIER L. REV. 363, 363 (1988).

24. 277 Cal. Rptr. 354 (Ct. App. 1991).

25. *Id.* at 362.

26. *Id.* at 360.

27. *Id.* at 362.

28. *Id.* at 360.

29. Glenney, *supra* note 16, at 1728. Glenney advocates legislation which will protect the identities of AIDS patients but will also address the goal of protecting uninfected health care workers. *Id.* at 1702. "Augmenting the tort law to protect the confidentiality of HIV carriers would likely deter all dissemination of this information. In order for the information to be used, legislative exceptions must exist to allow the flow of this information where necessary." *Id.* at 1728.

Note concludes with recommendations for clear statutory protection.

I. LIMITING THE SCOPE OF SECTION 199.21

A. Facts and Background

In September 1984, Richard Urbaniak suffered a head injury while working as a machine operator in San Francisco.[30] The injury produced disabling head and back pain which prevented him from working.[31] Urbaniak brought a workers' compensation action in mid-1985 against his former employer, complaining of headaches, shoulder pain, mid-back pain, and numbness and tingling in the fingers of his right hand.[32]

The employer's insurance carrier, Allianz Insurance Company, hired the law firm of John J. Parente to defend the action.[33] In February 1986 an associate in Parente's firm made arrangements through Urbaniak's counsel for a neurological examination by Dr. Frederic H. Newton.[34] The examination required that Dr. Newton fasten reusable metal electrodes with sharp points to Urbaniak's body.[35]

Urbaniak was concerned that traces of blood on the electrodes could infect another person.[36] After requesting confidentiality, he told Dr. Newton's nurse he was HIV-positive so she could take precautions and carefully sterilize the reusable probes.[37] Although Urbaniak insisted he never talked directly to the doctor about his HIV status,[38] Dr. Newton's examination report mentioned Urbaniak's HIV status as a possible source of muscle tension which could account for his symptoms.[39] Dr. Newton sent one copy of the report to Parente which forwarded copies to Urbaniak's counsel and to Allianz Insurance, where at least seven employees had access to it.[40] Copies also went to the Workers' Compensation Appeals Board and Urbaniak's chiropractor.[41]

In his lawsuit against Dr. Newton, Urbaniak maintained the dissemination of the medical report disclosing his HIV status was a violation of Health

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30. *Urbaniak*, 277 Cal. Rptr. at 356.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* Urbaniak reported his conversation with Dr. Newton's nurse was a very brief one, to tell her that he didn't want his HIV status put on his report and she needed to be careful sterilizing the equipment. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*

and Safety Code section 199.21.[42] Urbaniak argued the statute should be broadly construed to cover disclosures orally received from an HIV-infected individual.[43]

B. The Court's Construction of Section 199.21

The *Urbaniak* court held the statutory language "appears to apply only to disclosures by persons having access to the record of the results of a blood test."[44] The court conceded the legislative history called for a broad interpretation, but observed Urbaniak's "interpretation would give the statute an extraordinarily long reach, affecting the transmittal of information about AIDS victims in a wide variety of social contexts. This sweeping scope is not supported by the statutory language."[45]

The court found liability was limited to any person who "discloses results of a blood test."[46] The court noted section 199.21, subdivision (k) defines "disclosed" as the "release [of] . . . any part of any *record* orally, [or] in writing . . . to any person or entity.[47] The court determined "record" could "only refer to the record of a blood test."[48]

C. Rationale for the Court's Construction

The *Urbaniak* court limited the scope of 199.21 based on its narrow definition of the word "record" and its interpretation of the statute's urgency provision.[49] In this urgency provision, the legislature explained 199.21 was intended to protect the confidentiality of persons undergoing a blood test for HIV infection and to encourage them to undergo treatment.[50] The *Urbaniak* court found the legislative purpose would be served "only to the extent that the statute is applied to persons and institutions that conduct tests for AIDS, assume responsibility for custody or distribution of test results, or use test results in connection with [the] treatment of [an] affected person."[51]

The facts in *Urbaniak* indicate Urbaniak's HIV status was used in

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42. *Id.* at 355.

43. *Id.* at 362.

44. *Id.* Note: the Urbaniak decision occurred prior to the 1991 amendment to section 199.21. However, the amendment did not change the civil and criminal liability for wrongful disclosure of HIV test results. The amendment changed the definition of an HIV test. An "HIV test" is now defined as "any clinical test, laboratory or otherwise, used to identify HIV, a component of HIV, or antibodies or antigens to HIV." CAL. HEALTH & SAFETY CODE § 199.21 (Deering 1992) and § 26(c) (Deering 1993).

45. *Urbaniak*, 277 Cal. Rptr. at 362.

46. *Id.*

47. *Id.* (emphasis in original).

48. *Id.*

49. *Id.*

50. 1985 CAL. STAT. ch. 22, § 4, at 83.

51. *Urbaniak*, 277 Cal. Rptr. at 362.

connection with treatment. The insurance company used Dr. Newton's report to terminate payments to Urbaniak's chiropractor.[52] Termination of payments can have a significant impact on medical treatment. Using a similar analysis, the court could have found Dr. Newton's examination was made in connection with Urbaniak's treatment, applied section 199.21 to the situation, and determined Dr. Newton negligently disclosed the information.[53]

Although the *Urbaniak* court identified a public interest favoring the communication of HIV-positive status in order to warn a health care worker to take safety precautions,[54] the court stated it wanted to avoid a broad interpretation of section 199.21.[55] Simply addressing the narrow question presented by *Urbaniak* would have satisfied the public interest and accomplished the court's goal.[56] The court could have considered only disclosures made to health care workers in order to encourage them to take safety precautions. Answering this narrow question and applying section 199.21 would not have required a broad construction of the statute.[57]

The court's rationale for denying a remedy under section 199.21 was to avoid giving the statute a broad interpretation which would apply in a wide variety of social situations. Instead, the court granted Urbaniak a right to privacy action in his HIV status. Thus, the court may have actually provided even broader protection than Urbaniak had expected from the statute.[58]

II. RIGHT TO PRIVACY IN HIV STATUS

The *Urbaniak* court found HIV status was entitled to privacy protection under the California Constitution under certain circumstances.[59] These circumstances involve "improper use of information properly obtained" when

52. *Id.* at 356.

53. The court in justifying the right to privacy alluded to Dr. Newton's negligence. "The allegations of the complaint support the inference that Dr. Newton knew of and ratified the use of the information confided to his nurse. The offending information had limited relevance to the medical examination. It would have been possible to mention the patient's concern over his health as a source of stress without specifically mentioning his HIV-positive status." *Id.* at 361.

54. *Id.* at 360.

55. *Id.* at 362.

56. California Medical Association, Petition for Decertification in *Urbaniak v. Newton*, March 14, 1991, at 8 [decertification denied] [hereinafter CMA Petition] (on file with the California Western Law Review).

57. *Id.*

58. *Id.* at 13. "[T]he Court of Appeal's application of the constitutional right of privacy will create even greater problems than those the court feared would result from a "sweeping" interpretation of 199.21 The constitutional right is virtually boundless." *Id.*

59. *Urbaniak,* 277 Cal. Rptr. at 360. "There can be no doubt that disclosure of HIV positive status may under appropriate circumstances be entitled to protection under article 1, section 1." *Id.*

the patient had reasonable expectations of privacy.[60] Urbaniak was entitled to protection since he had reasonably anticipated privacy when he disclosed his status to Dr. Newton's nurse.[61]

A. California's Constitutional Right to Privacy

The *Urbaniak* court arrived at its decision by first reviewing the history of California's right to privacy. Article I, section 1 of the California Constitution was amended in 1972 to include "privacy" among every citizen's inalienable rights.[62]

One of the first cases to consider a violation of the state constitutional right to privacy was *White v. Davis*.[63] In *White*, police officers posed as students to engage in a covert operation of recording class discussions at the University of California.[64] The California Supreme Court found the police activity constituted a prima facie violation of the students' and professors' right to privacy.[65] As the Court pointed out, the privacy amendment created a legal and enforceable right of privacy for every Californian which could only be infringed by a compelling public need or government interest.[66]

The California Supreme Court suggested a compelling government interest might pertain to the investigation of "illegal activity or acts."[67] The Court also cited *County of Nevada v. MacMillen*[68] and *City of Carmel-By-The-Sea v. Young*[69] for examples of what would constitute a compelling state interest. In both cases, the compelling state interest concerned the public's right to know about any conflict of interest between a public official's employment and his or her private financial interests.[70] Another example of a compelling government interest found in *Carmel* is "the need

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60. *Id.* "In the field of health care, disclosure of information about a patient constitutes 'improper use' when it will subvert a public interest favoring communication of confidential information by violating the patient's reasonable expectations of privacy." *Id.* One person's right to privacy may threaten another's freedom of expression. However, freedom of expression restrictions are tolerated when a compelling state interest provides justification. White v. Davis, 533 P.2d 222, 224 (Cal. 1975).

61. *Urbaniak,* 277 Cal. Rptr. at 361.

62. Article I, section 1 (as reworded by constitutional amendment in November 1974) now reads: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

63. 533 P.2d 222 (Cal. 1975).

64. *Id.* at 224.

65. *Id.*

66. *Id.* at 234.

67. *Id.*

68. 522 P.2d 1345 (Cal. 1974).

69. 466 P.2d 225 (Cal. 1970).

70. *County of Nevada*, 522 P.2d at 1350. *Carmel*, 466 P.2d at 226-27. "Obviously the elimination and prevention of conflict of interest is a proper state purpose. . ." *Carmel*, 466 P.2d at 232.

to preserve the efficiency and integrity of the public service."[71]

B. Scope of the Constitutional Right to Privacy

The California Supreme Court in *White* looked to the state's election brochure for guidance in determining the scope of the amendment.[72] The election brochure identified a need for restraints on the information activities of government and business and noted the principal "mischiefs" at which the amendment was directed.[73] One of these "mischiefs" was the "improper use of information properly obtained."[74]

Relying on the Supreme Court decision in *White*, it is likely any state or business action which "improperly uses information properly obtained" could be held in violation of the state constitutional right to privacy. But how did the courts extend this action from government and business to private individuals?

The *Urbaniak* court relied on *Porten v. University of San Francisco*,[75] one of the first cases to announce a broad scope to the constitutional right to privacy. Porten complained that the University violated his right to privacy.[76] Without permission, the University of San Francisco had disclosed grades Porten earned at Columbia University to the State Scholarship and Loan Commission.[77] The First District Court of Appeal found Porten had a right to privacy in his grade transcripts.[78] The court noted "[p]rivacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone."[79]

After *Porten*, the appellate courts continued to broaden the scope of the constitutional right to privacy. Using article I, section 1, the courts have

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71. *Carmel*, 466 P.2d at 232.

72. *White*, 533 P.2d at 234. "California decisions have long recognized the propriety of resorting to such election brochure arguments as an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people." *Id.* at 234 n.11.

73. *Id.* at 234.

74. *Id.* at 234. The election brochure listed these principal mischiefs: "(1) 'government snooping' and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure to some third party; and (4) the lack of a reasonable check on the accuracy of [an] existing record." *Id.*

75. 134 Cal. Rptr. 839 (Ct. App. 1976).

76. *Id.* at 840.

77. *Id.*

78. *Id.* at 843.

79. *Id.* at 842. "There is no question that privacy was meant to be enforced, indeed enforced even against private actors, and California courts are unanimous in treating it so." Jennifer Friesen, *Should California's Constitutional Guarantees of Individual Rights Apply Against Private Actors?*, 17 HASTINGS CONST. L.Q. 111, 124 (1989).

protected the privacy of women seeking abortions,[80] a hospital patient's records,[81] and disclosures to a psychotherapist.[82] The *Urbaniak* court justified extending the right to privacy protection to HIV status by considering HIV status to be a "private fact," the disclosure of which may "be offensive and objectionable to a reasonable person of ordinary sensibilities."[83]

Porten held the constitutional right of privacy can be violated by any private individual[84] suggesting that a violation could occur in a wide variety of social contexts. This broad scope is exactly what the *Urbaniak* court attempted to avoid by narrowly construing section 199.21.[85] Instead, the court extended the constitutional right to privacy action to cover HIV status while denying Urbaniak a remedy under section 199.21. Without the protection of section 199.21, the concern becomes whether the right to privacy action is sufficient to fully protect HIV-positive individuals while still encouraging disclosure for safety purposes.

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80. Chico Feminist Women's Health Ctr. v. Scully, 256 Cal. Rptr. 194 (Ct. App. 1989). "The state right of privacy protects information about a citizen's participation in a medical procedure, including abortion." *Id.* at 199. The *Chico* court found that patients of a women's health center in a small town had no reasonable expectation of anonymity on the public sidewalk in front of the clinic and declined to order an injunction to stop picketers. *Id.* at 200. However, it did protect the women's privacy by upholding with modifications the trial court's injunctive orders. Defendants were enjoined from "identifying (except from prior personal knowledge) or disclosing the identity of any person approaching, entering, or leaving the . . . Center. . ." *Id.* at 205.

81. Div. of Medical Quality, Board of Medical Quality Assurance v. Gherardini, 156 Cal. Rptr. 55 (Ct. App. 1979). Here, Gherardini and the Mt. Helix hospital refused to surrender five patients' records to the Medical Board investigating gross negligence of the patients' doctor. *Id.* at 57. "The state of a person's gastrointestinal tract is as much entitled to privacy from unauthorized public or bureaucratic snooping as is that person's bank account, the contents of his library or his membership in the NAACP." *Id.* at 61. The court required the Board to show probable cause for invasion of patient privacy and a compelling state interest before disclosure would be compelled. *Id.* at 62.

82. Cutter v. Brownbridge, 228 Cal. Rptr. 545 (Ct. App. 1986). The issue in Cutter was whether a psychotherapist is immune from liability for a disclosure of privileged information voluntarily made in a judicial proceeding, when the disclosure violates the patient's right of privacy. *Id.* at 547. "We recognize the close analogy between a physician-patient and a psychotherapist-patient relationship, and conclude that Brownbridge's impressions and diagnosis, and other details of his professional relationship with Cutter fall with the zone of privacy protected by the state Constitution." *Id.* at 549.

83. *Urbaniak*, 277 Cal. Rptr. at 360. "The condition is ordinarily associated either with sexual preference or intravenous drug uses. . . . In the field of constitutional law, federal decisions concerning the right of privacy accorded to sexual practices, and California precedents dealing with the privacy attaching to medical records and the psychotherapist-patient relationship, provide judicial recognition of privacy interests in closely related areas of life." *Id. See* Doe v. Borough of Barrington, 729 F. Supp. 376 (D.N.J. 1990). The Federal District Court found a right of privacy in HIV status which was disclosed by a police officer. *Id.* at 385.

84. *Porten*, 134 Cal. Rptr. at 842.

85. *Urbaniak*, 277 Cal. Rptr. at 362.

III. DOES THE CONSTITUTIONAL RIGHT OF PRIVACY PROVIDE ADEQUATE PROTECTION?

A constitutional right to privacy action based on "improper use of information properly obtained" requires unauthorized overt disclosure of private information where the party seeking relief had a reasonable expectation of privacy which is not outweighed by a compelling public interest.[86] However, the protection afforded by the constitutional right to privacy based on "improper use of information properly obtained" is uncertain. There are several reasons for concern. First, the standard defining "improper use of information properly obtained" is unclear. Second, the degree of overt disclosure required is questionable. Third, the right applies only when the party seeking to protect the information has a reasonable expectation of privacy. Fourth, the protection is not absolute since the constitutional right of privacy is not absolute; it can be outweighed by a "strong" or "compelling" countervailing public interest.

A. Improper Use of Information Properly Obtained

The *Urbaniak* court described the concept of "improper use of information properly obtained" as amorphous.[87] Amorphous has been defined as "having no definite form" or "being without definite character or nature: unclassifiable."[88]

The election brochure for the 1972 privacy amendment described "improper use" as the use of information for another purpose or the disclosure of it to some third party.[89] Subsequently, the courts have applied the concept of "improper use of information properly obtained" to overly broad dissemination of arrest data,[90] to the posting of a personnel action memorandum in a public place,[91] to disclosure of an academic record without permission,[92] and to a psychotherapist's disclosure of confidential communications of a patient.[93]

The First District Court of Appeal in *Central Valley Chapter of the 7th Step Foundation v. Younger*[94] found the California Department of Justice

86. *Id.* at 358-60.

87. *Id.* at 359. "[A] cause of action under article 1, section 1, may be based on a more extensive, if still somewhat amorphous, concept of improper use of information properly obtained." *Id.*

88. WEBSTER'S NEW COLLEGIATE DICTIONARY 38 (1977).

89. *Urbaniak*, 277 Cal. Rptr. at 359.

90. Central Valley Chapter of the 7th Step Found., Inc. v. Younger, 262 Cal. Rptr. 496, 505 (Ct. App. 1989).

91. Payton v. City of Santa Clara, 183 Cal. Rptr. 17, 18 (Ct. App. 1982).

92. Porten v. Univ. of San Francisco, 134 Cal. Rptr. 839, 843 (Ct. App. 1976).

93. Cutter v. Brownbridge, 228 Cal. Rptr. 545, 549 (Ct. App. 1986).

94. 262 Cal. Rptr. at 496.

had a compelling interest in maintaining arrest records containing nonconviction data.[95] Although the nonconviction information was properly obtained and used for law enforcement purposes, it was improperly used for public employment considerations since it did not further law enforcement or criminal justice.[96] The *Central Valley* court found the use of the nonconviction arrest information was improper because it did not further the original purpose for maintaining the information.[97]

Similarly, the First District in *Payton v. City of Santa Clara*[98] found improper use when an interoffice memorandum stating reasons for an employee's dismissal was posted on a bulletin board in a public employee workroom.[99] The memorandum was addressed to the dismissed employee alone and was posted by another employee acting within the scope of his employment.[100] Although the memorandum may have been written for a proper city purpose, the disclosure was not related to that purpose.[101]

As discussed above, the First District in *Porten* found improper use of information properly obtained when the University of San Francisco disclosed Porten's Columbia University grades to the State Scholarship and Loan Commission.[102] This disclosure was made without Porten's consent or the request of the Commission.[103] However, as the court pointed out, if the Commission had requested the information, Porten might not have a cause of action.[104]

The First District in *Cutter v. Brownbridge* found a psychotherapist's unauthorized disclosure to Cutter's wife's attorney regarding details of Cutter's therapy sufficient to sustain a constitutional right to privacy action.[105] The attorney attached the therapy information to a court petition requesting suspension of the patient's child visitation rights.[106] This information could then become public knowledge as part of a court's judicial proceedings.[107]

The First District has found "improper use of information properly obtained" when the use did not "further" the original purpose for maintaining the information, when the use was not "related" to the original purpose, and when it was "disclosed without consent" to a third party. These three

95. *Id.* at 505.
96. *Id.*
97. *Id.*
98. 183 Cal. Rptr. 17 (Ct. App. 1982).
99. *Id.* at 17.
100. *Id.*
101. *Id.* at 18.
102. *Porten*, 134 Cal. Rptr. at 843.
103. *Id.* at 840.
104. *Id.* at 843.
105. *Cutter*, 228 Cal. Rptr. at 549.
106. *Id.* at 547.
107. *Id.*

factors appear to be the controlling ones in such cases.

Urbaniak applied the concept of "improper use of information properly obtained" to redisclosure of HIV status originally disclosed to warn a health care worker to take safety precautions.[108] However, the courts have not provided limitations for "improper use of information properly obtained." As noted in *Urbaniak*, the concept is amorphous.[109] The cases could be interpreted as holding that an unauthorized disclosure related to the use for which the information was gathered is proper.[110] Under this analysis, a health care provider who performs a third party medical examination could legally reveal a subject's HIV status without consent if the status was relevant to the examination.[111] Without well defined limitations it is unclear when disclosure of HIV status will be considered improper use of the information.

B. Overt Disclosure

In a footnote, the *Urbaniak* court indicated that "some kind of overt disclosure" is required to sustain a constitutional right to privacy action.[112] The court admitted it found no clear general standard for resolving the issue of what is sufficiently overt.[113] Dr. Newton disclosed Urbaniak's HIV status in a report to Parente which ultimately resulted in disclosure to a least seven individuals.[114]

The First District has consistently found that full public disclosure is not required for a right to privacy action. The *Central Valley* court found the dissemination of nonconviction arrest records to authorized public employers and licensing agencies was sufficiently overt to violate an arrestee's right to privacy.[115] Here, dissemination was not to the general public, but resulted in disclosure to various agencies and their employees.

The *Payton* court found the posting of an interoffice memorandum in an employee workroom sufficiently overt.[116] Here, the workroom was visited

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108. Urbaniak v. Newton, 277 Cal. Rptr. 354, 360 (Ct. App. 1991).

109. *Id.* at 359.

110. CMA Petition, *supra* note 56, at 11.

111. *Id.* Urbaniak's examination was a third party examination. The physician was retained by the defense. Generally, "there is no confidential physician-patient relationship in a medical examination of a plaintiff arranged for the benefit of the defense." *Urbaniak*, 277 Cal. Rptr. at 357.

112. *Urbaniak*, 277 Cal. Rptr. at 359 n.4. "While article 1, section 1, does not require 'public disclosure,' some kind of overt disclosure is inherent in the concept of invasion of privacy." *Id.*

113. *Id.* "The question remains whether a disclosure is sufficiently overt to violate a constitutionally protected interest in privacy. Whatever may be the general standard for resolving this issue, we note that decisions under article 1, section 1, indicate that a disclosure for purpose of litigation may give rise to a cause of action under article 1, section 1." *Id.*

114. *Id.* at 356.

115. Central Valley Chapter of the 7th Step Foundation v. Younger, 262 Cal. Rptr. 496, 499 (Ct. App. 1989).

116. Payton v. City of Santa Clara, 183 Cal. Rptr. 17, 17 (Ct. App. 1989).

daily by forty to fifty public employees.[117]

The *Porten* court found disclosure to the public was not required to sustain a right to privacy action.[118] A prima facie case was met by unauthorized disclosure of Porton's grade transcript to the State Scholarship and Loan Commission.[119]

The *Cutter* court found unauthorized disclosure of patient information to one party, Cutter's wife's attorney, violated Cutter's right to privacy.[120] This disclosure was sufficiently overt since the attorney attached the patient information to a court petition which could become public knowledge.[121]

In those cases where the standard "improper use of information properly obtained" has been applied, disclosure to a third party organization, to a number of employees, or even to only one person has been held sufficient to satisfy the overt requirement. However, all these cases involved actual or threatened disclosure to more than a few individuals. The question of the lower limit for overt disclosure remains. Under what circumstances, if any, would communication to only one person, without possible dissemination to others, constitute overt disclosure?

C. Reasonable Expectation of Privacy

"In the field of health care, disclosure of information about a patient constitutes 'improper use' when it will subvert a public interest favoring communication of confidential information by violating the patient's reasonable expectations of privacy."[122] The significance of reasonable expectations "lies in the public interest in encouraging confidential communications within a proper professional framework."[123] The *Urbaniak* court reasoned that enforcing the patient's reasonable expectations of privacy would encourage both open communication and protection of the professional relationship from abuse.[124]

The *Urbaniak* court found, based upon the particular circumstances, Urbaniak had reasonably anticipated privacy.[125] The test applied was

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117. *Id.*

118. Porten v. Univ. of San Francisco, 134 Cal. Rptr. 839, 843 (Ct. App. 1976).

119. *Id.*

120. Cutter v. Brownbridge, 228 Cal. Rptr. 545, 549 (1986).

121. *Id.* at 547.

122. *Urbaniak*, 277 Cal. Rptr. at 360.

123. *Id.* at 360.

124. *Id.* at 361.

125. *Id.* The court appeared to agree with the defendant that "while an examining physician [in a discovery proceeding] might indeed incur liability by disclosing confidential information irrelevant to the purpose of the examination, such liability cannot be predicated on invasion of privacy in the absence of special circumstances indicating that the information was given in a confidential communication between patient and physician." *Id.* at 357. "The asserted right of privacy here must be premised on the peculiar circumstances of Urbaniak's disclosures to Dr. Newton's nurse." *Id.* Here, Urbaniak had requested confidentiality prior to alerting the nurse

whether Urbaniak "exhibited a subjective expectation of privacy which is objectively reasonable."[126] The inquiry is equivalent to the reasonable expectations test found in Federal Fourth Amendment cases.[127] The question there is "[w]hether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy' . . . [and whether] . . . society [is] prepared to recognize [it] as reasonable."[128]

The court found Urbaniak exhibited a subjective expectation of privacy when he requested confidentiality from Newton's nurse.[129] This expectation of privacy was objectively reasonable since patients ordinarily expect that personal matters will remain with their physician.[130]

The application of a "reasonable expectation of privacy" standard can vary significantly depending on the particular circumstances of a case. Scholars have questioned the reasonable expectation formula, as applied in California privacy cases, suggesting that it can lead to arbitrary results.[131] The *Urbaniak* court noted "the test of reasonable expectations can sometimes be circular: expectations will be reasonable where privacy is recognized."[132] This standard does not adequately identify the circumstances under which a patient can assume his or her subjective desire for privacy will actually receive legal protection.[133] The California Medical Association, in its petition to decertify *Urbaniak*, pointed out the court's decision appeared to allow a physician performing a third party examination to reveal a patient's HIV status, without consent, if that status was relevant to the

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to take safety precautions. *Id.*

126. *Id.* at 358.

127. *Id.* at 360. "State and federal decisions stemming from *Katz v. United States* have established that the basic test as to whether there has been an unconstitutional invasion of privacy is whether the person has exhibited a subjective expectation of privacy which is objectively reasonable. . ." *Id.* at 358 (citation omitted). "Whether or not it should be so regarded, the reasonable expectations test of these Fourth Amendment precedents may be read as at least establishing a criterion, relevant to certain categories of cases, for recognizing a right to privacy protected under the California Constitution." *Id.*

128. Katz v. United States, 389 U.S. 347, 361 (1967). *See* Kevin E. Maldonado, *California v. Greenwood: A Proposed Compromise to the Exploitation of the Objective Expectation of Privacy*, 38 BUFF. L. REV. 647, 657 (1990). The U.S. Supreme Court found that Greenwood had a subjective expectation of privacy in his garbage but that an objective expectation of privacy was not accepted by society. *Id.* at 647-48.

129. *Urbaniak*, 277 Cal. Rptr. at 356.

130. *Id.* at 360.

131. *See* Maldonado, *supra* note 128, at 664. Maldonado suggests this dual test "allows the courts to shape the interpretations of privacy expectations to fit their policy objectives." *Id. See also* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2-3, 8 (1971); Gerstein, *California's Constitutional Right to Privacy: The Development of the Protection of Private Life*, 9 HASTINGS CONST. L.Q. 385 (1982). "What is finally obvious is that the reasonable expectation formula is indeterminate enough to allow for the consideration of a whole range of factors, which are frequently dealt with in an arbitrary or at least subjective manner. Consideration of societal attitudes and 'shared experience' as the basis for decision-making can lead to very casual reasoning." *Id.* at 397-398.

132. *Urbaniak*, 277 Cal. Rptr. at 361 n.5.

133. CMA Petition, *supra* note 56, at 11.

examination.[134] However, if a patient during a third party examination discloses his or her status for infection control purposes it is unclear what constitutional protection the courts will provide.[135] Without clear protection, the public policy favoring disclosure of HIV status for infection control is in significant jeopardy.

D. The Right to Privacy Can Be Outweighed

A Californian's right to privacy can be outweighed by a compelling state interest.[136] The California courts have used both a compelling interest test and a balancing of interests test to determine when a right to privacy can be outweighed.

The California Supreme Court used the compelling interest test to determine whether information gathered by undercover agents in university classrooms violated students' right to privacy.[137] The court was concerned that the information collected was "largely unnecessary for any legitimate, let alone 'compelling' governmental interest."[138] The First Appellate District used the compelling interest test and suggested a university could contest a student's right to privacy action by showing some compelling public interest justifying the unauthorized transmittal of his grade transcript.[139]

In another instance, the First District recognized a compelling state interest in ascertaining the truth in judicial proceedings.[140] The court found a patient's statements to his or her psychotherapist are protected by the constitutional right to privacy, but an infringement of that right may be allowed when the need for disclosure outweighs the patient's interest in privacy.[141] Here, the court used the balancing of interests test instead of the compelling interest test.[142] The court found, even when information is directly relevant to litigation, "discovery will not be permitted until a balancing of the compelling need for discovery against the fundamental right of privacy determines that disclosure is appropriate."[143] The court recognized both tests and noted they could not "readily determine" whether the

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134. *Id.*

135. *Id.*

136. *White*, 533 P.2d at 234. "[T]he amendment does not purport to prohibit all incursion into individual privacy but rather that any such intervention must be justified by a compelling interest." *Id.* "[A]lthough a patient has a constitutionally protected interest in information contained in his or her medical file, disclosure may be appropriate in narrowly limited circumstances to serve a compelling interest." *Cutter*, 228 Cal. Rptr. at 549.

137. *White*, 533 P.2d at 234.

138. *Id.*

139. *Porten*, 134 Cal. Rptr. at 843-844.

140. *Cutter*, 228 Cal. Rptr. at 549.

141. *Id.* at 550.

142. *Id.* n.7.

143. *Id.* at 549.

two tests would produce equivalent results.[144]

Because of the potential differences between the two tests, the HIV-positive individual is in a precarious position when depending on constitutional protection. He or she cannot be certain when a compelling interest will outweigh his or her right to privacy. A statute can provide that certainty.

Section 199.20 explicitly protects a person from being compelled in a legal proceeding to identify an HIV-positive individual.[145] The statue also clearly identifies exceptions where disclosure is permitted.[146] The legislature has provided clear protection for an individual's HIV status which can not be overridden by a compelling interest. However, the *Urbaniak* court held this legislation will apply only to those who have direct access to HIV blood test results. With this narrow application of section 199.21 and the uncertain constitutional protection, it is unclear when an individual's right to privacy in his or her HIV status can be overridden.

E. Additional Inadequacies of a Constitutional Remedy

The *Urbaniak* decision suggests every unauthorized disclosure of HIV status would violate a patient's right to privacy since a patient generally has a reasonable expectation of privacy in the traditional physician-patient relationship.[147] This overly broad application of the right to privacy seems comprehensive but it remains inadequate.

As discussed above, the right to privacy does not fully protect HIV status and it does not address the public interest in disclosure for safety purposes. An infected person is unlikely to disclose his or her HIV status to a health care provider without clear protection.[148] Additionally, the *Urbaniak* decision contradicts the Legislature's intent in section 199.24 to allow

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144. *Id.* at 550 n.7. "We utilize the balancing of interests test in the present case, because we perceive that the intrusion (denial of the means to enforce the privacy right) is less onerous than in cases involving invasions of privacy which impact on the free exercise of other constitutional rights in addition to the right of privacy." *Id.*

145. "No person shall be compelled in any state, county, city, or other local civil, criminal, administrative, legislative, or other proceedings to identify or provide identifying characteristics which would identify any individual who is the subject of a blood test to detect antibodies to the probable causative agent of AIDS." CAL. HEALTH & SAFETY CODE § 199.20 (Deering 1992).

146. Sections 199.21, 199.215, 199.24 and 199.25 provide disclosure exceptions. *See* § 199.21(h) (cadavers); § 199.215 (disclosure to health care providers); § 199.24 (disclosure to subject's legal representative, provider of health care, agent or employee of the subject's provider of heath care, and to a provider of heath care who procures, processes, distributes, or uses a donated human body part); and § 199.25 (notification to endangered spouse, sexual partner or person with whom subject shared needles).

147. CMA Petition, *supra* note 56, at 13. "Not every unauthorized disclosure of medical information should be constitutionalized. By amending the constitution to add an explicit right of privacy, the People cannot have intended to render meaningless all specific statutory schemes governing the confidentiality of medical information. The constitutional amendment was intended to expand, not supplant, then-existing statutory and common law protections for invasion of privacy." *Id.*

148. *Id.* at 12.

unauthorized disclosures under specific circumstances.[149]

Furthermore, resolution of a constitutional action is likely to take longer in the courts than one based on a clearly defined statute. A plaintiff seeking recovery might face a judgement-proof defendant, an extremely long wait for trial, or problems finding legal representation.[150] This is precious time that an HIV-positive individual can not afford.[151]

Urbaniak died while his appeal was pending.[152] By the time his case was remanded to the Superior Court, actual damages could not be proven, since most evidence offered was considered hearsay. The action was dismissed.[153] The hearsay problem might have been overcome if the attorney had foreseen a problem with proving actual damages. However, even if damages could have been proven, the timing was critical. Urbaniak needed and deserved a remedy during his lifetime. A broad statute can provide clear HIV confidentiality protection and facilitate a faster remedy.[154]

IV. RECOMMENDATIONS FOR A BROAD STATUTE

The *Urbaniak* court found section 199.21 does not cover an HIV-infected person who disclosed his or her status to a health care worker in order to warn the worker to take safety precautions.[155] Given the court's interpretation of section 199.21 and the ambiguities inherent in a right to privacy action, California should consider new legislation to provide clear protection and to encourage disclosure. HIV-infected persons need clear and predictable protection in order to feel comfortable disclosing their status in settings where safeguards need to be taken.[156]

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149. *Id.* at 11. Section 199.24 allows unauthorized disclosures to: (a) the subject of the HIV test or the subject's legal representative; (b) a subject's provider of heath care; (c) an agent or employee of the subject's provider of health care; and (d) a provider of health care who uses a donated body part. § 199.24.

150. Glenney, *supra* note 16, at 1728. "The tort system cannot be relied on to ensure confidentiality. A plaintiff seeking recovery faces many hurdles: a judgment-proof defendant, an extremely long wait for trial, difficulty in securing legal representation, and proving damages, to name a few. Moreover, an AIDS patient may not survive long enough to benefit from the judgment."

151. The median incubation period between HIV infection and the onset of AIDS is nearly 10 years. *Policy Briefs*, *supra* note 6, at 31. However, "[t]hose who actually develop AIDS usually die within eighteen months of diagnosis." Glenney, *supra* note 16, at 1705.

152. *Urbaniak*, 277 Cal. Rptr. at 356.

153. Telephone interview with Alice Philipson, Urbaniak's Trial Attorney (Sept. 29, 1992).

154. *See supra* note 150.

155. *Urbaniak*, 277 Cal. Rptr. at 362. "The statutory language, in short, appears to apply only to disclosures by persons having access to the record of the results of a blood test." *Id.*

156. CMA Petition, *supra* note 56, at 5. "Without an assurance that their identities as 'HIV positives' will be kept confidential in the health care setting at-risk persons will be unwilling to seek testing, counseling, and treatment from their personal physicians and to disclose their sexual or needle-sharing partners to physicians for purposes of partner notification; HIV seropositive persons will also be unwilling to disclose their infected status to health care providers for purposes of treatment and infection control." *Id.*

A. Arguments Against a Broader Statute

One argument against broad HIV confidentiality legislation is that if confidentiality is based on a right to privacy, it does not matter whether the information concerns HIV status or any other medical condition.[157] HIV status is already protected by California's medical confidentiality laws.[158] However, there are reasons for specific HIV legislation. First, HIV-infected individuals may be subjected to more stigma and discrimination than persons with other disabilities.[159] Second, there is legal precedent for laws which address specific disabilities.[160]

Another argument against broad legislation is that it is not needed to cover disclosure to a health care provider. Under many circumstances, HIV status is protected by the confidential physician-patient relationship.[161] However, as in *Urbaniak*, no physician-patient relationship is established during an examination done for discovery purposes.[162] If California wants to encourage disclosure of HIV status in order to warn a health care worker, or others, to take safety precautions, then clearly defined legislation to protect confidentiality is the answer. Other states have enacted broad HIV confidentiality statutes. It is time for California to look to these states for guidance.

B. Hawaii's Statute

Hawaii's Revised Statute section 325-101 is an example of legislation which provides broad confidentiality protection for HIV status.[163] In essence, the statute protects all communication that identifies any individual

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157. RENNERT, *supra* note 1, at 4. "Confidentiality is a matter of personal autonomy. . . ." *Id.* A single confidentiality policy for all medical information would minimize confusion. "[T]he more confusion, the greater the likelihood of breaching confidentiality." *Id.*

158. *Id.* at 3. California Civil Code section 56.10 addresses confidentiality of medical information. Section 56.10(a) prohibits disclosure of a patient's medical information without authorization. *Id.* However, a court can compel disclosure. *Id.* § (1). California Health & Safety Code section 199.20 specifically provides a court cannot compel disclosure of an individual's HIV test results. Clearly, California has determined section 56.10 does not provide adequate confidentiality protection for HIV test results. CAL. HEALTH & SAFETY CODE § 199.20. Additionally, HIV-infected persons want assurances that their HIV status is protected not only in health care settings, but residential programs, day care centers, and schools. RENNERT, *supra* note 1, at 3-4.

159. RENNERT, *supra* note 1, at 4.

160. *Id.*

161. Bruce A. McDonald, *Ethical Problems for Physicians Raised by AIDS and HIV Infection: Conflicting Legal Obligations of Confidentiality and Disclosure*, 22 U.C. DAVIS L. REV. 557, 571 (1989). "Duties under existing state law . . . are adequate to enforce the patient's privacy rights without subjecting physicians to penalties under new state or federal requirements." *Id.*

162. *Urbaniak*, 277 Cal. Rptr. at 357.

163. HAW. REV. STAT. § 325-101 (1992).

who has HIV infection or AIDS.[164] It protects not only records of a blood test, but the fact an individual is HIV-infected.[165]

The statute also contains a list of exceptions, including release to emergency medical personnel, the health department and sexual partners.[166] It establishes a civil penalty for willful disclosure that raises from one thousand to ten thousand dollars plus reasonable court costs and attorney's fees to be paid to the injured party.[167]

The Hawaii statute appears to protect voluntary disclosures of HIV status to warn another to take safety precautions. This protection would cover disclosures not to only medical personnel but also police, fire-fighters, and even private individuals. This significant protection applies in a wide variety of social situations.

C. New York's Statute

New York's Public Health Law section 2782 is another example of fairly broad confidentiality legislation.[168] The New York statute protects HIV-related information in all health and social service settings. It also covers HIV-related information obtained by authorized release.[169] The stat-

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164. *Id.* Section (a) of the statute reads: "The records of any person that indicate that a person has a human immunodeficiency virus (HIV) infection, AIDS related complex (ARC), or acquired immune deficiency syndrome (AIDS), which are held or maintained by any state agency, health care provider or facility, physician, laboratory, clinic, blood bank, third party payor, or any other agency, individual, or organization in the state shall be strictly confidential. For the purposes of this part, the term 'records' shall be broadly construed to include all communication which identifies any individual who has HIV infection, ARC, or AIDS. This information shall not be released or made public upon subpoena or any other method of discovery." *Id.* at (a).

165. To be truly effective, the scope of confidentiality protection must extend beyond positive HIV test results to the fact that a person is infected. "Without an assurance that their identities as "HIV positives" will be kept confidential in the health care setting at-risk persons will be unwilling . . . to disclose their infected status to health care providers for purposes of treatment and infection control." CMA Petition, *supra* note 56, at 5.

166. HAW. REV. STAT. § 325-101. Section 325-101(a) exceptions include: (1) release to the department of health; (2) release made by prior written consent; (3) release made to medical personnel in an emergency to protect the health of the named party; (4) disclosure to inform the sexual or needle sharing contact of an HIV-positive patient provided identity not disclosed; (5) release of data for the control and treatment of infection provided identity not disclosed; (6) release of a child's records to the department of human services and child protective services primarily on a need to know basis; (7) release made to patient's health care insurer to obtain reimbursement for services rendered; (8) release to another health care provider for the purpose of continued treatment and (9) release made pursuant to a court order, after an in camera review of the records, upon a showing of good cause by the party seeking the information. *Id.*

167. *Id.* § 325-102.

168. N.Y. PUBLIC HEALTH LAW § 2782 (McKinney 1992).

169. *Id.* § 2782(1). "[N]o person who obtains confidential HIV-related information in the course of providing any health or social service or pursuant to a release of confidential HIV-related information may disclose or be compelled to disclose such information. . ." *Id.*

ute covers a number of exceptions similar to those in Hawaii's statute.[170]

New York's HIV confidentiality legislation provides for civil and criminal penalties. The civil penalty is up to five thousand dollars for improper disclosure.[171] The criminal penalty makes it a misdemeanor to willfully disclose HIV status without consent of the individual or under the protection of one of the express exceptions.[172]

The scope of the New York statute is not as broad as Hawaii's statute. It does not extend to all agencies, services or private individuals. However, it does appear to cover situations where an HIV-positive person discloses his or her status to warn a health care worker to take safety precautions.

D. Pennsylvania's Statute

On February 27, 1991, Pennsylvania's Confidentiality of HIV-Related Information Act took effect.[173] The Act is similar to New York's and protects almost all HIV-related information held by a health or social service worker.[174] Coverage is broad and expected to include not only health and social service workers but also schools, legal services, hotlines and job programs.[175] The Act also lists a number of specific exceptions similar to those found in the New York and Hawaiian statutes.[176]

Today, in Pennsylvania, anyone who freely discloses his or her HIV status to a health or social service worker or discloses in writing will be protected.[177] The Act is enforced by private lawsuits with the plaintiff entitled to compensatory damages and possibly attorney fees and court costs.[178]

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170. *Id.* Numerous exceptions are made including disclosure to specific heath care providers and facilities, insurers, adoptive parents, foster parents, correctional institutions, third party reimbursers for health care and disclosures authorized by court order. *Id.*

171. *Id.* § 2783(1)(b). "Any person who shall disclose, or compel another person to disclose, or procure the disclosure of, confidential HIV related information in violation of section twenty-seven hundred eighty-two of this article; shall be subject to a civil penalty not to exceed five thousand dollars for each occurrence." *Id.*

172. *Id.* § 2783(2).

173. PENNSYLVANIA MEDICAL SOCIETY, AIDS A MEDICAL-LEGAL HANDBOOK 19 (1991).

174. *Id.* at 26-27.

175. *Id.* at 27.

176. *Id.* HIV-related information may be released to the subject and to those designated by the subject in a release form. Others who may receive the information without a specific written release include health care workers treating the patient, organizations providing peer review for health care workers, health care workers providing emergency services, insurers, government health authorities, anyone found by a court to have a compelling need, funeral directors and employees of juvenile justice providing residential placement. *Id.* at 27-28.

177. *Id.* at 27. "Anyone is free to release HIV-related information about himself/herself to anyone he/she pleases in any way he/she likes. If the recipient is providing any health or social service, or if the release comes in writing as specified in the Act, the recipient is bound by the confidentiality rule of the Act." *Id.*

178. *Id.* at 31.

E. Recommendations For California

The statutes of Hawaii, New York and Pennsylvania point out the inadequate state of HIV confidentiality protection in California. The California Legislature should consider expanding section 199.21 or enacting new legislation to provide broader protection for HIV status. Broader protection will encourage disclosure for safety purposes. The legislature could look to the laws of Hawaii, New York or Pennsylvania as examples which provide broader protection. Another option might be to codify the California right to privacy in clear and predictable terms.

The *Urbaniak* court was concerned with providing protection in too wide a range of social settings. The New York and Pennsylvania statutes provide protection in health and social service settings without opening protection to limitless situations. These statutes protect in situations where an individual discloses his or her HIV status in order to warn a health care worker to take safety precautions. California should enact similar confidentiality legislation to provide protection for HIV-positive persons and their health care workers.

CONCLUSION

In seeking to provide protection for HIV status, the *Urbaniak* court narrowly construed a potentially effective statute while providing for very broad protection under the California constitution. This right to privacy protection superficially appears to be adequate, but has problems in scope and definition which can seriously impact the rights of HIV-positive individuals.

First, the right to privacy action based on "improper use of information properly obtained" is not well defined. It is not clear when use will be considered improper. It appears that an unauthorized disclosure of HIV status may be made if the purpose is related to the use for which the information was gathered.

Second, the degree of disclosure necessary for a prima face case has not been determined. Disclosure to one person could have serious impact on an HIV-positive individual's life. Nonetheless, it is not clear that an unauthorized disclosure to only one person would be considered a violation.

Third, in order to be protected, the HIV-positive person must have a reasonable expectation of privacy. However, the courts use both subjective and objective tests of reasonableness. The differences between the tests can lead to arbitrary decisions.

Fourth, and perhaps the most pressing concern, is that the right to privacy can be outweighed by a compelling public interest. Again, because there are two different tests used by the courts, an HIV-positive individual cannot be certain when his or her reasonable expectation of privacy will be outweighed.

One public purpose for protecting the confidentiality of HIV-positive individuals is to encourage them to enter treatment programs. There is also

a compelling public interest in disclosure of HIV status for safety purposes. If clear and predictable protection is not available, individuals are not likely to disclose they are infected. They will not receive much needed treatment and others will not be protected from infection.

The current state of HIV confidentiality protection in California is inadequate. The California Legislature should consider expanding 199.21 or enacting new legislation to provide broader protection for HIV status and to encourage disclosure for safety purposes. With the increase in HIV infection, the continued threat of discrimination, and the public's need for disclosure for safety purposes, it is critical that the Legislature provide for definitive HIV confidentiality protection.

*Joan N. McNamara**

* This Note is dedicated to my husband, Joseph McNamara, and my son, John-Anthony Giannetta. Thank you Joey for all your love, patience and support. Thank you Tony for giving me strength, hope and understanding. Special thanks to Sana Loue and Sue Holloway for all their guidance and encouragement.