NEW YORK LAW SCHOOL

NYLS Law Review

Volume 37 | Issue 1 Article 45

January 1992

Mandatory Testing of Health-Care Workers for AIDS: When Positive Results Lead to Negative Consequences

Christine Huebner

MANDATORY TESTING OF HEALTH-CARE WORKERS FOR AIDS: WHEN POSITIVE RESULTS LEAD TO NEGATIVE CONSEQUENCES

I. INTRODUCTION

In 1990, the first transmission of the Human Immunodeficiency Virus (HIV)[1] from a dentist, Dr. David Acer, to a patient, Kimberly Bergalis, was reported to the Centers for Disease Control (CDC).[2] Since then, four more transmissions of HIV from this particular dentist to other patients have been reported.[3] This has prompted heated debates in the medical community over the need for greater precautions to be taken during health-care worker/patient interactions.[4] One particular proposal that has received critical notice is mandatory testing of all health-care workers for HIV.[5]

In 1991, three pieces of legislation pertaining to HIV-infected health-care workers were introduced before Congress.[6] Senator Jesse Helms (R-

---

1. HIV slowly destroys the immune system by killing T-helper lymphocytes (T-cells), which cause the body to produce antibodies, as needed. Wayne R. Cohen, *An Economic Analysis of the Issues Surrounding AIDS in the Workplace: In the Long Run, the Path of Truth and Reason Cannot Be Diverted*, 41 AM. U. L. REV. 1199, 1203-04 (1992) (footnotes omitted). As T-cells are destroyed over time, the immune system becomes increasingly unable to produce antibodies. *Id.* at 1204. Eventually, the body is susceptible to certain conditions, such as pneumocystis carinii pneumonia and Kaposi's sarcoma. *Id.* Acquired immune deficiency syndrome (AIDS) is diagnosed only when the conditions develop.

2. *See* CENTERS FOR DISEASE CONTROL, *Possible Transmission of Human Immunodeficiency Virus to a Patient During an Invasive Dental Procedure*, 39 MORBIDITY & MORTALITY WKLY. REP. 489, 489 (1990) (commenting in editorial notes that no such transmission had been previously documented).

3. *See* CENTERS FOR DISEASE CONTROL, *Update: Transmission of HIV Infection During an Invasive Dental Procedure—Florida*, 40 MORBIDITY & MORTALITY WKLY. REP. 21, 21 (1991).

4. *See* David Orentlicher, *HIV-Infected Surgeons:* Behringer v. Medical Center, 266 JAMA 1134, 1135 (1991).

5. *See* F.D.C. Reports, Inc., *CDC Urged Not to Issue Guidelines Establishing Mandatory HIV Testing For Health Care Workers*, 34 BLUE SHEET 7, 7 (Feb. 27, 1991), *available in* LEXIS, Nexis Library, Blue Sheet Drug Research Reports.

6. Two amendments were proposed to the Treasury, Postal Service and General Governmental Appropriations Act, and a new bill was proposed as the Kimberly Bergalis Patient and Health Providers Protection Act. *See* H.R. 2622, 102d Cong., 1st Sess.

N.C.) proposed Amendment 734 to the Treasury, Postal Service and General Government Appropriations Act of 1992.[7] As proposed, the amendment called for imprisonment of, and fines for, any health-care worker infected with acquired immune deficiency syndrome (AIDS) who performed invasive procedures without notifying the patient.[8] Although the amendment was passed by the Senate, congressional negotiators ultimately defeated it.[9]

Senators Robert Dole (R-Kan.) and Orin Hatch (R-Utah) introduced the Dole-Hatch Amendment No. 781 to the same act before the Senate in July.[10] This amendment requires each state, as a condition to receiving federal public-health service funds, to adopt CDC guidelines in its licensing laws.[11] The amendment also requires health-care workers who test positive for HIV either to refrain from performing exposure-prone procedures or to notify prospective patients before performing such procedures.[12] This bill passed in a modified form[13] and requires each state, as a condition to receiving federal public-health funds, to adopt either CDC guidelines or a substitute measure, which it must certify to the Secretary of Health and Human Services within one year.[14]

In the House, Representative William Dannemeyer (R-Cal.) proposed the "Kimberly Bergalis Patient and Health Providers Protection Act of 1991."[15] This legislation would have mandated testing of health-care workers on a regular basis and proposed that the patient be notified should

---

(1991) (both Amendments were adopted by the Senate on July 18, 1991); H.R. 2788, 102d Cong., 1st Sess. (1991) (bill was proposed on June 26, 1991).

7. *See* 137 CONG. REC. S9776 (daily ed. July 11, 1991).

8. *See* 137 CONG. REC. S10322 (daily ed. July 18, 1991); Philip J. Hilts, *Congress Urges That Doctors Be Tested for AIDS*, N.Y. TIMES, Oct. 4, 1991, at A18.

9. *See* H.R. REP. No. 102-234, 102d Cong., 1st Sess. (1991) (the House objected to the Helms amendment and subsequently both the House and the Senate passed the Dole-Hatch version of the amendment); Joyce Price, *Lawmakers Reject AIDS Amendment*, WASH. TIMES, Sept. 28, 1991, at A5.

10. *See* H.R. 2622, 102d Cong., 1st Sess. (1991); 137 CONG. REC. S9977 (daily ed. July 15, 1991) (statement of Senator Hatch).

11. *See* H.R. 2622, 102d Cong., 1st Sess. (1991); 137 CONG. REC. at S9977.

12. *See* 137 CONG. REC. at S9979.

13. *See* 42 U.S.C. § 300ee-2 (Supp. III 1991); *see* Hilts, *supra* note 8, at A18.

14. *See* 42 U.S.C. § 300ee-2.

15. H.R. 2788, 102d Cong., 1st Sess. (1991); 137 CONG. REC. E3276 (daily ed. June 26, 1991).

the health-care worker test positive.[16] This bill was never enacted; its last action date was October 31, 1991.[17]

Because current statistical information suggests that the risk of HIV transmission from health-care worker to patient is extremely low, mandatory testing does not appear to be warranted at this time.[18] Therefore, it appears that continuing public education and universal safety precautions are more attractive alternatives.

This legislation and the media attention on the Bergalis case raise many issues, most prominently that of the health-care provider's rights versus the patient's rights. This note explores many of these issues. Part II presents a brief summary of the AIDS epidemiology and current preventative methods. Part III focuses on the issues raised by mandatory testing, namely: (1) whether mandatory testing and disclosure of health-care workers' HIV status violates their right to privacy; (2) whether mandatory testing constitutes an illegal search and seizure; and (3) whether the testing, reporting, and curtailment of the health-care workers' practice is unduly discriminatory. Part IV focuses on other viable options to testing. Part V concludes that although the possibility of contracting HIV from a health-care worker is a serious consideration, the government must not succumb to the hysteria surrounding this issue by recommending mandatory testing of all health-care workers.

II. BACKGROUND

A. *Epidemiology of AIDS*

On June 5, 1981, the first reports of an illness subsequently defined as AIDS were made by health-care providers in California to the CDC.[19] As of December 31, 1992, 253,448 AIDS cases among persons of all ages

16. *See* 137 CONG. REC. E2376 (daily ed. June 26, 1991).

17. *See* 137 CONG. REC. H8919 (daily ed. Oct. 31, 1991) (the last action taken was to add a co-sponsor).

18. *See infra* text accompanying notes 50-57.

19. CENTERS FOR DISEASE CONTROL, *The HIV/AIDS Epidemic: The First 10 Years*, 265 JAMA 3228 (1991).

had been reported to the CDC.[20] The number of AIDS cases is expected to reach between 415,000 and 535,000 by the end of 1994.[21]

The CDC described AIDS as "a viral disease which destroys the body's immune system, leaving it vulnerable to opportunistic infections not usually threatening to others."[22] HIV has been identified in blood, semen, vaginal secretions, saliva, tears, breast milk, cerebrospinal fluid, amniotic fluid, and urine.[23] Transmission of HIV, however, has been linked only to exchanges of blood, semen, vaginal secretions, and breast milk.[24] The virus itself can be transmitted through sexual contact, exposure to infected blood or its components, and perinatally from mother to fetus.[25] No evidence exists that HIV is transmitted through casual contact, such as kissing, handshaking, or the person-to-person contact commonly found in the work environment.[26] AIDS is a fatal disease for which no known cure or successful treatment exists.[27]

The presence of HIV is determined by screening tests and confirmatory tests.[28] Screening tests are used first to distinguish between

---

20. Telephone Interview with CDC National AIDS Hotline (Apr. 16, 1993) [hereinafter AIDS Hotline].

21. Salwa G. Spong, *AIDS and the Health Care Provider: Burgeoning Legal Issues*, 67 MICH. B.J. 610, 610 (1988); *see also* AIDS Hotline, *supra* note 20 (stating that the latest yearly total of reported AIDS cases between December 1991 and December 1992 was 47,106).

22. CENTERS FOR DISEASE CONTROL, *Update: Acquired Immunodeficiency Syndrome—United States*, 35 MORBIDITY & MORTALITY WKLY. REP. 757 (1986). Such opportunistic diseases include pneumocystis carinii and Kaposi's sarcoma. "Acquired immunodeficiency syndrome (AIDS) is a specific group of diseases or conditions, which are indicative of severe immunosuppression related to infection with the human immunodeficiency virus (HIV)." CENTERS FOR DISEASE CONTROL, *HIV/AIDS SURVEILLANCE* (Oct. 1992).

23. CENTERS FOR DISEASE CONTROL, *Recommendations for Prevention of HIV Transmission in Health-Care Settings*, 36 MORBIDITY & MORTALITY WKLY. REP. 3s, 3s (Supp. 1987).

24. *Id.*

25. *Id.*

26. CENTERS FOR DISEASE CONTROL, *supra* note 22, at 760.

27. *See* CENTERS FOR DISEASE CONTROL, *AIDS and Human Immunodeficiency Virus Infection in the U.S.: 1988 Update*, 38 MORBIDITY & MORTALITY WKLY. REP. 1, 3 (1989) (stating that "[56%] of all AIDS patients . . . and 85% of those diagnosed [with AIDS] before 1986 are reported to have died . . . . [However,] incomplete reporting of deaths to [the] CDC results in an underestimate of the case-fatality ratio").

28. Royce R. Bedward, *AIDS Testing of Rape Suspects: Have the Rights of the Accused Met Their Match?*, 1990 U. ILL. L. REV. 347, 350.

infected and non-infected blood.[29] The least expensive and most frequently used screening test is the enzyme-linked immunosorbant assay (ELISA).[30] Confirmatory tests, such as the Western Blot and the immunofluorescence assay (IFA),[31] are then used to verify a positive screening test.[32] A major problem with the most widely used methods, the ELISA and the Western Blot, is that they test only for the presence of HIV antibodies.[33] The period of time between infection and the appearance of HIV antibodies can be several months, resulting in a "window period" wherein an infected person will test negative.[34]

Both federal and state testing programs are currently in effect in certain areas, including the employment context.[35] The U.S. government utilizes screening programs in a variety of areas. The Defense Department screens all new recruits and active-duty personnel.[36] The State Department, Peace Corps, and Job Corps screen foreign-service personnel.[37] Furthermore, persons testing HIV-positive may not immigrate to the United States.[38] State legislatures have enacted laws requiring compulsory screening of marriage applicants, pregnant women,

---

29. *Id.*

30. *Id.* ELISA detects the presence of HIV antibodies. *See id.* at 351. It is the most frequently used test, but its predictive value, although high, is not as high as the Western Blot or IFA. *See* Theodore C. Falk, *HIV Testing*, 49 OR. ST. B. BULL. 8, 8 (1989) (stating that "confirmatory tests [such as the Western Blot and IFA] have fewer false positives than the screening tests [such as the ELISA]").

31. *See* Bedward, *supra* note 28, at 351. Patients who test positive with ELISA are then given either the Western Blot or IFA to validate the ELISA results. The Western Blot and IFA are more time consuming and expensive than the ELISA. *Id.*

32. *Id.*

33. *Id.* ELISA, the Western Blot, and IFA detect the presence of HIV antibodies, not the virus itself. Thus, these tests only determine whether the individuals were exposed to HIV, not that they currently have it or will develop full-blown AIDS. *See* Falk, *supra* note 30, at 8.

34. *See* Falk, *supra* note 30, at 8 (noting that this "window" ranges from a few weeks to several months, with two months as the average).

35. *See* Larry O. Gostin, *Public Health Strategies for Confronting AIDS: Legislative and Regulatory Policy in the United States*, 262 JAMA 1621, 1621 (1989).

36. *Id.* at 1624-25.

37. *Id.* at 1625.

38. *See* 42 C.F.R. § 34.4(b)(i) (1986).

newborns, hospital patients, mentally ill or mentally retarded patients, prisoners, prostitutes, intravenous drug abusers, and sex offenders.[39]

B. *The Bergalis Case*

Investigation of HIV infection among a group of patients treated by an AIDS-infected Florida dentist strongly suggested that HIV was transmitted to five of approximately 850 patients treated by the dentist through June 1991.[40] This dentist, Dr. David Acer, and the patient who first identified him as the source of her HIV infection, Kimberly Bergalis, have been given widespread attention from the media, resulting in a barrage of cries from the American public for mandatory HIV testing of health-care workers.[41]

These five patients had no other confirmed exposures to HIV. In addition, the dentist had performed invasive procedures on all of these patients, and they were infected with strains genetically related to the strain that infected Dr. Acer.[42] These strains had little genetic variation, which further supports the finding that Dr. Acer was the source of the infection.[43]

The concern that these patients contracted the virus from Dr. Acer through routine dental care may be unfounded because the precise

---

39. Illinois, Texas, and Utah require premarital testing; Florida and Michigan require prenatal testing; Delaware, Maine, Rhode Island, South Carolina, and Texas authorize testing after documented exposure; Texas and Wisconsin authorize testing of mentally ill and retarded patients if it changes the patient's social or medical management or poses a risk of transmission; Alabama, Colorado, Georgia, Idaho, Iowa, Michigan, Montana, Nebraska, New Hampshire, Oklahoma, Rhode Island, West Virginia, and Wyoming have enacted mass inmate-screening programs; California, Florida, Illinois, Iowa, Kansas, Michigan, Nebraska, Rhode Island, and Washington test prostitutes; Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Oklahoma, Rhode Island, and Washington require testing for drug abusers; and California, Colorado, Idaho, Illinois, Indiana, Kansas, Michigan, Oregon, South Carolina, Texas, and Washington test sex offenders. *See* Gostin, *supra* note 35, at 1625.

40. CENTERS FOR DISEASE CONTROL, *Recommendations for Preventing Transmission of Human Immunodeficiency Virus, Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures*, 266 JAMA 771, 774 (1991).

41. *See, e.g.*, Laurie Garrett, *Dentist's Deadly Legacy*, N.Y. NEWSDAY, Sept. 15, 1991, at 32.

42. *See* AMA, *Update: Transmission of HIV Infection During Invasive Dental Procedures—Florida*, 127 ARCHIVES DERMATOLOGY 1126, 1127 (1991).

43. *See* Garrett, *supra* note 41, at 33.

mechanism of transmission has not been determined.[44] Hypotheses for transmission include: (1) Acer carried a particularly virulent and infectious HIV strain; (2) drills and other rarely sterilized dental tools became repeatedly contaminated with Acer's blood; (3) Acer infected his patients deliberately; (4) Acer violated CDC-recommended precautions by not following strict sterilization techniques; and (5) Acer did not violate guidelines, indicating that CDC precautions are inadequate.[45]

Bergalis filed suit against Cigna Dental Health of Florida, the insurance company that referred her to Dr. Acer, and Continental National Assurity Insurance (CNA), Dr. Acer's malpractice insurer.[46] Both Cigna and CNA settled with Bergalis.[47] Based on its losses, CNA has offered a one-time $150,000 payment to any HIV-infected dentist whom it insures who promises to stop performing invasive procedures.[48]

C. *Prevalence of AIDS Transmission between Health-Care Workers and Patients*

The CDC estimates that approximately 6,700 health-care workers are known to have contracted AIDS, and five-to-ten times that many are believed to be infected with HIV.[49] Current data suggests that the risk of transmission of HIV from an infected health-care worker to a patient is low, although a precise assessment of the risk is not yet available.[50] It has been estimated that the chance of a surgeon infecting a patient lies between one in 48,000 and one in 416,000.[51]

---

44. *See* CENTERS FOR DISEASE CONTROL, *supra* note 40, at 774.

45. Garrett, *supra* note 41, at 33.

46. *Id.* at 35.

47. Two other patients of Dr. Acer also filed suit and were awarded damages of an undisclosed amount from his medical malpractice insurer. *Id.*

48. Wendy Melillo, *Protecting Patients from Infection: Tests for Health Care Workers and Disclosure of Their HIV Status Still Debated*, WASH. POST, Mar. 3, 1992, at 7.

49. David Zinman, *The Issue of Doctors Disclosing if They Have AIDS: Health-Care Workers Struggle with Dilemma as Congress Takes a Look at Mandatory Testing*, N.Y. NEWSDAY, Sept. 24, 1991, at 69.

50. *See* CENTERS FOR DISEASE CONTROL, *supra* note 40, at 771.

51. *See* Zinman, *supra* note 49, at 72.

In addition to the Acer investigation, the CDC has done four other studies on the possible transmission of HIV from health-care worker to patient.[52] In two of these studies,

> when patients cared for by a general surgeon and a surgical resident who had AIDS were tested, all patients tested, 75 and 62, respectively, were negative for HIV infection. In [the third] study, 143 patients . . . treated by a dental student with HIV infection . . . [all] later tested . . . negative for HIV infection. In [the fourth study,] HIV antibody testing was offered to all patients . . . [treated] by a general surgeon within 7 years before the surgeon's diagnosis of AIDS. . . . Of [the] 1,340 surgical patients contacted, 616 . . . were tested for HIV. [Only o]ne patient, a known intravenous drug user, [tested] HIV positive. . . .[53]

It is believed, however, that this patient was already HIV-positive prior to his surgery.[54] Due to the limited number of participants and the differences in procedures, it is difficult to generalize from these studies and to precisely define the risk of HIV transmission from the AIDS-infected health-care worker to patient.[55]

To date, in more than seventy testing programs throughout the country, which have tested tens of thousands of patients, only seventy patients have been found HIV-positive.[56] Many of these patients testing HIV-positive, however, are believed to have been infected by sexual contact or intravenous drug use and not from exposure in the health-care setting.[57]

D. *Recommendations for Preventing and Controlling the Transmission of AIDS from Health-Care Workers to Patients*

The media attention given to the Bergalis case has generated a great deal of discussion regarding the best method to prevent, or at least

---

52. *See* CENTERS FOR DISEASE CONTROL, *supra* note 40, at 774.

53. *Id.* (citations omitted).

54. *Id.*

55. *See id.*

56. *See* Malcolm Gladwell, *Three Patients of Surgeon Also Have HIV: Officials Find No Evidence that Doctor Is Source of Infection*, WASH. POST, Dec. 12, 1991, at A9.

57. *See id.*

control, the transmission of HIV from health-care workers to patients.[58] Both the CDC and the Occupational Safety and Health Administration (OSHA), as well as a few state legislatures, have issued guidelines for preventing the transmission of the HIV and hepatitis B viruses (HBV) in the health-care setting.[59]

1. CDC Recommendations

"[The CDC] recommendations emphasize adherence to universal precautions that require that blood and other specified body fluids . . . be handled as if they contain blood-borne pathogens."[60] These recommendations were based on the following assumptions: (1) infected health-care workers who adhere to universal precautions and who do not perform invasive procedures pose no risk for transmitting HIV or HBV to patients; (2) infected health-care workers who adhere to universal precautions and who perform certain exposure-prone procedures pose a small risk for transmitting HBV; and (3) HBV is a disease more readily transmitted to patients then HIV.[61]

The CDC defines an invasive procedure as:

> surgical entry into tissues, cavities, or organs or repair of major traumatic injuries associated with any of the following: 1) in an operating or delivery room, emergency department, or outpatient setting, including both physicians' and dentists' offices; 2) cardiac catheterization and angiographic procedures; 3) a vaginal or

---

58. *See* Marlene Cimons, *AIDS-Infected Doctors to Get New Guidelines*, L.A. TIMES, Apr. 14, 1991, at A1.

59. HBV is the causative agent of hepatitis B, a viral infection transmitted in ways similar to HIV. *See* 29 C.F.R. § 1910.1030 (1992) (codification of OSHA's regulations on blood-borne pathogens); CENTERS FOR DISEASE CONTROL, *supra* note 23, at 3s-17s (setting out and discussing the CDC's recommendations); *infra* notes 77, 81; *infra* text accompanying notes 66-84.

60. CENTERS FOR DISEASE CONTROL, *supra* note 40, at 771 (endnotes omitted). A pathogen is "[a] microorganism or substance capable of producing a disease." TABER'S CYCLOPEDIC MEDICAL DICTIONARY 1241 (15th ed. 1985) [hereinafter TABER'S].

61. The risk of transmission of HBV after percutaneous exposure is 30%, while for HIV it is 0.3%. CENTERS FOR DISEASE CONTROL, *supra* note 40, at 771. Percutaneous injury refers to an injury effected or performed through the skin. An example would be a cut with a scalpel. *See* TABER'S, *supra* note 60, at 1257.

> cesarean delivery or other invasive obstetric procedure during which bleeding may occur; or 4) the manipulation, cutting or removal of any oral or perioral tissues, including tooth structure, during which bleeding occurs or the potential for bleeding exists.[62]

Despite adherence to universal precautions, certain invasive, oral, cardiothoracic, colorectal, and obstetric/gynecological procedures have been implicated in the transmission of HBV and possibly HIV from infected health-care workers to patients and are recommended as being classified as exposure-prone.[63]

> Characteristics of exposure-prone procedures include digital palpation of a needle tip in a body cavity or the simultaneous presence of the [health-care worker's] fingers and a needle or . . . sharp instrument . . . in a poorly visualized or highly confined anatomic site. Performance of [such] exposure-prone procedures presents a . . . risk of percutaneous injury to the [health-care worker,] and—if such an injury occurs—the [health-care worker's] blood is likely to contact the patient's body cavity, subcutaneous tissues, and/or mucous membranes.[64]

With these factors in mind, the CDC has made the following recommendations to minimize the risk of HIV and HBV transmission:

> [First, health-care workers] should adhere to universal precautions, including . . . hand washing, [the use of] protective barriers, and care in the use and disposal of needles. . . . [In addition, health-care workers] with [open] lesions . . . should refrain from all direct patient care and from handling patient-care equipment and devices used in performing invasive procedures until the condition [subsides]. [Health-care workers] should also comply with current guidelines for disinfection and sterilization of reusable devices used in invasive procedures.

---

62. CENTERS FOR DISEASE CONTROL, *supra* note 23, at 6s-7s.

63. *See* CENTERS FOR DISEASE CONTROL, *supra* note 40, at 774.

64. *Id.* at 774-75. Contact with "subcutaneous tissues" refers to contact with those tissues immediately under the patient's skin. *See* TABER'S, *supra* note 60, at 1646.

> [Second, c]urrently available data provide no basis for recommendations to restrict the practice of [health-care workers] infected with HIV or HBV who perform [non-exposure-prone] invasive procedures . . . provided [they] practice recommended surgical or dental technique and comply with universal precautions. . . .
>
> [Third,] exposure-prone procedures should be identified by medical/surgical/dental organizations . . . at which the procedures are performed.
>
> [Fourth, health-care workers] who perform exposure-prone procedures should know their HIV antibody status. . . .
>
> [Fifth, m]andatory testing of [health-care workers] for [the] HIV antibody . . . is not recommended. The current assessment of the risk that [an] infected [health care worker] will transmit HIV . . . to patients during exposure-prone procedures does not [warrant] the diversion of resources . . . required to implement . . . [such] testing programs. . . .
>
> [Sixth, health-care workers] who are infected with HIV or HBV . . . should not perform exposure-prone procedures unless they have sought [advice] from an expert review panel . . . [regarding the circumstances,] if any, [under which] they may continue to perform [such] procedures.[65]

Four months later, however, the CDC abandoned its plan to restrict procedures that health-care workers with HIV could perform.[66] The new draft of the CDC guidelines proposed that responsibility for preventing HIV transmission from the health-care worker to the patient would be shifted to local review panels, which would determine the health-care worker's fitness to practice on an individual, case-by-case basis.[67]

---

65. CENTERS FOR DISEASE CONTROL, *supra* note 40, at 775.

66. *CDC Abandons Health-Worker Curbs*, FACTS ON FILE WORLD NEWS DIG., Dec. 19, 1991, at 955. Medical groups balked at cooperating in the formation of the CDC's list of invasive procedures that health-care workers would be restricted from performing because there was no scientific basis upon which to make such a list. *Id.*

67. *Id.*

2. OSHA Guidelines

In May 1989, OSHA proposed a regulation to prevent transmission of blood-borne diseases.[68] The standard was adopted after an extensive review by the CDC and OSHA to determine the most effective means of preventing transmission of all blood-borne diseases in the health-care setting.[69] Under the new guidelines, health-care facilities would be required to implement an exposure-control plan based on universal precautions, which would require employers to (1) provide exposed workers with personal protective equipment such as fluid-proof gloves, masks, gowns, eyewear,[70] (2) sterilize equipment and regularly disinfect work areas,[71] (3) place potentially infectious wastes and laundry in leak-proof, color-coded containers and treat all waste as if it were contaminated,[72] (4) train workers in proper procedures to prevent disease transmission and exposure,[73] and (5) provide hepatitis B vaccination to employees free of charge.[74]

Although these guidelines are similar to the CDC guidelines, the OSHA standard has an enforcement mechanism. OSHA has full authority to enforce the standard through inspections of workplaces to ensure that employers are in compliance and can impose civil penalties for any violations.[75]

---

68. *See* 137 CONG. REC. S11,320, 11,337 (daily ed. July 30, 1991) (statement of Sen. Kennedy).

69. *See* 56 Fed. Reg. 64,175 (1991) (amending proposed rule and codified at 29 C.F.R. § 1910.1030 (1991)).

70. *See* 29 C.F.R. § 1910.1030(d)(3).

71. *Id.* § 1910.1030(d)(4).

72. *Id.* § 1910.1030(d)(2).

73. *Id.* § 1910.1030(g)(2).

74. *Id.* § 1910.1030(f)(1).

75. *See* 29 U.S.C. §§ 657, 666 (1988 & Supp. 1990). OSHA has the authority to issue fines of up to $70,000 for each violation and can also issue criminal penalties "against employers whose willful or repeated violation of OSHA's standards result in the death of an employee. Legislation is pending to further expand OSHA's authority to issue criminal penalties." 137 CONG. REC. S11,337 (daily ed. July 30, 1991).

3. Debate over Mandatory Testing

The CDC,[76] OSHA,[77] American Medical Association,[78] American Dental Association (ADA),[79] American College of Emergency Physicians,[80] American Nurses Association,[81] and Service Employees International Union[82] all support voluntary testing and oppose mandatory testing.

One of the scientific reasons for opposing mandatory testing is that besides the Acer cases, no other documented cases of transmission of HIV from health-care worker to patient exist.[83] Also, data on HBV, a more readily transmitted virus,[84] shows that the risk of transmission is extremely low and is further reduced by adherence to basic infection-control guidelines.[85] Those HBV transmissions that do occur are

---

76. *See* CENTERS FOR DISEASE CONTROL, *supra* note 40, at 771.

77. *See* 29 C.F.R. § 1910.1030(f)(3)(A) (1992).

78. *See* F.D.C. Reports, Inc., *Mandatory HIV Testing of Physicians Rejected by AMA House of Delegates; Patients May Give Verbal Consent*, 34 BLUE SHEET 11 (July 3, 1991), *available in* LEXIS, Nexis Library, Blue Sheet (Research) File. The AMA supports testing of physicians, health-care workers, and medical students in appropriate situations following verbal consent. Routine testing may be adopted based on local circumstances, but not as a substitute for universal precautions against HIV. *Id.*

79. *See Prevention of HIV Transmission: Hearings Before the Subcomm. on Health and Environment of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 76-112 (1991) (statement of Geraldine M. Morrow, President, ADA). The ADA supports CDC guidelines and urged Congress to provide sufficient funds to continue investigations and to obtain scientific information. *See id.*

80. *See id.* (statement of Dr. Gabor Kelen, Research Director, Emergency Medicine, Johns Hopkins School of Medicine, representing American College of Emergency Physicians).

81. *See id.* (statement of Barbara Russell, Chair, Task Force on AIDS, American Nurses Association).

82. *See id.* (statement of Richard W. Cordtz, Secretary Treasurer, Service Employees International Union).

83. *See supra* notes 49-57 and accompanying text.

84. *The Risk of Contracting HIV Infection in the Course of Health Care*, 265 JAMA 1872, 1872 (1991). This commentary was adopted from a conference of the deans of seven medical schools in the New York City area and the presidents of the major New York teaching hospitals.

85. *Id.*

associated with failure of, or accidents involving, infection-control procedures.[86]

Additionally, other important concerns bear upon the testing issue. A mandatory testing policy would remove critically needed, trained health-care workers from patient care and would send a strong signal to all health-care workers to avoid care of HIV-positive or potential HIV-positive patients.[87] Furthermore, because antibodies may not appear in the bloodstream for up to six months after contracting the virus, infected individuals may not be identified immediately after testing.[88] Therefore, mandatory testing of this group would not necessarily identify all HIV-positive health-care workers nor prevent transmission of the virus.[89] Focusing on mandatory testing does little to promote community health; it merely removes the focus from more important areas such as research and treatment.[90]

The United States Presidential Commission on the Human Immunodeficiency Virus Epidemic has summarized the view of those who oppose mandatory testing by stating that "dependence on HIV blood testing as an infection control procedure . . . for the purpose of preventing occupational transmission of HIV is not effective and in fact may interfere with other means of preventing occupational transmission."[91]

Proponents of mandatory testing view the issue differently. Representative Dannemeyer, sponsor of the Kimberly Bergalis Patient and Health Providers Protection Act of 1991,[92] argues that caution is the best way to approach the AIDS epidemic and that mandatory testing of health-care workers would prevent possible transmission from an infected health-care worker to a patient.[93] Recommendations by the CDC for voluntary

---

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. 137 CONG. REC. S10,833 (daily ed. July 18, 1991) (statement of Sen. Durenberger).

91. PRESIDENTIAL COMM'N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 32 (1988); Sev S. Fluss & Dineke Zeegers, *AIDS, HIV, and Health Care Workers: Some International Legislative Perspectives*, 48 MD. L. REV. 77, 78 (1989).

92. *See* sources cited *supra* note 15.

93. David Saltman, *Dannemeyer Wars with Medical Experts Over HIV Testing of Physicians*, States News Serv., Sept. 19, 1991, *available in* LEXIS, Nexis Library, SNS File.

testing of these workers are viewed as weak and designed to protect those who are HIV-infected rather than those who are not.[94]

Senator Helms, another extremely vocal proponent of mandatory HIV testing, argues that even though only five cases of transmission from infected health-care worker to patient have been documented, no risk is too minuscule to ignore when handing a potential death sentence to a patient.[95] In fact, there may be more than five cases, because the latency period for the virus can be weeks, months, and even years.[96] Furthermore, the HIV transmission is not the only health issue to be concerned with because people with AIDS carry many infectious and potentially life-threatening diseases, such as tuberculosis and hepatitis.[97]

Proponents of testing urge that Americans should treat this as a medical issue and not a civil-rights issue because the health of the country is at risk.[98] Americans were asked whether they thought their health-care providers, dentists, doctors, or health-care workers should state whether they are infected with HIV or HBV before treatment.[99] Ninety-five percent of those polled said that surgeons should inform them, ninety-four percent said that dentists should inform them, and ninety percent said that all health-care workers should notify them before treatment.[100]

Whether one accepts either the proponent's or opponent's viewpoint on mandatory testing, the legal issues raised by the specter of mandatory testing must be carefully analyzed before such a program is rejected or accepted.

---

94. *See id.* Representative Dannemeyer believes that the CDC guidelines place the civil rights of the HIV-infected individual over those who are not infected. He believes caution is the best way to approach the AIDS epidemic. *Id.*

95. *See* 137 CONG. REC. S10,334 (daily ed. July 18, 1991) (statement of Sen. Helms).

96. *Id.*

97. *Id.*

98. *See* 137 CONG. REC. H5203-05 (daily ed. June 26, 1991) (statement of Rep. Burton).

99. *See id.* at H5204.

100. *Id.*

III. LEGAL ISSUES RAISED BY MANDATORY TESTING

A. Estate of Behringer v. Medical Center[101]

Mandatory blood testing, in general, has been objected to on many grounds in the past including violation of: (1) the Fourth Amendment as an illegal search and seizure; (2) the right to privacy; (3) due process; and (4) federal and state discrimination policies.[102] At least one case has directly addressed the rights of a health-care worker who was diagnosed with AIDS in the context of a few of these issues.

In *Estate of Behringer v. Medical Center*,[103] a surgeon diagnosed with AIDS brought suit against his employer, the Medical Center at Princeton, after his surgical privileges were revoked and his test results were disclosed throughout the hospital.[104] The Judge presiding over the case noted that

> [t]his case raises novel issues of a hospital's obligation to protect the confidentiality of an AIDS diagnosis of a health-care worker, as well as a hospital's right to regulate and restrict the surgical activities of an HIV-positive doctor. [It] addresses the apparent conflict between a doctor's rights . . . and a patient's "right to know" . . . [it] explores the competing interests of a surgeon with AIDS, his patients, the hospital at which he practices and the hospital's medical and dental staff.[105]

The New Jersey Superior Court found that: (1) the medical center breached its duty of confidentiality to plaintiff, as a patient, when it failed to take reasonable precautions to prevent his diagnosis from becoming amatter of public knowledge;[106] (2) the relationship between the hospital and the surgeon with surgical privileges brought the surgeon within the

---

101. 592 A.2d 1251 (N.J. Super. Ct. Law Div. 1991).

102. Bedward, *supra* note 28, at 355.

103. *Behringer*, 592 A.2d at 1251.

104. *See id.* at 1254.

105. *Id.*

106. *See id.* at 1268-74.

scope of the New Jersey Law Against Discrimination;[107] (3) the medical center met its burden of establishing that its temporary suspension and restriction of plaintiff's surgical privileges were justified by a reasonable probability of harm to the patient;[108] (4) the "risk of harm" to the patient includes the risk of surgical accident as well as the actual transmission of HIV from surgeon to patient;[109] (5) the medical center, as a condition of temporary suspension of surgical privileges, properly required plaintiff to secure informed consent from surgical patients;[110] and (6) the medical center's policy of restricting surgical privileges of health-care workers who pose "any risk of HIV-transmission to the patient" was a reasonable exercise of the medical center's authority as applied to the facts of the case.[111]

The American Medical Association has been critical of the *Behringer* decision.[112] The *Behringer* court's standard of "zero-tolerance" (elimination of all risk) permits irrational and invidious discrimination prohibited by discrimination laws without providing meaningful protection for patients.[113] In the context of informed consent, the court's approach is both unnecessary and counterproductive because the likely effect of disclosure would be irrational discrimination and would be better handled by reliance on public-health guidelines.[114] Mandatory testing of health-care workers may be a logical extension of the *Behringer* decision.[115]

---

107. *See id.* at 1274-75; *see also* N.J. STAT. ANN. § 10:5-4.1 (West Supp. 1992) (providing that it is unlawful to "discriminat[e] against any person because such person is or has been at any time handicapped"); Arthur S. Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11, 21 (1985) (stating that while laws vary, the determinations, for consideration of AIDS as a handicap, have been unanimous).

108. *See Behringer*, 592 A.2d at 1283.

109. *See id.* at 1279.

110. *See id.* at 1283.

111. *Id.*

112. *See* Orentlicher, *supra* note 4, at 1136 (stating the AMA's viewpoint from the Ethics and Health Policy Council).

113. *See id.* at 1135.

114. *See id.* at 1136.

115. *Id.*

B. *Right to Privacy*

1. Right-to-Privacy Doctrine

The *Behringer* court balanced the right to privacy of the plaintiff-surgeon against the right of the patient to be fully informed.[116] This raises the issue whether mandatory testing and disclosure of infected health-care workers' HIV status violates their right to privacy.

The right to privacy was formulated by the United States Supreme Court in *Griswold v. Connecticut*.[117] The right to privacy is not expressly mentioned in the Constitution, but is rather a "penumbra" right derived from the First, Third, Fourth, Fifth, and Ninth Amendments and is applicable to the states through the Fourteenth Amendment.[118]

In *Roe v. Wade*,[119] the Court found that only rights deemed fundamental or implicit in the concept of ordered liberty are included within this guarantee of personal privacy, which includes activities related to marriage, procreation, family relationships, child rearing, and education.[120] The right to privacy is not absolute, and some state regulation of areas protected by this right may be justified by a compelling state interest.[121] A state may properly deem safeguarding health, maintaining medical standards, and protecting potential life to be compelling interests.[122]

In *Whalen v. Roe*,[123] the Court upheld a statute requiring disclosure of all names and addresses of patients obtaining prescriptions for certain drugs.[124] The Supreme Court held that this invasion was not sufficient to constitute a violation of the right to privacy.[125] The Court noted that individuals have a right to avoid the disclosure of personal matters and an

---

116. *See Behringer*, 592 A.2d at 1268.

117. 381 U.S. 479 (1965).

118. *Id.* at 484-85.

119. 410 U.S. 113 (1973).

120. *See id.* at 152.

121. *Id.* at 154-55.

122. *Id.* at 154.

123. 429 U.S. 589 (1977).

124. *See id.* at 591.

125. *See id.* at 602.

interest in making certain kinds of important decisions.[126] The legislation here was valid, however, because it related to the legitimate goal of controlling illegal prescription-drug distribution and reasonable restrictive controls regarding the use of the information were in effect.[127]

More recently in *Bowers v. Hardwick*,[128] the Court spelled out the limitations on the right to privacy. The Court held that the right to privacy did not encompass homosexual sodomy and cautioned against extending the right to activities that bore no resemblance or connection to previously recognized areas of privacy or to those implicit in the concept of ordered liberty.[129]

Recently, cases have examined both mandatory blood testing and the subsequent disclosure of the results as an unreasonable search and seizure and an invasion of an individual's right to privacy.[130] This privacy interest, however, has rarely been found superior to the state's interest.[131] The Court will employ a balancing test, weighing the individual's right to privacy against the state's interest in obtaining this information as a means of safeguarding the public health and welfare.[132]

2. Mandatory Testing for HIV and the Right to Privacy

The right to privacy is an important element in analyzing the constitutionality of mandatory testing and in the subsequent disclosure of the test results. There have been several cases specifically challenging

---

126. *See id.* at 599-600.

127. *See id.* at 598.

128. 478 U.S. 186 (1986).

129. *See id.* at 191-95.

130. *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (analyzing whether mandatory drug testing of employees was an unreasonable search and seizure under the Fourth Amendment); *see also* Woods v. White, 689 F. Supp. 874 (W.D. Wis. 1988) (holding that prison officials violated an inmate's right to privacy when they discussed his HIV-positive test results); Capua v. Plainfield, 643 F. Supp. 1567 (D.N.J. 1986) (holding that random urinalysis testing of fire fighters was an unreasonable search and seizure and violated their privacy interest in the information).

131. *See* Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) (holding that the New Jersey Racing Commission's regulations that permitted urine testing of jockeys to detect alcohol or drug consumption did not violate the jockey's right to privacy because horse racing is a highly regulated industry); Plowman v. United States Dep't of Army, 698 F. Supp. 627 (E.D. Va. 1988) (holding that the voluntary testing and disclosure of the results was not a violation of the plaintiff's privacy right).

132. *See, e.g.*, *Von Raab*, 489 U.S. at 656.

HIV-testing procedures in which the courts have not been willing to find a privacy violation.

In *Plowman v. United States Department of Army*,[133] a civilian employee of the Army was tested for HIV without his consent, and the positive test results were made known to his superiors.[134] The Virginia District Court found no violation of plaintiff's asserted privacy right in his medical condition because this right was neither clearly established nor absolute.[135]

In *Local 1812, American Federation of Government Employees v. Department of State*,[136] the District of Columbia District Court found no violation of privacy when the Department of State required the union to include mandatory HIV testing as part of its medical fitness program. The court found that the Department of State had taken reasonable measures to protect plaintiff's privacy[137] and that the psychological concerns that may arise after a person is notified of HIV infection do not raise constitutional privacy issues. The court reasoned that other serious diseases revealed by a blood test, such as cancer, present similar concerns.[138]

In analyzing the constitutionality of mandatory HIV testing, other courts recognize a privacy right but also find a compelling state interest sufficient to justify overriding this right. In *Harris v. Thigpen*,[139] the Alabama state corrections department's policy of testing all prisoners for HIV and substantially restricting the activities of those found to be HIV-positive was challenged on, among other grounds, being an invasion of privacy.[140] The court rejected the claim of invasion of privacy because the state's interest in controlling the spread of HIV within the prison system and in protecting uninfected prisoners and prison employees provided sufficient justification for these practices.[141]

---

133. *Plowman*, 698 F. Supp. at 627.

134. *See id.* at 629-30.

135. *See id.* at 633 (noting that the constitutional privacy right in avoiding disclosure of personal matters had not, as yet, been extended to medical information).

136. 662 F. Supp. 50 (D.D.C. 1987).

137. *See id.* at 54.

138. *See id.* at 53.

139. 727 F. Supp. 1564 (M.D. Ala. 1990).

140. *See id.* at 1566.

141. *See id.* at 1572.

In *Johnetta J. v. Municipal Court*,[142] the California Court of Appeals found that a California statute requiring HIV testing for any individual charged with interfering with official duties of a public-safety employee by biting or transferring blood or bodily fluids, when probable cause exists to believe that the individual's bodily fluids have mingled with those of the employee, does not violate Fourth Amendment constitutional guarantees of privacy.[143] The unique circumstances of the AIDS epidemic, the risk of anxiety and fatal infection to public-safety employees in the course of their duties, and the strict guidelines under which the test is performed, rendered the state's interest sufficiently compelling to overcome the plaintiff's right of privacy against what the court has termed a "minimal intrusion."[144]

When the constitutionality of test-result disclosure is at issue, the courts seem willing to uphold the privacy interest when no compelling interest in disclosure is demonstrated. The need for disclosing this information must be weighed against the potential danger to the individual tested.[145]

In *Woods v. White*,[146] the District Court of Wisconsin held that prison officials who discussed an inmate's HIV-positive test results with other prisoners and non-medical prison personnel violated the inmate's right to privacy.[147] At least one court has extended this right to the infected individual's family members. In *Doe v. Borough of Barrington*,[148] a police officer who disclosed to neighbors that an individual was infected with HIV violated the privacy rights of not only

142. 267 Cal. Rptr. 666 (Ct. App. 1990).

143. *See id.* at 680-81.

144. *Id.*

145. *See* Rasmussen v. South Fla. Blood Serv., 500 So. 2d 533, 538 (Fla. 1987) (AIDS victim's interest in acquiring names and addresses of blood donors from blood donation organization was subordinate to "society's interest in a strong and healthy blood supply").

146. 689 F. Supp. 874 (W.D. Wis. 1988).

147. *See id.* at 875 (holding that there is a constitutional right to privacy in one's medical records and that the right "is not relinquished automatically when a person is incarcerated").

148. 729 F. Supp. 376 (D.N.J. 1990).

the individual, but also the individual's family members.[149] Because there was no threat to Doe's neighbors in contracting the disease through casual contacts, this disclosure did not serve the government's compelling interest in preventing the spread of the disease.[150]

In looking at the cases cited above, it appears that there is a privacy interest regarding the disclosure of an individual's HIV status. When the constitutionality of mandatory testing and disclosure is raised within the context of the health-care setting, no clear rule emerges. The court must weigh and balance the health-care worker's privacy interest against the public's health. Often the court finds the public-health interest to be more important.

In re the Milton S. Hershey Medical Center[151] illustrates this point. Dr. Doe, a resident physician in obstetrics and gynecology, voluntarily submitted to blood testing for HIV, and the test results were positive.[152] He notified appropriate officials and undertook a voluntary leave of absence.[153] The hospital disclosed his test results according to strict guidelines under the Confidentiality of the HIV-Related Information Act.[154] Dr. Doe's name was given only to physicians in the obstetrics and gynecology department so that they could notify patients on whom Dr. Doe had performed surgery or obstetrical care. Notification letters to patients and media releases did not mention Dr. Doe by name, instead describing him as an obstetrics/gynecology physician and naming the relevant period of this service. Moreover, the hospital reminded each physician to whom Dr. Doe's name was released that the Act prohibits disclosure of that information.[155]

The Pennsylvania Superior Court held that the hospital demonstrated a compelling need for the disclosure of Dr. Doe's AIDS status based on

---

149. *See id.* at 385 (stating that disclosure of AIDS causes a violation of the family's privacy interest much greater than simply revealing any other aspect of their family medical history and that the hysteria surrounding AIDS extends beyond those who have the disease and attaches a stigma to the victim's family).

150. *See id.*

151. 595 A.2d 1290 (Pa. Super. Ct. 1991).

152. *Id.* at 1292.

153. *Id.*

154. PA. STAT. ANN. tit. 35, §§ 7607-7608 (Supp. 1992) (limiting disclosure of the blood-test results to the subject of the test, the physician who ordered the test, and selected others specified in the Act).

155. *Hershey Medical Center*, 595 A.2d at 1293.

(1) the nature of HIV, (2) that AIDS is always fatal, (3) the nature of Dr. Doe's residency, and (4) his involvement with the surgical team.[156] Specifically, the court found that "after weighing the competing interests . . . the scale tips in favor of the public health, regardless of the small potential for transmittal of the fatal virus."[157] "[T]he compelling need to prevent the spread of disease . . . requires some degree of sacrifice of confidentiality."[158] In this case, however, the court viewed the disclosure as "conservative and sound."[159]

The importance of the confidentiality and privacy interest of HIV-related information is readily apparent.[160] Factors to be taken into consideration before disclosure include the spreading of unnecessary alarm due to the significant number of false positives and the resulting ostracism of the infected individual.[161] AIDS victims are subject to "social censure, embarrassment, and discrimination in nearly every phase of their lives."[162]

These factors must be given careful consideration and must be weighed by legislators when developing regulations pertaining to testing and disclosure of the HIV-infected health-care worker and by the courts when deciding whether such regulations are constitutional.

Even with these considerations in mind, it is unlikely that the Court will extend the right to privacy to prohibit mandatory HIV testing of health-care workers. The Court would be hard pressed to find that the interest in protecting the information contained in one's blood is a

---

156. *See id.* at 1296.

157. *Id.* at 1297.

158. *Id.* at 1300.

159. *Id.* at 1298.

160. *See* David P.T. Price, *Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 DICK. L. REV. 435, 435-37 (1990).

161. *See id.* at 445 (stating that testing all individuals with the HIV virus would be astronomically expensive and time consuming and that a significant number of persons would be unnecessarily quarantined because of false positive test results).

162. Terry Summers, Glover v. Eastern Nebraska Community Office of Retardation: *Federal Court Invalidates AIDS Policy*, 57 UMKC L. REV. 369, 370 (1989) (citing South Fla. Blood Serv. v. Rasmussen, 467 So. 2d 798, 800 (Fla. Dist. Ct. App. 1985), *aff'd*, 500 So. 2d 533 (Fla. 1987)).

fundamental one.[163] Furthermore, if the Court were willing to find a right to privacy here, it would nonetheless be outweighed by the state's interest in protecting the public against the transmission of HIV.[164]

In light of recent court decisions, it appears that the invasion of the HIV-infected health-care worker's privacy interest is outweighed by the interest in protecting public health—however slight the risk may be.

C. *Fourth Amendment—Right to Privacy and Search and Seizure*

1. Fourth Amendment Privacy Safeguards

The Constitution states:

> 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.[165]

The Fourth Amendment is enforceable against the states through the Fourteenth Amendment.[166] Because the Fourth Amendment is directed toward governmental actions, the restraints of the Fourth Amendment do not apply to private entities unless their actions contain a governmental nexus.[167]

"The essential purpose of the . . . Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government

---

163. *See* Roe v. Wade, 410 U.S. 113, 152-54 (1973) (discussing fundamental privacy interests and noting that rights arising from such interests are limited to the state's interest in safeguarding health, maintaining medical standards, and protecting potential life; also noting that vaccinations and sterilization are not prohibited by an individual's privacy right).

164. *See id.* at 154-55.

165. U.S. CONST. amend. IV.

166. Mapp v. Ohio, 367 U.S. 643 (1961).

167. *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (holding that private agreements to exclude persons based on race or color from use or occupancy of real estate for residential purposes does not violate the Fourteenth Amendment; an enforcement of such a private agreement by a state court, however, violates the Fourteenth Amendment).

officials"[168] to "safeguard the privacy and security of individuals against arbitrary invasions by government officials."[169] Searches and seizures must be reasonable.[170] A search usually requires both a warrant and probable cause to be reasonable.[171] The Supreme Court has found, however, that neither is an absolute requirement of a valid search.[172] A search may be conducted on the basis of reasonable suspicion,[173] but this reasonable suspicion must be directed specifically at the person to be searched.[174]

The determination of a search's reasonableness depends on a balancing of the intrusiveness of the search against the promotion of a legitimate government interest.[175] The degree of intrusion is viewed in light of the individual's legitimate expectation of privacy.[176] A legitimate expectation of privacy is one that is actually held by the individual and is one that society is willing to recognize as reasonable.[177]

Searches conducted without a warrant are usually considered unreasonable,[178] but exceptions to this rule do exist. A search may be conducted without a warrant if there is a strong state interest in conducting the search, which includes health and safety regulations or pervasive regulation of an industry that reduces that individual's expectation of privacy regarding the subject matter of the search.[179] The reasonableness

---

168. Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (footnote omitted).

169. Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

170. *See* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985); Carroll v. United States, 267 U.S. 132, 147 (1925).

171. *See Camara*, 387 U.S. at 528-29.

172. *See T.L.O.*, 469 U.S. at 340.

173. Terry v. Ohio, 392 U.S. 1, 24 (1968).

174. Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979).

175. *See* United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983); Bell v. Wolfish, 441 U.S. 520, 559 (1979).

176. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

177. *Id.*

178. Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967).

179. *See* Donovan v. Dewey, 452 U.S. 594, 600-03 (1981) (finding that because a legislative scheme authorizing warrantless searches of commercial property, such as underground mines, is necessary to the success of the regulatory scheme, it does not necessarily violate the Fourth Amendment); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) (holding that because horse racing is a highly regulated industry, New Jersey Racing Commission's regulation that permitted urine testing of jockeys to detect alcohol or drug consumption did not violate the jockey's right to privacy).

of the warrantless search is determined by a two-prong test: (1) the action must be justified at its inception; and (2) the search as actually conducted must be reasonably related in scope to the circumstances that justified the interference in the first place.[180] A search is therefore justified if reasonable grounds exist for suspecting that the search will reveal evidence of an employee's misconduct or if it is necessary for a work-related purpose.[181]

2. Fourth Amendment Application to Blood Testing

Certain types of testing, such as urinalysis and blood tests, have been deemed to be a search for Fourth Amendment purposes.[182] The search-and-seizure doctrine has been applied to a government employer's testing of an employee's blood and urine for drugs.[183]

The United States Supreme Court has held that the administration of a blood test constitutes a personal search under the Fourth Amendment and is proscribed when the procurement of the blood sample is unreasonable.[184] The Court found that blood testing is a reasonable search method, however, when the government's need to administer the test outweighs the individual's privacy expectation.[185] The Court has recognized that blood testing is commonplace and routine in today's society[186] and, for most people, involves no risk, trauma, or pain.[187]

---

180. Terry v. Ohio, 392 U.S. 1, 20 (1968).

181. *See* O'Connor v. Ortega, 480 U.S. 709, 720-21 (1987).

182. *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

183. *See, e.g.*, McDonnell v. Hunter, 809 F.2d 1302, 1308 (8th Cir. 1987) (holding that urinalysis drug testing of correctional officers may be performed on a uniform or random basis for those having regular contact with prisoners); Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) (holding that because the horse-racing industry is already heavily regulated, the random urinalysis drug testing of jockeys did not violate the Fourth Amendment); Capua v. Plainfield, 643 F. Supp. 1507, 1520-21 (D.N.J. 1986) (holding that random urinalysis testing was an unreasonable search and seizure because the fire fighters' privacy interest regarding information contained in their urine outweighed the city's interest in maintaining the integrity of the fire department).

184. *See* Schmerber v. California, 384 U.S. 757, 767-71 (1966).

185. *See id.* at 770-71.

186. *See* Breithaupt v. Abram, 352 U.S. 432, 436 (1957).

187. *See Schmerber*, 384 U.S. at 771.

The intrusion in this case can thus be considered minimal and insignificant.[188]

A specific doctrinal development in the search-and-seizure context arises in *Skinner v. Railway Labor Executives' Ass'n*.[189] In *Skinner*, the Court held that the government's interest in regulating the conduct of railroad employees engaged in safety-sensitive tasks presented a "special need" beyond normal law enforcement that may justify departures from the usual warrant requirements.[190] The removal of blood for chemical testing was found to be an intrusion of such a minimal nature that, under these circumstances, the intrusion could be justified without probable cause or individualized suspicion.[191]

Again, in *National Treasury Employees Union v. Von Raab*,[192] the Court upheld mandatory drug testing of Customs Service employees in sensitive positions under the "special-needs" doctrine in light of evidence demonstrating a national crisis in law enforcement caused by smuggling narcotics.[193] The Court found that testing of employees directly involved in drug interdiction was reasonable despite the absence of probable cause or some level of individualized suspicion.[194]

Although the intrusion caused by a blood test alone is minor, the subsequent chemical analysis of the blood sample can reveal a great deal of medical facts about the individual being tested.[195] For example, a blood test can reveal whether the individual is infected with HIV. The courts have recently been faced with determining the weight of the intrusion in this area.

In *Glover v. Eastern Nebraska Community Office of Retardation*,[196] the state mental retardation agency's Chronic Infectious Disease Policy required employees in certain positions at the Eastern Nebraska Community Office of Retardation (ENCOR) to submit to mandatory testing for tuberculosis, HBV, and HIV or to be subject to disciplinary

---

188. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 625 (1989).

189. *Id.*

190. *Id.* at 620.

191. *See id.* at 624-25.

192. 489 U.S. 656 (1989).

193. *See id.* at 666, 678 (noting that the customs service did not adequately define the category of employees who would fall within these sensitive positions).

194. *See id.* at 670-77.

195. *Skinner*, 489 U.S. at 617.

196. 686 F. Supp. 243 (D. Neb. 1988).

action.[197] The Nebraska District Court held that, given the minimal risk of disease transmission between employees and clients, the mandatory blood-testing policy was not justified at its inception and constituted an unreasonable search and seizure under the Fourth Amendment.[198] The court balanced the employees' reasonable privacy expectations involving personal information contained in their bloodstreams against ENCOR's interest in providing a safe environment for its clients.[199] The intrusion into employees' privacy expectations was not supported given scientific evidence indicating that the risk of employees transmitting HIV to ENCOR clients was extremely low, approaching zero.[200]

In contrast, the risk of transmission has, in certain cases, been found sufficient to justify intrusion into protected Fourth Amendment rights. In *Government of Virgin Islands v. Roberts*,[201] the District Court of the Virgin Islands held that the Fourth Amendment permitted the compulsory extraction of the defendant's blood to determine whether the alleged victim of a rape was exposed to HIV.[202] The court reasoned that the government's interest in protecting victims of sexual assault and its interest in curbing the transmission of HIV were served by the nonconsensual extraction of the defendant's blood for HIV testing.[203]

The California Court of Appeals similarly applied the special-need doctrine to HIV testing in *Love v. Superior Court*.[204] In *Love*, the court held that a California statute mandating HIV tests for persons convicted of soliciting prostitution addresses the state's special need to prevent the spread of HIV.[205] This special need outweighed the minimal intrusion on privacy occasioned by a blood test, to which disclosure restrictions apply, resulting in no violation of the Fourth Amendment.[206]

---

197. *See id.* at 245.

198. *See id.* at 250. "The medical evidence is overwhelming that the risk of transmission of the AIDS virus in the . . . workplace is trivial to the point of non-existence. Such a theoretical risk does not justify a policy which interferes with the constitutional rights of the staff members." *Id.*

199. *See id.*

200. *See id.*

201. 756 F. Supp. 898, 904 (D.V.I. 1991).

202. *See id.* at 903-04.

203. *See id.* at 903.

204. 276 Cal. Rptr. 660, 664 (Ct. App. 1990).

205. *See id.* at 664.

206. *See id.* at 664-66.

Thus, the Fourth Amendment search-and-seizure doctrine should apply to HIV testing of health-care workers. Each health-care worker has a reasonable expectation of privacy in the information contained in his or her blood.[207] In turn, the government has a legitimate interest in protecting the health and safety of its citizens from contracting HIV from health-care workers.[208] It could be found that the health-care worker has a reduced expectation of privacy based on the recent documented transfer of HIV from a health-care worker to a patient.[209] Under the special-needs doctrine, however, the government would be free to test health-care workers for HIV without probable cause or individualized suspicion.[210]

If the Supreme Court follows the *Glover* reasoning,[211] because the risk of contracting HIV from a health-care worker is extremely low, the state's special need in preventing the spread of HIV may not be justified at its inception.[212] In this instance, both *Roberts* and *Love* could be distinguished because in both cases the method of transmission was sexual intercourse,[213] which is well documented as behavior that carries a substantial risk of transmission of HIV.[214]

If the Court ignores this distinction and simply follows the reasoning in *Roberts*, the state's interest in curbing the transmission of HIV alone, regardless of the risk, will be sufficient to mandate testing of health-care workers for HIV. Because the cases dealing with mandatory HIV testing are limited, it is difficult to determine a clear trend in the Court's reasoning.

---

207. *See* Capua v. Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986).

208. *See* Donovan v. Dewey, 452 U.S. 594, 602-04 (1981) (noting that the government has "a substantial federal interest in improving" health and safety).

209. *See id.* at 603 (noting that safety inspections that are required by statute are "sufficiently pervasive and defined that the [subject of the search] cannot help but be aware that he 'will be subject to effective inspection'" (quoting United States v. Biswell, 406 U.S. 311, 316 (1972))).

210. For a discussion of the special-needs doctrine, which states that certain substantial governmental interests such as public safety present a special need that may justify departure from the ordinary warrant and probable-cause requirements, see National Treasury Employees Union v. Von Raab, 489 U.S. 656, 666-77 (1989); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 620 (1989).

211. *See supra* text accompanying notes 196-200.

212. *See supra* part II.C.

213. *Roberts*, 756 F. Supp. at 898; *Love*, 276 Cal. Rptr. at 660.

214. *See* CENTERS FOR DISEASE CONTROL, *supra* note 23, at 3s.

D. *Violation of Equal Protection and Anti-Discrimination Laws*

Once a health-care worker tests positive for HIV, his or her opportunity to work in the health-care environment may be lost or severely restricted.[215] This scenario raises the question whether it is unduly discriminatory for a health-care employer to test health-care workers for HIV and then terminate or significantly curtail their employment opportunities if they test positive. This issue may best be resolved in light of federal and state anti-discrimination laws.

The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[216] Under the Fourteenth Amendment, classifications based on impermissible criteria that arbitrarily and unreasonably burden a particular group are unconstitutional.[217]

Most social and economic legislation is analyzed according to equal-protection standards.[218] The Supreme Court analyzes equal-protection claims according to three standards. The first standard, minimum scrutiny, is applied to most statutory schemes or classifications.[219] The Court will not set aside a statutory classification if it has some reasonable or rational basis or relation to the purpose for which it is made.[220]

---

215. *See, e.g.*, Estate of Behringer v. Medical Ctr., 592 A.2d 1251 (N.J. Super. Ct. Law Div. 1991) (noting that after a surgeon was diagnosed as suffering from AIDS, his surgical privileges at the medical center were suspended).

216. U.S. CONST. amend. XIV, § 1.

217. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1924).

218. PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 549 (2d ed. 1983).

219. *See id.* (discussing how, since 1937, equal-protection review has paralleled due-process review in which the Court has used minimum scrutiny—reflecting the Court's greater deference to legislative actions).

220. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 485 (1970) (noting that "[i]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality'") (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)); Railway Express Agency v. New York, 336 U.S. 106, 109-10 (1949) (upholding the regulation against an equal-protection challenge because the classification related to its legislative purpose).

The second standard, strict scrutiny, is applied to classifications that are immediately suspect, such as those based on racial characteristics.[221] Such a classification will be upheld only if it is necessary to achieve a compelling state interest and not simply rationally related to the accomplishment of a permissible state policy.[222]

The third standard, intermediate scrutiny, falls somewhere between the minimum- and strict-scrutiny standards.[223] Under this standard, the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives" to be upheld as constitutional.[224] This standard has been used in analyzing classifications based on gender.[225]

Mandatory testing of health-care workers for HIV is best viewed as typical health and safety legislation, traditionally subject to the minimum-scrutiny analysis.[226] A claim of employment discrimination based on a positive HIV classification would probably fail under the minimum "rational-classification" standard.[227] The state could reasonably terminate or restrict the HIV-positive health-care worker's employment in an effort to protect the health and safety of its citizens—a permissible state objective.[228]

In *Leckelt v. Board of Commissioners of Hospital District No. 1*,[229] an HIV-positive nurse, classified as "handicapped" for the purpose of the

---

221. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986); Fullilove v. Klutznick, 448 U.S. 448, 472 (1979) (noting that racial classifications receive "close examination" but that Congress is given somewhat more deference because of a special grant of power by the 14th Amendment to enforce equal protection); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1977); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1972); Korematsu v. United States, 323 U.S. 214, 216 (1944).

222. *See* McLaughlin v. Florida, 379 U.S. 184, 192-93 (1964).

223. BREST & LEVINSON, *supra* note 218, at 584. The intermediate standard of review is presumably intermediate between the rational (minimum) and suspect (strict) classification standards. *Id.*

224. Craig v. Boren, 429 U.S. 190, 197 (1976).

225. *See id.*

226. *See* Dandridge v. Williams, 397 U.S. 471, 484-85 (1970); Railway Express Agency v. New York, 336 U.S. 106, 108-10 (1949).

227. *See* Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 909 F.2d 820, 833 (5th Cir. 1990).

228. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 62 (1873).

229. *Leckelt*, 909 F.2d at 820.

Rehabilitation Act, was discharged from the hospital by his employer, although not because of his HIV status.[230] He subsequently brought an equal-protection claim against the hospital.[231] Although plaintiff proposed that an intermediate-scrutiny standard should be used, the Fifth Circuit used the minimum rational-classification standard, noting that "handicapped persons . . . are not 'a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation.'"[232] The court held that the "'[hospital's] infection control policies are rationally related to a legitimate state interest of protecting patients and health care workers from the spread of infectious or communicable diseases.'"[233] Because the hospital "had a substantial and compelling interest in enforcing . . . infection control policies,"[234] the court noted that "[e]ven if some form of heightened scrutiny were applicable to classifications involving handicapped persons," an equal-protection violation would not be established.[235]

To invoke intermediate scrutiny, health-care workers would first have to prove that having HIV is an immutable characteristic.[236] The state could then assert that preventing the spread of HIV is an important

---

230. *See id.* at 824; *see also infra* notes 285-98 and accompanying text.

231. *See Leckelt*, 909 F.2d at 824.

232. *Id.* at 831 (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1984)).

233. *Id.* at 832 (quoting *Leckelt*, 714 F. Supp. 1377, 1390 (E.D. La. 1989)).

234. *Id.* at 832.

235. *Id.*

236. *See Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring in part, dissenting in part) (stating that intermediate scrutiny should be applied in the instance of discrimination against retarded individuals and noting that the "immutability of the trait . . . may be relevant, but [may not make the classification suspect because] many immutable characteristics, such as height or blindness, are valid bases of governmental action and classifications under a variety of circumstances"); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) (applying the intermediate standard of review and finding that "if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate" (footnote omitted)). *But see* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (finding that gender is a suspect class because "like race and national origin, [it] is an immutable characteristic determined solely by the accident of birth" and bears no relation to the ability to perform or to contribute to society).

governmental objective.[237] Because HIV is not spread through casual contact, however, termination or curtailment of most health-care workers' employment may not be "substantially" related to the achievement of preventing the spread of HIV.[238] If this could be proven, the discrimination would be found unconstitutional under the intermediate-scrutiny standard.

To invoke strict "suspect-classification" scrutiny, health-care workers with HIV would have to contend that they are a suspect class.[239] The proposition that HIV victims are a suspect class has been rejected by the lower courts.[240] Claimants would have to prove that they either were burdened with disabilities, historically subjected to unequal treatment, or have been denigrated to a position of political powerlessness.[241] Again, this claim would probably fail to meet the difficult requirements under strict scrutiny.

The Supreme Court would most likely apply the minimum scrutiny standard to an equal-protection claim challenging mandatory testing of health-care workers for HIV. Challenges to such testing would probably fail because of the legitimate state interest of safeguarding the health and safety of its citizens.

---

237. *See* Government of V.I. v. Roberts, 756 F. Supp. 898, 902-03 (D.V.I. 1991).

238. *See* Craig v. Boren, 429 U.S. 190, 197-99 (1976) (noting that under intermediate scrutiny the classification must be substantially related to the achievement of important governmental objectives).

239. *See* Korematsu v. United States, 323 U.S. 214 (1944); *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (finding that the compelling government interest in remedying particular acts of past discrimination may justify the use of a race-based quota in the construction industry); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (Brennan, White, Marshall, and Blackmun, J.J., concurring in part, dissenting in part) (noting that racial and ethnic classifications are suspect and require exacting judicial scrutiny; the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in university admissions decisions).

240. *See, e.g.*, Harris v. Thigpen, 941 F.2d 1495, 1516 (11th Cir. 1991); Codero v. Coughlin, 607 F. Supp. 9, 10 (S.D.N.Y. 1984).

241. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

1. Federal and State Anti-Discrimination Laws

The HIV-positive health-care worker could use the equal-protection argument within the context of being a "handicapped person" under federal and state anti-discrimination laws.[242]

Section 504 of the Rehabilitation Act of 1973[243](the Act) prohibits a federally funded employer from discriminating against individuals on the basis of their handicap. The Act reads: "No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ."[244]

The Act defines an "individual with handicaps" as "any person who i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, ii) has a record of such an impairment, or iii) is regarded as having such an impairment."[245]

The Supreme Court has held that regulations developed by the Department of Health and Human Services (HHS) are an important source of guidance on the meaning of Section 504 of the Act.[246] HHS defines federal assistance broadly enough to include almost any hospital within the Act.[247] Furthermore, most federal courts hold that receiving Medicare and Medicaid funding constitutes federal financial assistance for the purposes of the Act, again placing most hospitals within the provisions of the Act.[248] The Act and the HHS regulations thereunder define

---

242. *See* Sonia Ryland, *AIDS and the Right to Privacy*, 16 S.U. L. REV. 393, 401-02 (1989).

243. 29 U.S.C. §§ 701-796 (1988).

244. *Id.* § 794(a).

245. *Id.* § 706(8)(B).

246. *See* School Bd. v. Arline, 480 U.S. 273, 279 (1987).

247. *See* 45 C.F.R. § 84.3(h) (1987):

> *Federal Financial Assistance* means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of: (1) Funds; (2) Services of Federal personnel; or (3) Real and personal property or any interest in or use of such property . . . .

Id.

248. *See* Spong, *supra* note 21, at 610-11.

"handicap" broadly enough to include HIV.[249] Furthermore, the lower courts have held that HIV-related diseases are covered under the Act.[250] Therefore, with regard to the Act, HHS regulations, and the lower courts, a health-care worker afflicted with HIV is a "handicapped person."[251] The Act and the HHS regulations substantially affect a hospital's right to implement an employee-testing program: a hospital may test only those employees who, because of their positions, create a risk that they will transmit HIV to the patient.[252]

The Court, however, has not specifically decided whether an individual infected with HIV should be considered a handicapped individual entitled to the protection of the Act.[253] In *School Board v. Arline*,[254] the Court held that persons infected with contagious diseases can be considered "handicapped persons" for purposes of the Act.[255] In *Arline*, an elementary-school teacher was discharged after suffering her third relapse of tuberculosis in a two-year period.[256] The Court found that Arline was a handicapped person within the meaning of the Act because tuberculosis was a physical impairment and also because her

---

249. Section 504 of the Rehabilitation Act of 1973 defines "'individuals with handicaps'" as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B) (1991). "Because HIV affects the hemic (blood) and lymphatic systems, the HIV victim falls into the impairment definition." Leonard C. Heath, Jr., *A Hospital's Dilemma: The Legal Implications of Promulgating Guidelines Concerning Human Immunodeficiency Virus*, 23 U. RICH. L. REV. 39, 56 n.74 (1988).

250. *See generally* Chalk v. United States Dist. Court Cent. Dist., 840 F.2d 701 (9th Cir. 1988) (granting a preliminary injunction prohibiting a school district from barring a teacher with AIDS from the classroom); Ray v. School Dist., 666 F. Supp. 1524 (M.D. Fla. 1987) (granting a preliminary injunction prohibiting a school district from excluding students with AIDS from the classroom); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1987) (granting a preliminary injunction prohibiting a school district from excluding a child with AIDS from the classroom); District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325 (Sup. Ct. 1986) (holding that the exclusion of AIDS victims from the classroom on the basis of a mere theoretical possibility of AIDS transmission violates section 504 of the Act).

251. *See* Heath, Jr., *supra* note 249, at 56 & n.74; cases cited *supra* note 250.

252. *See* Heath, Jr., *supra* note 249, at 58. This includes employees engaged in invasive procedures. *Id.*

253. Ryland, *supra* note 242, at 402.

254. 480 U.S. 273 (1987).

255. *See id.* at 285-86.

256. *Id.* at 276.

hospitalization for the disease limited her major life activities.[257] The Court noted that few aspects of a handicap give rise to the level of public fear and misapprehension as contagiousness does and that allowing discrimination based on the contagious effects of a physical impairment was inconsistent with the Act, which ensures that handicapped individuals are not denied jobs because of prejudice or ignorance.[258]

While declining to rule on whether Arline was otherwise qualified for purposes of the Act,[259] the Court recognized an otherwise qualified individual in the employment context as one who is able to perform the essential functions of the job in question.[260] When a handicapped individual is not able to meet the essential functions of the job, the employer must offer reasonable accommodations to enable the individual to perform those functions.[261] A contagious person who poses a significant risk of transmitting an infectious disease to others in the workplace will be otherwise qualified for that job if reasonable accommodation will eliminate the risk.[262]

An individual inquiry must be made to balance the handicapped individual's right to be free from deprivations due to prejudice, stereotypes, or unfounded fear with the employer's concern to avoid exposing others to significant health risks.[263] Basic considerations in weighing these interests include findings of fact based on reasonable medical judgments given the current state of medical knowledge regarding the nature of the risk, the duration of the risk, the severity of the risk, and the probabilities that the disease will be transmitted and cause various degrees of harm.[264] Although the Court refused to address whether an individual infected with HIV is a handicapped person for purposes of the

257. *See id.* at 280-81.

258. *See id.* at 287-89.

259. *See id.* at 289.

260. *See id.* at 288-89.

261. *See id.* at 287 n.17 (noting that accommodation is not reasonable if it imposes undue financial and administrative burdens on a grantee or requires a fundamental alteration in the nature of the program).

262. *Id.*

263. *See id.* at 287-88.

264. *See id.* at 288 (noting that in making these findings, courts normally should defer to the reasonable medical judgments of public-health officials).

Act in *Arline*,[265] it is probable that the courts would find that HIV is a contagious disease and thus that a health-care worker infected with HIV is a "handicapped person."

In light of this decision, a hospital must establish a need for testing its employees.[266] To justify testing employees, a hospital must evaluate whether the various health-care workers interact with patients in a way that creates a real risk of transmission of the virus.[267] If any employees test HIV-positive, then the hospital must attempt to accommodate them by placing them in positions that do not risk transmitting HIV to patients or in which the risk is extremely low.[268]

Following the *Arline* reasoning, an individual with HIV could be found "handicapped" within the meaning of the Act and HHS regulations because HIV is a physical impairment that limits major life activities of the individual.[269] If HIV-positive health-care workers are able to perform their regular job duties, then restricting or suspending their job functions would be discriminatory under the Act.[270] The hospital would have to offer other alternatives, such as allowing those health-care workers to follow universal safety precautions, before restricting their job functions.[271] The Court, however, would probably defer to the judgment of medical authorities as to whether these health-care workers posed a significant risk of transmission that could not be reasonably accommodated, resulting in the health-care workers being found not otherwise qualified and being suspended from their positions.[272]

The question whether a health-care worker with HIV is handicapped and thus protected by the Rehabilitation Act basically became moot with the passage of the Americans with Disabilities Act of 1990 (ADA).[273]

---

265. *See id.* at 282 n.7 (noting that the facts of the case did not present the question of whether carriers of a contagious disease could be considered handicapped).

266. *See* Heath, Jr., *supra* note 249, at 61.

267. *See id.*

268. *Id.*

269. *Id.* at 58 n.82.

270. *See Arline*, 480 U.S at 277 (classifying tuberculosis as a handicap because it is a physical impairment within meaning of the Rehabilitation Act).

271. *See id.* at 287.

272. *See id.* at 288.

273. *See* 42 U.S.C. § 12101 (1990).

By 1994, the ADA will apply to virtually all public and private employers.[274]

Under the ADA, "an employer may not discriminate against a qualified individual with a disability because of the disability."[275] Commentators agree that a disability would include HIV infection.[276]

Discrimination is prohibited in most aspects of employment.[277] An employer could require, however, that an employee not pose a direct threat to the health or safety of other individuals, including that associated with contagious diseases, for the individual to be qualified for the position.[278] A direct threat would be one that poses a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.[279] To avoid discrimination, an employer must make reasonable accommodations to the known limitations of an otherwise qualified individual with a disability, unless doing so would impose an undue hardship on the business.[280]

Under the ADA, it is likely that health-care workers with HIV will be considered disabled.[281] They would be considered otherwise qualified for their positions, however, because the risk of transmitting HIV is not a direct threat and can be eliminated by adherence to universal safety precautions.[282]

In addition to the Rehabilitation Act and the ADA, all fifty states and the District of Columbia have legislation forbidding discrimination in the

---

274. *Id.* § 12111(5)(A). For employers with 25 or more employees, the ADA became effective July 26, 1992, and for employers with 15 or more employees, the ADA becomes effective July 26, 1994. *Id.*

275. *Id.* § 12112(a). Under the ADA, "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such impairment or the perception of having such an impairment." *Id.* § 12102(2).

276. *See* John T. Shannon, *Americans with Disabilities Act: A New Era in Employment Practices Public Law 101-336, 42 U.S.C. 12101 Et. Seq.*, ARK. LAW., Apr. 1, 1991, at 35, 39.

277. *See* 42 U.S.C. § 12112. This includes job application procedures, advancement, discharge, compensation, and training. *See id.*

278. *See id.* § 12113(b).

279. *Id.* § 12111(3).

280. *Id.* § 12112(b)(5). This would include job restructuring, reassignment, and acquisition or modification of equipment. *Id.* § 12111(9).

281. Shannon, *supra* note 276, at 39.

282. *See supra* text accompanying notes 61-67.

employment of handicapped individuals in either the public or private sector or both.[283] In many of these states, these handicap laws are applicable to AIDS or HIV infection.[284]

2. Precedent

A few cases involving health-care workers with HIV have specifically addressed the issue of an equal-protection violation or a violation of federal and state anti-discrimination laws.[285] In *Leckelt v. Board of Commissioners of Hospital District No. 1*,[286] a licensed practical nurse was fired by the hospital after refusing to submit HIV test results to the hospital.[287] The hospital had reason to believe that Leckelt was HIV positive because he was openly homosexual and was the roommate of an AIDS patient currently admitted to the hospital.[288] The hospital requested the results of an HIV test that Leckelt had voluntarily taken.[289] The hospital ostensibly terminated Leckelt because he failed to comply with hospital policies—notably, because he failed to submit the HIV test results and to call a supervisor when he was not coming into work—not because of his positive test results.[290] Leckelt claimed that the hospital violated the federal Rehabilitation Act.[291]

The Fifth Circuit assumed that Leckelt was a "handicapped person" under § 504 of the Rehabilitation Act because testing HIV positive is an impairment protected under the Act and the hospital officials treated

---

283. *See* Leonard, *supra* note 107, at 21; Heath, Jr., *supra* note 249, at 61.

284. *See, e.g.*, Shuttlesworth v. Broward County, 639 F. Supp. 654 (S.D. Fla. 1986) (recognizing a county employee's handicapped-discrimination claim in which he claimed AIDS as his handicap); District 27 Community Bd. v. Board of Educ., 502 N.Y.S.2d 325 (Sup. Ct. 1986) (noting that excluding children with AIDS from public school might violate the Rehabilitation Act § 504 because AIDS fits the definition of handicap contained in the law); Gostin, *supra* note 35, at 1628.

285. *See* Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 909 F.2d 820 (5th Cir. 1990); Estate of Behringer v. Medical Ctr., 592 A.2d 1251 (N.J. Super. Ct. Law Div. 1991).

286. *Leckelt*, 909 F.2d at 820.

287. *See id.* at 821-24.

288. *See id.* at 822.

289. *See id.* at 822-23.

290. *See id.* at 824.

291. *See id.* at 824-25.

Leckelt as though he had such an impairment.[292] The court held that: (1) Leckelt was not discriminated against in violation of the Rehabilitation Act solely because of a perception that he was infected with HIV; and (2) Leckelt's refusal to submit HIV test results prevented the hospital from knowing his HIV status, so he was not "otherwise qualified" for purposes of the Act.[293]

Leckelt also contended that the hospital, by discharging him on the basis of a physical examination, violated the Louisiana Civil Rights for Handicapped Persons Act.[294] This statute prohibits "discharge or . . . other discriminatory action against an otherwise qualified individual on the basis of a physical . . . examination . . . not directly related to the requirements of the specific job or . . . not required of all employees."[295] Because Leckelt's discharge was based on his failure to submit his test results, not on the basis of the test itself or its results, the court held that the Act was not violated.[296]

The difficulty with applying this court's reasoning to other cases is that the basis for not finding a violation of either federal or state anti-discrimination laws is that the plaintiff was not discharged because of his handicap, but because of his failure to comply with his employer's policy.[297] The court noted the necessity of relying on the relevant-factor standard promulgated in *Arline*,[298] which may be an indication that other courts, in deciding on AIDS-discrimination claims, may do so as well.

An employment discrimination claim based on HIV status was maintained by the New Jersey Superior Court in *Estate of Behringer v. Medical Center*.[299] In *Behringer*, an HIV-positive doctor's surgical privileges were restricted and ultimately curtailed.[300] The New Jersey Law Against Discrimination[301] prohibits "unlawful discrimination against

---

292. *See id.* at 830.

293. *See id.* at 826-30 (noting court could not make determination on Leckelt's risk of transmission without knowing his HIV status).

294. LA. REV. STAT. ANN. § 2254(c)(5) (West 1980); *see Leckelt*, 909 F.2d at 831.

295. LA. REV. STAT. ANN. § 2254(c)(5).

296. *See Leckelt*, 909 F.2d at 831.

297. *See id.* at 830 (noting that the request for Leckelt's test results was directly related to the requirements of his job).

298. *See id.* at 829 (citing School Bd. v. Arline, 480 U.S. 273 (1987)).

299. 592 A.2d 1251 (N.J. Super. Ct. Law Div. 1991).

300. *See id.* at 1257-60.

301. N.J. STAT. ANN. § 10:5-4.1 (West Supp. 1992).

any person because such a person is . . . handicapped or any unlawful employment practice against such person, unless the nature and extent of the handicap reasonably precludes the performance of the particular employment."[302] Both the plaintiff, as a "handicapped person," and the hospital were found to be within the statute.[303]

The court noted that the plaintiff established a prima-facie case of discrimination under the statute because the hospital conceded that the only reason for suspending or terminating the privileges of the plaintiff was his HIV-positive diagnosis, a handicap protected by the statute.[304] In assessing the hospital's obligation under the statute, however, the court held that the hospital met its burden of showing a "'reasonable probability of substantial harm' if plaintiff continued to perform invasive procedures" and had therefore acted properly in suspending plaintiff's surgical privileges and ultimately barring him from surgery.[305] The court noted that the hospital's actions represented a "reasoned and informed response to the problem."[306] It is apparent from the cases charging a violation of equal protection or anti-discrimination laws that courts will carefully weigh and balance the health-care worker's employment rights and the hospital's need to maintain the health and safety of its patients. For now, it appears that the scale tips in favor of health and safety.

IV. ALTERNATIVES TO MANDATORY TESTING

As current statistics show, the risk of an infected health-care worker transmitting HIV to a patient is extremely low.[307] For this reason, mandatory testing of all health-care workers may not be warranted. Many medical groups and experts have proffered alternative means of preventing the spread of HIV from health-care worker to patient.

---

302. *Id.*

303. *Behringer*, 592 A.2d at 1274-75 (noting that the Medical Center fell within the statute as a place of public accommodation, that the surgeon-hospital relationship was within the statute, and that the surgeon suffering from AIDS was handicapped within the meaning of the statute).

304. *See id.* at 1276.

305. *Id.* at 1283 (quoting Jansen v. Food Circus Supermarkets, 541 A.2d 682, 688 (N.J. 1988)).

306. *Id.*

307. *See supra* part II.C.

A broad coalition of health-care and AIDS-advocacy groups argue that mandatory testing of health-care workers would be cost-inefficient, not guarantee an AIDS-free workplace, jeopardize the careers of those health-care workers found to be infected, and deter health-care workers from treating AIDS patients for fear of endangering their own careers.[308] They believe that educating both members of the health-care profession and the public would be a more effective approach to preventing the spread of HIV from health-care worker to patient.[309]

These groups have offered several alternatives to mandatory testing. The Infectious Disease Society recommends that the medical community develop, promulgate, and implement tough infection-control standards because current programs are "inadequate and underfunded."[310] One commentator noted that "[m]ost dentists practice close to the level of that dentist [Dr. David Acer] in Florida in 1987," and urged the CDC to work with OSHA in training dentists and enforcing regulated sterilization techniques.[311]

Safer instruments and techniques must be invented.[312] The American Federation of State, County, and Municipal Employees (AFSCME) suggests that the best way to protect health-care workers would be through the immediate adoption of OSHA's blood-borne pathogen standards.[313]

The American College of Emergency Physicians stated that more data must be collected and more studies performed to determine the exact likelihood of the transmission of HIV from health-care worker to patient.[314]

---

308. *See generally* F.D.C. Reports, Inc., *supra* note 5, at 7-8 (summarizing testimony of health care and AIDS advocacy groups at a conference held by Centers for Disease Control, Feb. 21-22, 1991.).

309. *See* Marsha F. Goldsmith, *Physicians and Dentists Tell the CDC: "Avoid Quick Fix for a Tough Problem,"* 265 JAMA 1221, 1221-22 (1991).

310. *Id.* at 1221 (demonstrating the "difficulty of maintaining proper vigilance against the spread of infectious diseases in American hospitals").

311. *Id.* at 1222 (quoting R. Runnells, DDS, director of infection control, University of Utah School of Medicine, at a meeting held to discuss the risks of physicians and dentists infecting their patients with HIV).

312. *Id.*

313. *Id.* An AFSCME representative said that at her inner-city hospital, every health-care worker takes precautions, "[b]ut there is room for improvement." *Id.*; *see also supra* notes 81-88 and accompanying text.

314. Goldsmith, *supra* note 309, at 1222.

The American public was urged to "[s]hift the emphasis on avoiding infection from where it is rare—the operating room or dental office—to where it is rampant."[315] For example, adolescents should be educated about HIV and should be urged to wear condoms when participating in sexual activities.[316]

The American Medical Association and the American Dental Association both recommend practice restrictions for health-care workers infected with AIDS.[317] Experts disagree on the actual risk patients face from HIV-positive health-care workers.[318] There is general agreement, however, that the risk must be above a certain threshold before practice restrictions are appropriate.[319] For example, a significant risk would be a risk of death of one per 10,000 while an insignificant risk would be a risk of death of one per 500,000.[320]

Many believe that these practice-restriction policies send the wrong message to the general public.[321] Viewing a visit to the doctor or dentist as a health hazard "would negate health authorities' hard-won success in convincing the public" that casual contact, such as that occurring with schoolmates or co-workers with HIV, poses no threat of transmission.[322]

In light of these less drastic alternatives, mandatory testing does not seem to be the best solution to prevent the spread of HIV from infected health-care workers to patients. Dr. Mervyn Silverman, president of the American Foundation for AIDS Research, eloquently stated that this problem can be solved "'with the appropriate cooperation, collaboration, communication and compassion.'"[323]

---

315. *Id.*

316. *See id.* Many high schools across the country are now providing condoms to their students in an effort to stop the spread of AIDS. *See* Bernice Hirabayashi, *School District Approves Condom Distribution Plan*, L.A. TIMES, Mar. 12, 1992, at J1; *Lincoln-Sudbury OK's Condom Plan*, BOSTON GLOBE, Mar. 12, 1992, at 36; *New York Goes First: High Schools Hand Out Condoms*, N.Y. TIMES, Dec. 1, 1991, § 4 (Magazine), at 6.

317. *See* Goldsmith, *supra* note 309, at 1221.

318. *See* Orentlicher, *supra* note 4, at 1135.

319. *Id.*

320. *Id.*

321. Goldsmith, *supra* note 309, at 1221.

322. *Id.*

323. *Id.* at 1222 (quoting Dr. Silverman who attended a meeting held to discuss the risk of physicians and dentists infecting their patients with HIV).

V. CONCLUSION

The question of whether to mandate testing of all health-care workers for HIV is not easily answered. The decision to test all health-care workers must be an informed one. This decision must be made knowing that such testing could violate the privacy rights of the health-care worker, could be considered an illegal search and seizure, and could also unduly discriminate against these individuals in violation of the Equal Protection Clause and federal and state anti-discrimination laws.

In making this decision, the courts and legislatures should not surrender to the fear and hysteria surrounding this issue. The medical profession has eradicated many of the myths surrounding AIDS, including the belief that HIV can be spread by everyday, casual contact. Implementing mandatory testing of all health-care workers would be a step backward, toward reconfirming these myths.

It is clear that the interests of the health-care worker must be balanced against the important health and safety interests of the public. Wherever the scales may tip, the courts must recognize that other viable alternatives to mandatory testing exist. Hopefully, the courts, the legislatures, and the medical profession will react to the facts and not the fear and hysteria when developing a solution to this problem.

The courts must realize that the small risk of transmitting HIV in the health-care setting does not warrant governmental intrusion to the extent of mandatory testing. To find otherwise would be to ignore the right-to-privacy doctrine and anti-discrimination laws. The legislature must focus on providing proper funding to provide continued research on AIDS, including methods of prevention and ultimately, a cure. Mandatory testing is not the answer.

Christine Huebner