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Mary Carter

Pankaj Malik

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TESTING HEALTH CARE WORKERS FOR AIDS: PUBLIC NECESSITY OR PRIVATE INTRUSION?

Acquired Immunodeficiency Syndrome ("AIDS")\(^1\) has spread dramatically since its discovery in 1981,\(^2\) making it one of the greatest health concerns of the decade.\(^3\) AIDS develops from the Human Immunodeficiency Virus ("HIV")\(^4\) and is characterized by

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\(^1\) See Mary E. Chamberland & James W. Curran, *Epidemiology and Prevention of AIDS and HIV Infection*, in *PRINCIPLES AND PRACTICE OF INFECTIOUS DISEASES* 1029, 1030 (Gerald L. Mandell et al. eds., 3d ed. 1990) [hereinafter *INFECTIOUS DISEASES*] (medical name given to disease characterized by occurrence of rare and opportunistic infections in patients with suppressed immune systems is AIDS); see also *Disease and Trauma Reviews*, 70th ed., 1991, available in LEXIS, Medex Library, MEDEX File [hereinafter *Trauma Reviews*] (same).


\(^3\) See Arnold S. Relman, *Introduction to AIDS: The Emerging Ethical Dilemmas*, 15 HASTINGS CENTER REP. 1, 1 (Supp. Aug. 1985). Near the end of 1981 a new disease was recognized and the Centers for Disease Control suggested it be called Acquired Immunodeficiency Syndrome. Id.


AIDS is a fatal disease; no one diagnosed with the disease has survived. See Charles R. Horsburgh, Jr. et al., *Preventive Strategies in Sexually Transmitted Diseases for the Primary Care Physician*, 258 JAMA 815, 818 (1987). Studies indicate that by the end of 1992 approximately 265,000 people will have died of AIDS. See *Trauma Reviews*, supra note 2. Further, by the year 2000, an additional fifteen to twenty million infected persons will suffer the same fate. *HIV/AIDS Epidemic*, supra, at 3228.

Currently AIDS is the second leading cause of death among men between twenty-two and forty-four years old; it will soon become one of the five leading causes of death among women between fifteen and forty-four years old. *Mortality Attributable to HIV Infection—United States 1981-1991*, 40 MORBIDITY & MORTALITY WKLY. REP. 41, 41-44 (1991).
a severe impairment of the human immune system. HIV is primarily transmitted through intimate sexual contact, exposure to AIDS-infected blood and intravenous drug use. Several investiga-

(HTLVIII) from Patients with AIDS and at Risk for AIDS, 224 SCIENCE 500, 500-02 (1984) (HIV virus primary cause of AIDS); John Coffin, Letter to the Editor, Human Immunodeficiency Viruses, 232 SCIENCE 697, 697 (1986) (several members of Subcommittee on Human Retroviruses of International Committee on Taxonomy of Viruses recommended virus be called Human Immunodeficiency Virus). See generally Sheldon H. Landesman et al., Special Report: The AIDS Epidemic, 312 NEW ENG. J. MED. 521, 522 (1985). The enzyme linked immunosorbent assay test ("ELISA") is employed to detect the presence of HIV or AIDS. Id.

See Jean Marx, Clue Found to T Cell Loss in AIDS, 254 SCIENCE 798, 798-800 (1991) (discussing possible causes of suppression of immune system in AIDS patients).

AIDS alters the T-lymphocytes or the white blood cells that build the human immune system. See Krim, supra note 1, at 4. The AIDS virus multiplies in these cells and proceeds to destroy them. Id. The virus transcribes its genetic material, RNA, into white blood cells and subsequently alters the cell's function. Id.

See Margaret A. Hamburg et al., Immunology of AIDS and HIV Infection, in Infectious Diseases, supra note 1, at 1046 (transmission "can occur through sexual contact, infected blood products and from mother to infant"); Krim, supra note 1, at 4 (to be transmitted from one person to another, HIV must virtually be injected into blood stream and "en-counter cells in which it can multiply"); Mueller, supra note 1, at 256 (virus has been detected in blood, saliva, tears, breast milk and semen); David D. Ho et al., Letter to the Editor, Infrequency of Isolation of HTLV-III Virus from Saliva in AIDS, 313 NEW ENG. J. MED. 1606, 1607 (1985) (higher risk of transmitting HIV through anal intercourse); Mads Melbye et al., Letter to the Editor, Anal Intercourse as a Possible Factor in Heterosexual Transmission of HTLV-III to Spouses of Hemophiliacs, 312 NEW ENG. J. MED. 857, 857 (1985) (same).

Statistically, the majority of AIDS victims are homosexuals, bisexuals and intravenous drug users. Trauma Reviews, supra note 1. As of April 1991, there were a total of 168,913 cases of AIDS among adults and adolescents. Id. Fifty-nine percent of the victims were either homosexual or bisexual, 22% were female and heterosexual male IV drug users, 5% were persons who contracted AIDS through heterosexual contact, 2% were blood transfusion recipients and 1% were hemophiliacs. Id.

The minority of victims include heterosexuals, see Nancy S. Padian et al., Female-to-Male Transmission of Human Immunodeficiency Virus, 266 JAMA 1664, 1664 (1991) (four percent of AIDS cases attributable to heterosexual contact with high-risk partners), and children born to AIDS infected mothers. See Philippe Van De Perre et al., Postnatal Transmission of Human Immunodeficiency Virus Type 1 from Mother to Infant—A Prospective Cohort Study in Kigali, Rwanda, 325 NEW ENG. J. MED. 593, 593 (1991). It is generally believed that mother to infant transmission occurs during pregnancy or delivery. Id. In such cases the rate of transmission is 10% to 52%. Id. Transmission via breast milk is also possible although this is generally regarded as extremely rare. Id. It is believed that most perinatal transmissions occur before or during child birth rather than afterwards. See Recommendations for Assisting in the Prevention of Perinatal Transmission of Human Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus and Acquired Immune Deficiency Syndrome, 34 MORTALITY MORTALITY WKLY. REP. 721, 722 (1985); see also Janine Jason, Breast Feeding in 1991, 325 NEW ENG. J. MED. 1036, 1037 (1991) (concern over transmission of HIV through breast milk heightened when mother has HIV infective risk factors). See generally Julie A. Menella & Gary K. Beauchamp, The Transfer of Alcohol to Human Milk Effects on Flavor and the Infants Behavior, 325 NEW ENG. J. MED. 981, 982 (1991) (HIV has been detected in breast milk).

To date, no evidence has been established that would suggest that HIV can be transmitted through the air or by casual skin contact. See Gerald H. Freidland et al., Lack of Trans-
Testing Health Care Workers

tions by the Centers for Disease Control ("CDC") have documented transmission of HIV in the health care setting. The mission of Contacts of Patients with Oral Candidiasis, 314 NEW ENG. J. MED. 344, 344 (1986) (absent sexual contact, household contact poses minimal or no risk of transmission); C. Everett Koop, Surgeon General's Report on Acquired Immune Deficiency Syndrome, 256 JAMA 2784, 2784 (1984) (AIDS virus not transmitted by casual contact); Recommendations to Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace, 34 MORBIDITY & MORTALITY WKLY. REP 681, 683-94 (1985) [hereinafter Workplace Recommendations] (infection from household contact not yet detected).

Although AIDS can be transmitted in a variety of ways, "[t]he clinical syndrome of AIDS follows infection with HIV after a variable, often prolonged, period of time." Richard E. Chaissnon & Paul A. Volberding, Clinical Manifestations of HIV Infection, in INFECTIOUS DISEASES, supra note 1, at 1059, 1060. In the majority of cases, it takes about ten to fifteen years after the infection for full blown AIDS to develop. Id.

To date there has been only one documented report of HIV transmission from an infected health care worker to patients. In that case, five patients became infected with HIV after receiving care from an HIV-infected dentist; the mechanism of transmission remains unclear. Current data indicate that the risk of HIV transmission from health care workers to patients is so low that it cannot be measured accurately; nonetheless, the potential for such transmission raises complex medical, ethical, legal and social issues that have major public health implications.

Prior to the Kimberly Bergalis controversy, reports only documented transmission to health care workers exposed to patients' infected blood. See Update: Human Immunodeficiency Virus Infections in Health-Care Workers Exposed to Blood of Infected Patients, 36 MORBIDITY & MORTALITY WKLY. REP 285, 285-88 (1987) (evaluating and examining three cases wherein health care workers developed AIDS from exposure to their patient's infected blood); Rachel L. Stricof & Dale L. Morse, Letter to the Editor, HTLV-III/LAV Seroconversion Following a Deep Intra Muscular Needlestick Injury, 314 NEW ENG. J. MED. 1115, 1115 (1986) (describing transmission of HIV to health care worker pricked by needle contaminated with blood of AIDS patient); Workplace Recommendations, supra note 6, at 683-94 (assessing risk of transmission between patients and health care workers). See generally 137 CONG. REC. H5, 495-01 (daily ed. July 16, 1991) (statement of Hon. Dannemeyer) ("records of the [Centers for Disease Control] make clear that today 6,436 health care workers are
tragic story of Kimberly Bergalis, the young woman who contracted AIDS from her dentist,\(^8\) inspired a national debate on whether federal law should require mandatory AIDS testing of all health care workers.\(^9\)

This Note will examine the constitutional implications of AIDS testing of health care workers. Part One will discuss recent federal legislation requiring states to enact guidelines designed to prevent transmission of HIV in the health care environment. Part Two will address protections guaranteed by the Fourth Amendment and suggest that AIDS testing of health care workers violates such rights. Parts Three and Four will discuss the impact that subsequent disclosure of test results would likely have on a health care worker's rights to privacy and equal protection, respectively. Part Five will examine federal statutes which protect AIDS-infected employees from discrimination. In conclusion, this Note will propose that in adopting guidelines, states must ensure that health care workers' constitutional rights are not abridged.

I. PROPOSED LEGISLATION AND THE CDC GUIDELINES

In response to the discovery that Kimberly Bergalis had contracted AIDS, several legislative proposals seeking to mandate AIDS testing of all health care workers were introduced.

A. Legislation in Response to Kimberly Bergalis

On June 26, 1991, the Honorable William E. Dannemeyer sponsored the Kimberly Bergalis Patient and Health Providers Protection Act of 1991 ("Dannemeyer Bill")\(^{10}\) which directs the

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\(^9\) See Jennifer L. Scott, Take Steps Against AIDS, NEWSDAY, Jan. 5, 1992 (Nassau ed.), at 31 (Bergalis' story stirred national debate). Congress responded to this debate by considering several legislative proposals calling for mandatory AIDS testing of health care workers. See, e.g., infra notes 10-22 (discussing various proposals introduced).

Testing Health Care Workers

Secretary of the Health and Human Services to specify medical and dental procedures that HIV-infected health care workers should not perform. Under the Dannemeyer Bill, states would be required to screen all health care workers who perform the specified procedures for HIV or Hepatitis B. Any health care worker testing positive for either disease would be prohibited from performing further invasive procedures. An exception to this prohibition would allow health care workers to perform any procedure if they fully disclosed their HIV status to their patients and obtained the patients' written consent. The Dannemeyer Bill would also permit physicians to test patients for HIV and Hepatitis B provided there is reason to suspect they may be infected with either disease.

In further response to the Kimberly Bergalis controversy, two amendments to the Postal Service Appropriations Act ("PSAA") were proposed. The first proposed amendment would make it a federal crime for health care workers who knew they had AIDS to perform exposure-prone invasive procedures without having obtained their patient's prior written consent. Violation of the amendment would result in the imposition of a $10,000 fine, a minimum of 10 years incarceration, or both. The second proposed amendment ("Amendment 781") would require states to adopt CDC guidelines or their equivalent.

In October 1991, Congress passed Amendment No. 781 to the PSAA, rejecting all other aforementioned proposals.

11 Memorandum from Mary McGrane & Howard Cohen to the Republican Members of the Subcommittee on Health and Environment 3 (Sept. 17, 1991) [hereinafter Memorandum].
12 Id.
13 Id.
14 Id.
15 Id.
16 Id.
17 H.R. 2622, 102d Cong., 1st Sess. (1991). A corollary proposal to amend the Judiciary Appropriations Act ("JAA") would have allowed HIV testing of patients in order to protect health care workers. Id.
18 See id.
19 Id.
20 Id.
B. The CDC Recommendations for Preventing Transmission of HIV from Health Care Worker to Patient

Under Amendment No. 781, each state has one year to certify to the Health and Human Services Department that it has implemented the CDC recommendations or their equivalent. Failure to comply with this legislation would render a state ineligible to receive federal aid under the Public Health Service Act.

In July 1991, the CDC issued recommendations in order to prevent transmission of HIV from health care workers to their patients. The CDC distinguished exposure-prone invasive proce-
Testing Health Care Workers

dures from other medical activities, and suggested that health care workers performing such procedures know their HIV status. However, the CDC's recommendations specifically rejected mandatory AIDS testing health care workers. It concluded that the risk of transmission from health care worker to patients "does not support the diversion of resources that would be required to implement mandatory testing programs." The recommendations do provide for the establishment of an expert review panel to advise HIV-positive health care workers as to which procedures they would be permitted to perform with the informed consent of the

of reusable devices used in invasive procedures.

[2] Currently available data provide no basis for recommendations to restrict the practice of HCWs infected with HIV or HBV who perform invasive procedures not identified as exposure-prone, provided the infected HCWs practice recommended surgical or dental technique and comply with universal precautions and current recommendations for sterilization/disinfection.

[3] Exposure-prone procedures should be identified by medical/surgical/dental organizations and institutions at which the procedures are performed.

[4] HCWs who perform exposure-prone procedures should know their HIV antibody status. HCWs who perform exposure-prone procedures and who do not have serologic evidence of immunity to HBV from vaccination or from previous infection should know their HBsAg status and, if that is positive, should also know their HBeAg status.

[5] HCWs who are infected with HIV or HBV (and are HBeAg positive) should not perform exposure-prone procedures unless they have sought counsel from an expert review panel and been advised under what circumstances, if any, they may continue to perform these procedures. The review panel should include experts who represent a balanced perspective. Such experts might include all of the following: (a) the HCW's personal physician(s), (b) an infectious disease specialist with expertise in the epidemiology of HIV and HBV transmission, (c) a health professional with expertise in the procedures performed by the HCW, and (d) state or local public health official(s). If the HCW's practice is institutionally based, the expert review panel might also include a member of the infection-control committee, preferably a hospital epidemiologist. HCWs who perform exposure-prone procedures outside the hospital/institutional setting should seek advice from appropriate state and local public health officials regarding the review process. Panels must recognize the importance of confidentiality and the privacy rights of infected HCWs.

[6] Mandatory testing of HCWs for HIV antibody, HbsAg, or HBeAg is not recommended. The current assessment of the risk that infected HCWs will transmit HIV or HBV to patients during exposure-prone procedures does not support the diversion of resources that would be required to implement mandatory testing programs. Compliance by HCWs with recommendations can be increased through education, training, and appropriate confidentiality safeguards.

Id.

27 See Bernard Lo & Robert Steinbrook, Health Care Workers Infected With the Human Immunodeficiency Virus: The Next Steps, 267 JAMA 1100, 1101 (1992). Exposure-prone invasive procedures are those which present a substantial risk of patients being exposed to their health care worker's infected blood. Id.

28 Id.
patient in question.\textsuperscript{29} Many professional groups were opposed to the CDC's recommendations because the risk of transmission from health care worker to patient was minuscule.\textsuperscript{30} Moreover, no one in the medical community would agree to draft a list of exposure-prone invasive procedures,\textsuperscript{31} and at least one professional group opined that such a list would be "irrelevant and counterproductive" since such procedures "cannot be defined in any scientific or rational way."\textsuperscript{32} Faced with this dissent, the CDC recently withdrew plans to list such procedures and revised the guidelines to focus on the requisite skill and technique of HIV-positive health care workers rather than listing the type of procedures they can perform.\textsuperscript{33} According to the new guidelines, the review panel would decide which procedures an infected health care worker may perform on a case by case basis.\textsuperscript{34} Prior written consent of patients, however, is required before an HIV-positive health care worker can perform such invasive procedures.\textsuperscript{35}

In complying with Amendment 781, it is suggested that states consider the impact their guidelines may have on a health care worker's constitutional rights. The following three sections of this Note will examine the constitutionality of mandatory AIDS testing of a health care worker and disclosure of their positive test results.

\section{II. Involuntary Testing: Does the Fourth Amendment Provide a Shield?}

The Fourth Amendment provides the "right of the people to be secure in their persons . . . against unreasonable searches and
seizures . . . ."36 The United States Supreme Court has held that involuntary blood testing constitutes a search within the meaning of the Fourth Amendment.37 In determining whether mandatory blood testing without probable cause or individualized suspicion is reasonable under the Fourth Amendment, courts evaluate whether the government's interest "is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches."38

36 U.S. Const. amend. IV. The Fourth Amendment provides:

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.

Id.

The goal of the Fourth Amendment is to safeguard the privacy and security of individuals by requiring that all searches and seizures are reasonable and are conducted upon the issuance of a warrant. See California v. Acevedo, 111 S. Ct. 1982, 1991 (1991) (searches outside judicial process, without prior judicial approval, are per se unreasonable under Fourth Amendment, subject to few delineated exceptions) (citing Mincey v. Arizona, 437 U.S. 385, 390 (1978)); Winston v. Lee, 470 U.S. 753, 755 (1985). "The Fourth Amendment protects expectations of privacy; an individual's expectations that in certain places and at certain times he had the right to be let alone, the most comprehensive of rights and the right most valued by civilized men." Id. at 758; see also Horton v. United States, 110 S. Ct. 2301, 2306 (1990) (search compromises individual's privacy interest) (citing United States v. Jacobsen, 466 U.S. 109, 113 (1984)); O'Connor v. Ortega, 480 U.S. 709, 709-10 (1987) (Fourth Amendment protects government employees from having personal property searched and taken, unless unreasonable because of operational realities); cf. Acevedo, 111 S. Ct. at 1992 (Scalia, J., concurring) (Fourth Amendment merely prohibits searches and seizures that are unreasonable); Craig M. Bradley, Two Models of the Fourth Amendment, 83 Mich. L. Rev. 1468, 1472 (1985) (recognizing over twenty exceptions to warrant requirement). See generally Rodney L. LaGrone & William W. Cook, Investigation and Police Practices Overview of the Fourth Amendment, 78 Geo. L.J. 699, 700 (1990) (search is governmental infringement upon privacy of individual); Donald J. McNeil & Laurie A. Spieler, Mandatory Testing of Hospital Employees Exposed to the AIDS Virus: Need to Know or Unwarranted Invasion of Privacy, 21 Loy. U. Chi. L.J. 1039, 1057 (1990) (Fourth Amendment provides protection against searches that interfere with individual's expectations of privacy).


38 National Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989); see Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 619 (in determining whether search is reasonable, courts weigh intrusion on individual's privacy against governmental interest in conducting search); Willner v. Thornburgh, 928 F.2d 1185, 1193 (D.C. Cir.) (government's interest in requiring drug testing of applicants for Justice Department jobs outweighs minimal invasion of privacy), cert. denied, 112 S. Ct. 669 (1991); Georgia Assoc. of Educators v. Harris, 749 F. Supp. 1110, 1114 (N.D. Ga. 1990) (applying balancing test from Treasury Employees, court concluded no specific compelling governmental interest was identified).
A. Mandatory AIDS Testing of Health Care Workers: Glover v. Eastern Nebraska Community Office of Retardation

Recently, the United States Court of Appeals for the Eighth Circuit addressed the issue of whether the Fourth Amendment protects health care workers from involuntary AIDS testing in Glover v. Eastern Nebraska Community Office of Retardation. In Glover, employees of a multi-county health services agency brought an action under the Fourth Amendment protesting mandatory testing of health care workers for Hepatitis B and HIV. The state agency defended mandatory AIDS testing, analogizing it to mandatory drug testing of persons working in some state regulated fields. Maintaining that the risk of transmission was "minuscule," the court held that requiring employees to be tested was not justified under the Fourth Amendment.

B. Mandatory Drug Testing of Employees in State Regulated Fields

When balancing the government's interest against the intrusion on individual privacy in the context of AIDS testing of health care workers, an analogy has been made to mandatory drug testing of employees in state regulated areas. Courts addressing the validity of mandatory drug testing have found a compelling state interest in deterring drug use among employees in potentially dangerous jobs. Courts have upheld such testing, concluding that the intru-

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See generally Melton, infra note 45, at 871 (describing balancing test used in Glover).

Glover, 867 F.2d at 462. The purpose of requiring AIDS testing as part of a disease control policy was to create "a safe work environment for all developmentally disabled persons receiving services from the [a]gency." Id.

Id. at 463. For a discussion of cases upholding mandatory drug testing, see infra note 43.

Glover, 867 F.2d at 464. Although the court recognized the severity of the disease at which the testing was aimed, they nevertheless held that such testing would violate the Fourth Amendment due to the low risk of transmission. Id.


368
Testing Health Care Workers

sion on the individual’s privacy caused by the search is not substantial in light of the governmental interest in protecting the public."


An initial inquiry in employee drug testing cases is whether a warrant is required. See Railway Labor, 489 U.S. at 619. Although the general rule is that a search and seizure must be accompanied by a judicial warrant issued upon reasonable cause, exceptions are made in certain well-defined circumstances. Id. In Railway Labor, the Court concluded that requiring the issuance of warrants would be impractical since supervisors often have no experience with warrants. Id. at 623; see also New York v. Burger, 482 U.S. 691, 702-03 (1987) (allowing warrantless search when: 1) substantial state interest justifies regulatory scheme; 2) inspection is necessary for regulatory scheme; and 3) application of regulatory scheme must be certain and uniform); Payton v. New York, 445 U.S. 573, 586 (1980) (exigent circumstances exception) (citing Treasury Employees, 489 U.S. at 665-66).

The courts apply a balancing test in mandatory drug testing. See International Bhd. of Teamsters v. Department of Transp., 932 F.2d 1292, 1299 (9th Cir. 1991). The Teamster court balanced the commercial truck drivers’ privacy interests against the government’s interest in deterring drug use by these employees. In determining the practicality of a warrant requirement, the court factored in the standardized nature of the drug testing and the minimal discretion of the administrators, which decreased the risk of discrimination. Id.; see also Railway Labor, 489 U.S. at 629 n.9. The Railway Labor court explicitly rejected the notion that the constitutionality of a drug testing program turns upon the availability of less intrusive means to achieve the agency’s goals. Id. The state’s interest is not reduced when a less intrusive means of promoting safety and deterring drug use exists, or evidence of a prevalent drug abuse problem is lacking. Id. at 674-75. The Court reasoned that the state need only show that it had a reasonable basis for concern. Id.; Teamsters v. Department of Transp., 932 F.2d at 1302 (Federal Highway’s reasonable basis for drug testing was its deterrent effect); Bluestein, 908 F.2d at 456 (“the [Custom] Service’s policy of deterring drug users from seeking . . . promotions cannot be deemed unreasonable”) (quoting Treasury Employees, 489 U.S. at 673).

Employers have offered additional justification for mandatory drug testing. See, e.g., Taylor v. O’Grady, 888 F.2d 1189, 1200-01 (7th Cir. 1989) (Department of Corrections claimed drug testing fostered public’s perception of employees’ integrity; maintained physical fitness of employees; prevented correctional officers from smuggling drugs to prisoners).

The courts apply a balancing test in mandatory drug testing. See, e.g., Taylor v. O’Grady, 888 F.2d 1189, 1200-01 (7th Cir. 1989) (Department of Corrections claimed drug testing fostered public’s perception of employees’ integrity; maintained physical fitness of employees; prevented correctional officers from smuggling drugs to prisoners).
It is submitted that in applying the Fourth Amendment, mandatory AIDS testing of health care workers is distinguishable from mandatory drug testing of government employees. The most obvious distinction is that using drugs is illegal while having AIDS is not, and the government's interest in deterring the former is substantial. Moreover, mandatory drug testing has a higher utility than AIDS testing because of its inherent deterrent effect. Finally, the government's interest in controlling work-related impairment of employees in safety sensitive positions is more compelling than in requiring AIDS testing, because the risk of public harm caused by a worker affected by drugs is much greater than the minimal risk of a health care worker transmitting HIV to a patient. It is further submitted that AIDS testing of health care workers is a greater intrusion on privacy than the drug testing of employees in a highly regulated industry. Employees in such an industry are often already subject to frequent physical examinations and testing, and therefore have a diminished expectation of privacy. Since health care workers have never been subject to such testing, their privacy interests are greater.

“operational realities of the workplace,” and therefore does not outweigh government's interest).


48 See Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 634 (1989) (alcohol and drug testing of railroad employees is reasonable under the Fourth Amendment in part because of their diminished expectation of privacy); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989) (employees involved in interdiction of illegal drugs or who carry firearms have diminished expectation of privacy because of “special, and obvious, physical and ethical demands”); International Bhd. of Electrical Workers, Local 1245 v. Skinner, 913 F.2d 1454, 1463 (9th Cir. 1990) (though pipeline workers have not been “focus or ‘regulatory concern,’” regulations concerning performance, medical fitness or ability to perform jobs lead to diminished expectation of privacy).

49 See International Bhd, 913 F.2d at 1463 (identifying whether employees are already subjected to testing as factor in determining intrusion of privacy) (citing Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 627 (1989)).
Testing Health Care Workers

C. Mandatory AIDS Testing of Prison Inmates

Prisons have been particularly affected by the AIDS epidemic because of the great percentage of prisoners in high risk groups. Although the United States Supreme Court has held that prisoners retain such constitutional protections as freedom of religion, freedom from racial discrimination, access to the courts, right to be free from cruel and unusual punishment, freedom of speech and freedom to marry, nevertheless, prisoners do not have the rights and privileges of free citizens. In balancing a prison’s interest in treating and preventing the spread of AIDS

50 See Shawn Marie Boyne, Women in Prison with AIDS: An Assault on the Constitution, 64 S. CAL. L. REV. 741, 750 (1991) (high number of AIDS cases in prisons attributed to IV drug users); Peter Rhodes Easley, The AIDS Crisis in Prison: A Need for Change, 6 J. CONTEMP. HEALTH L. & POL’Y 221, 221 (1990) (AIDS in prisons particularly critical because of “rampant overcrowding, unsatisfactory medical care and the general lack of adequate response by prison officials”); T. Hammett, Epidemiology of HIV Infection and AIDS in Correctional Facilities and the Population at Large, 1988 UPDATE: AIDS IN CORRECTIONAL FACILITIES 1, 9 (1989). AIDS cases reported in 1988 in state and federal correctional facilities were as high as 536 per 100,000 prison inmates compared to 13.3 cases per 100,000 in the total population of the United States. Id. at 11. In New York nearly 60% of the inmates who died in prison during 1987 and 1988 died from AIDS. Id. See generally Simeon Goldstein, Prisoners with AIDS: Constitutional and Statutory Rights Implicated in Family Visitation Programs, 31 B.C. L. REV. 967, 968 (1990) (increasing number of inmates have contracted AIDS).

51 See Cruz v. Beto, 405 U.S. 319, 322 (1972) (constitutional rights of Buddhist inmate violated when inmate not allowed to use prison chapel, write to religious advisor, or share religious materials with other inmates); see also Goldstein, supra note 50, at 972 (prisoners retain right of religious freedom).

52 See, e.g., Lee v. Washington, 390 U.S. 333, 333 (1968) (racial segregation in prisons violates prisoner’s Fourteenth Amendment rights); Goldstein, supra note 50, at 972 (prisoners constitutionally protected from racial discrimination).

53 See, e.g., Johnson v. Avery, 393 U.S. 483, 485-90 (1969) (prisoners have right of access to courts, although prison officials can limit time and place prisoners receive assistance from others, and can restrict compensation); see also Goldstein, supra note 50, at 972 (same).

54 See, e.g., Estelle v. Gamble, 429 U.S. 97, 104 (1976) (prison officials indifference to inmate’s medical needs was cruel and unusual punishment violating Eighth Amendment), cert. denied, 434 U.S. 974 (1977); see also Goldstein, supra note 50, at 972 (prisoners constitutionally protected from cruel and unusual punishment).


56 See Turner v. Safley, 482 U.S. 78, 95-96 (1987) (restriction on marriage of prisoners requiring approval of prison superintendent violates fundamental right to marry); see also Goldstein, supra note 50, at 972 (prisoners have right to marry).

57 See Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) (although prisoner’s rights may be diminished by exigencies of institutional environment, prisoner is not wholly stripped of constitutional protections); see also Goldstein, supra note 50, at 971 (constitutional protections applicable to prisoners); cf. Thornburgh v. Abbott, 490 U.S. 401, 413 (1989) (prisoner’s incoming mail could be censored because of legitimate security concerns).
against the prisoners' expectation of privacy under the Fourth Amendment, courts have generally found the prison's interest to be paramount. Consequently, courts have upheld mandatory testing of prison inmates.

It is suggested that requiring health care workers to be tested for AIDS is also distinguishable from mandatory AIDS testing of prisoners. Prisoners have a diminished expectation of privacy due to their incarceration while health care workers enjoy the full rights and privileges of free citizens. Therefore mandatory testing results in a greater intrusion upon the privacy rights of health care workers. In addition, courts have traditionally deferred to the judgment of prison administrators and have not required as compelling a state interest in their analysis of prison cases. It is suggested that since there is no similar tradition of deferring to the decisions of hospital administrators, the state interest should be held to a higher standard.

It is submitted that the rationale applied in Glover was correct.

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**Notes:**

5 Block v. Rutherford, 468 U.S. 576, 584-85 (1984) (upholding practice of searching inmates' cells and prohibition of contact meetings, in part, on grounds that courts should defer to prison officials); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 128 (1977) (deference to prison officials accorded because of difficulties and complexities of operating prison); see, e.g., Turner v. Safley, 482 U.S. 78, 89-91 (1987). The Turner Court applied a four-prong test for minimum scrutiny which examined (1) whether there is a rational relation between the regulation and the prison's interest in enforcing it; (2) whether the prisoners can exercise their rights by another means; (3) whether allowing the Constitution to protect the prisoner would adversely effect the employees, other prisoners or prison resources, and (4) whether the prison administrators have other ways to address the problem. Id. See generally O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987) (prison upheld prohibition on inmates attending religious services on Friday afternoons as rationally connected with legitimate government interest); Miriam G. Waltzer, *Acquired Immune Deficiency Syndrome and Infection with Human Immunodeficiency Virus*, 36 Loy. L. Rev. 55, 66 (1990) (courts generally do not interfere with operation of prisons); Irene Lambrou, *Comment, AIDS Behind Bars: Prison Responses and Judicial Deference*, 63 Temp. L. Rev. 327, 334-38 (1989) (Court's deferential treatment towards prisons); Goldstein, *supra* note 50, at 971 (prison officials may restrict or deny rights to inmates because of special nature of prisons).


59 See Bell v. Wolfish, 441 U.S. 520, 562 (1979) (while "hands-off" approach should not be applied, "judgment calls" that satisfy constitutional and statutory standards should be left to prison officials); *supra* note 59 (discussing deference to prison officials). *See generally supra* note 58 (prisoners not entitled to rights of free citizens).
Testing Health Care Workers

The state's interest in requiring AIDS testing of health care workers, based on the mere possibility that a health care worker could transmit the disease to a patient, is not great enough. With only one recorded case of such transmission, despite the fact that there are thousands of practicing HIV-infected health care workers, it is suggested that the state's interest could not reasonably be considered compelling. It is therefore submitted that mandatory AIDS testing of health care workers violates the Fourth Amendment.

III. THE RIGHT TO PRIVACY

A. The Health Care Environment: Health Care Workers

The right of privacy is "the most comprehensive of rights and the right most valued by civilized men."61 Although the Constitution is devoid of any explicit reference to a right of privacy, the United States Supreme Court has repeatedly protected the individual's right to be free from unnecessary governmental intrusions in certain matters affecting individual autonomy including marriage,62 raising children,63 education,64 use of contraceptives,65

61 Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), overruled on other grounds sub nom. United States v. Katz, 389 U.S. 347 (1967). "The makers of our Constitution sought to protect Americans in their belief, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone . . . ." Id.; see Griswold v. Connecticut, 381 U.S. 479, 494 (1965) (Goldberg, J., concurring). "[T]he right of privacy is a fundamental right emanating from the totality of the constitutional scheme under which we live." Id.; Louis D. Brandeis & Samuel D. Warren, The Right to Privacy, 4 HARV. L. REV. 193, 193 (1890). "The right to life has come to mean the right to enjoy life, the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term 'property' has grown to comprise every form of possession — intangible as well as tangible." Id.

62 See, e.g., Loving v. Virginia, 388 U.S. 1, 12 (1967) (law prohibiting inter-racial marriages violated Equal Protection Clause and Due Process Clause because it curtailed right long recognized as personal and essential to pursuit of happiness).

63 See, e.g., Pierce v. Society of Sisters, 268 U.S. 510, 536 (1925) (amending Oregon law requiring children to attend public schools because existing statute violated fundamental right).

64 See, e.g., Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (invalidating statute that prohibited teaching of foreign languages to young children).

65 See, Griswold, 381 U.S. at 479. In Griswold, the Court acknowledged a 'penumbra' of privacy inherent in each of the first nine amendments which they held to be applicable to the states via the Fourteenth Amendment. Id. at 483. The majority concluded that the Connecticut statutes in question, which prohibited the use or distribution of contraceptives, infringed upon the plaintiff's right to privacy and were therefore unconstitutional. Id. at 485-86. The Court has also stated that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intru-
procreation,\textsuperscript{66} and abortion.\textsuperscript{67}

In the context of mandatory AIDS testing of health care workers, it might be argued that the right to individual autonomy implies that individuals have the right to choose for themselves whether to undergo testing. Despite the Supreme Court's reluctance to interfere in areas which have traditionally been within the state's police power—such as disease control—\textsuperscript{68} it has recognized constitutional limits on the exercise of such power.\textsuperscript{69}

However, in light of the changing composition of the Supreme Court and because the right to privacy is not expressly provided in the Constitution, right of privacy precedents have been placed on questionable ground.\textsuperscript{70} The Rehnquist Court has steadfastly re-
Testing Health Care Workers

treated from substantive due process theories and has shown a de-
cided preference for legislative rather than judicial action in creat-
ing rights to privacy or autonomy. As a result, it is submitted
that health care workers may have difficulty claiming that a neces-
sary extension of their fundamental right to individual autonomy
is the right to choose whether to undergo an AIDS test.

B. The Right to Keep Personal Medical Information Private

The United States Supreme Court has also recognized a right
to prevent disclosure of personal and private information. The
Supreme Court has indicated that "cases sometimes characterized
as protecting 'privacy' have in fact involved . . . the individual
interest in avoiding disclosure of personal matters . . . ." In the
area of random and mandatory testing, courts have recognized a
right to keep personal medical information private. State regula-
tions mandating testing have been upheld, so long as the results
were kept confidential.

illegitimacy when dealing with judge-made constitutional law having little or no cognizable
roots in language or design of Constitution). See generally Erwin Chemerinsky, The Vanish-
ing Constitution, 103 HARV. L. REV. 45, 48-51 (1989) (examining Court's retreat from sub-
stantive due process theories); Henry P. Monaghan, Our Perfect Constitution, 56 N.Y.U. L.

See supra note 70.

See Department of Justice v. Reporters Comm., 489 U.S. 749, 762 (1989) (recognizing
privacy interest in avoiding disclosure of personal matters contained in FBI criminal rap-
sheet); Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 457 (1977) (constitutional in-
terest in avoiding disclosure of personal matters). Contra Whalen v. Roe, 429 U.S. 589,
603-04 (1977) (upholding New York statute that mandated reporting names of prescription
drug users).

Whalen, 429 U.S. at 605. The Whalen Court, however, did not deal with the broader
issue of constitutionality of disclosing private information. Id. On at least one occasion, the
Court has invalidated a restriction on abortions that opened detailed medical reports for
public inspection. See Thornburgh v. American College of Obstetricians & Gynecologists,

analysis of blood or urine can reveal private medical facts and infringes on expectation of
privacy).

(absent unauthorized disclosure of drug test results, signing of consent form and submis-
sion of urine did not, in itself, trigger infringement of right to privacy), aff'd, 844 F.2d 562
(8th Cir. 1988); see also National Treasury Employees Union v. Von Raab, 489 U.S. 656,
663-64 (1989) (upheld regulations requiring urine testing for customs employees involved
in drug interdiction wherein results could not be disclosed absent employee's written
consent).

375
In evaluating cases dealing with disclosure of private and personal information, a court will balance the state's need for the information against the degree of harm likely to result from disclosure. It is submitted that a state, in determining whether to disclose a health care worker's test result, should apply a similar balancing test. The need or utility to the state of information regarding the health care worker's HIV status is likely to diminish with the adoption of uniformly enforceable infection control guidelines. It is suggested that such uniform procedures will minimize the need for stigmatizing certain health care worker's solely because of their HIV status. Further, disclosure of a health care worker's HIV-positive status will often result in public humiliation and loss of livelihood. This potential harm evinces the need for stringent safeguards to prevent unauthorized disclosure.

IV. Equal Protection

The Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." In evaluating the viability of an equal protection claim, courts employ one of three standards of review: (i) strict scrutiny; (ii) intermediate scrutiny; or (iii) minimal rational scrutiny.

A. Strict Scrutiny

Under a strict scrutiny standard of review, a state has the burden to establish that its action was justified by a compelling state
Testing Health Care Workers

interest. Strict scrutiny is limited in its application and is only applied when a fundamental right or a suspect class is involved. Fundamental rights have been defined as those liberties that are "deeply rooted in our nation's history and tradition." The right most likely to be implicated in the mandatory testing context is the right of privacy discussed in Part III of this Note. As indicated in Part III, it is speculative as to whether the right to privacy will provide adequate protection to a health care worker against mandatory testing.

In the absence of a fundamental right, AIDS-infected health care workers may be entitled to this standard of review if they are able to establish that they are members of a suspect class. For strict scrutiny purposes, a suspect class is one which has been "saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." It has been suggested that

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83 See supra note 80 and accompanying text (describing state's burden under strict scrutiny analysis); see also San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 10 (1972). In a strict scrutiny analysis, a state must show that the chosen action was the least restrictive alternative, that the legislation was drawn with precision and closely tailored to achieve the state's objective. Id.

84 See infra notes 85-87 (cases involving fundamental rights); see also infra notes 88-91 (suspect classification).


86 See supra notes 61-77 and accompanying text (analyzing right to privacy under Constitution).

87 See supra note 70 and accompanying text (cases and materials discussing uncertainty of constitutional right of privacy).

88 See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (suspect class is "the target of . . . prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1972) (stating suspect class is one that has been "subjected to . . . a history of unequal treatment . . . [and] relegated to a position of political powerlessness . . . ").

In 1944 the Court held that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." Korematsu v. United States, 323 U.S. 214, 215 (1944). Justice Black added that "courts must subject [such restrictions] to the most rigid scrutiny." Id.: see also Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (classifications based on sex, race, alienage and national origin are inherently suspect).

89 San Antonio, 411 U.S. at 28.
this standard should be applied only to review legislation which is
discriminatory on the basis of race and that a suspect class must
have had a "'lengthy and tragic history' . . . of segregation and
discrimination." Health care workers will have difficulty demon-
strating that AIDS victims have had such an oppressed history,
not only because the AIDS epidemic is a relatively new disease,
but also because AIDS patients are not politically powerless and
have been given legal safeguards to protect their interests, includ-
ing anti-discrimination legislation.

B. Intermediate Scrutiny

If a group of individuals not entitled to suspect classification be-
come targets of discrimination, or if important, but not funda-
mental rights are threatened, an intermediate standard of review
may be applied. This analysis requires a state to demonstrate

"[T]here is no language used in the [Fourteenth] Amendment, nor any historical evidence
as to the intent of the Framers, which would suggest to the slightest degree that it was . . .
designed in any way to protect 'discrete and insular minorities' other than racial minorities
. . . ." Id.; GERALD GUNTHER, CONSTITUTIONAL LAW 589-91 (11th ed. 1988) (examining
Supreme Court's reluctance to recognize new suspect classes).

91 City of Cleburne, 473 U.S. at 472 (Marshall, J., concurring in part, dissenting in part)
(quoted University of Cal. Regents v. Bakke, 438 U.S. 265, 303 (1978)).

92 See supra note 2 and accompanying text (discussing discovery of AIDS).

93 See infra notes 101-127, and accompanying text (AIDS victims are entitled to federal
protection against discrimination); see also City of Cleburne, 473 U.S. at 445. The Cleburne
Court rejected the notion that the mentally retarded were a suspect class because of laws
protecting them. Id. The Court held that "legislative response which could hardly have
occurred and survived without public support negates any claim that . . . they have no
ability to attract the attention of the lawmakers." Id. Justice White added that the
favorable legislation "belies a continuing antipathy or prejudice." Id.; The Supreme Court,
1984 Term, 99 HARV. L. REV. 120, 164 (1985) (reviewing Justice White's analysis in
Cleburne).

94 See, e.g., Clark v. Jeter, 486 U.S. 456, 461 (1988) (intermediate scrutiny applied to
classifications discriminating on basis of sex or illegitimacy). Intermediate scrutiny has also
been employed when legislation burdens a 'quasi-suspect' class or a 'quasi-fundamental'
Richardson, 411 U.S. 677, 688 (same). See generally Ray G. Spece, Jr., Justifying Invigorated
Scrutiny and the Least Restrictive Alternative Review: Civil Commitment and the Right to Treat-
ment as a Case Study, 21 ARIZ. L. REV. 1049, 1052-53 (1979) (advocating least restrictive
principle as independent form of intermediate scrutiny).

For contrary authority, where the Supreme Court has declined to recognize certain clas-
ses as quasi-suspect, see City of Cleburne, 473 U.S. at 442 (mentally retarded); Matthews v.
Lucas, 427 U.S. 495, 506 (1976) (illegitimate children); San Antonio, 411 U.S. at 28 (po-
verty stricken individuals); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1090
(3d ed. 1991) (intermediate scrutiny protects classes with "outdated stereotypes" and "long

378
Testing Health Care Workers

that its action is substantially related to the achievement of an important state interest.98

It is submitted that mandatory testing of health care workers is not substantially related to the state’s important interest in controlling the spread of AIDS. Since the probability of transmission from health care worker to patient is minuscule, testing such workers will not prevent the spread of AIDS to any substantial degree.98 A state’s interest is further diminished by the unreliability of current testing procedures.97 A state will, therefore, have difficulty defending mandatory testing under an intermediate scrutiny analysis.

C. Minimal Rational Scrutiny

In a minimal rational scrutiny analysis, a state only has to show that its action is rationally related to a legitimate state interest.98


97 See Frances Taylor, Letter to the Editor, The Risk of Transmission of HIV From Health Care Professional to Patient, 266 JAMA 1955-36 (1991) (citing Working Group of the New York Academy of Medicine, The Risk of Contracting HIV Infection in the Course of Health Care, 265 JAMA 1872-73 (1991)). It has been argued that “basing widespread testing of health care professionals on [a] single poorly understood cluster of cases is... both unjustified and ill advised.” Id.

96 See Sheldon H. Landesman et al., Special Report: The AIDS Epidemic, 312 NEW ENG. J. MED. 521, 524 (1985). HIV testing procedure is not completely accurate, for instance, out of 40 million tests, 40 thousand will be false positives. Id.

This standard favors any state legislation which advances a legitimate purpose.\textsuperscript{99} It is submitted that under this standard, states may even argue that the public's fear of possible transmission of the AIDS virus provides a rational basis for requiring mandatory testing of all health care workers. It is argued that to enact legislation in response to the public's unsubstantiated fears is unwarranted. Nevertheless, it is suggested that challenging mandatory AIDS testing under this standard of review would be fruitless.

V. Federal Anti-Discrimination Statutes

Apart from protections guaranteed by the Constitution, health care workers with AIDS may also seek coverage under federal legislation enacted to prevent employment discrimination. In enacting guidelines, states must evaluate the applicability of these federal statutes to HIV-positive health care workers. If a state's guidelines conflict with the congressional intent of the federal anti-discrimination statutes, the state guidelines may be preempted and thus unenforceable.\textsuperscript{100}

A. Rehabilitation Act of 1973

The broad purpose of the Rehabilitation Act of 1973 is "to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living."\textsuperscript{101} In protecting handicapped persons from discrimination, section 504 of the Rehabilitation Act provides: "No otherwise qualified individual with handicaps . . . shall, solely by reason of..."


Testing Health Care Workers

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 . . . .”

In 1987, the United States Supreme Court, in *School Board of Nassau County, Florida v. Arline*, extended protection of handicapped workers under the Rehabilitation Act to persons suffering from contagious diseases. In *Arline*, a school teacher, who was discharged solely because of her recurring tuberculosis, brought an action under the Rehabilitation Act. The Court held that persons with contagious diseases are not excluded from protection under the Rehabilitation Act, relying in part on the intent of Congress when they broadened the definition of “handicapped individual” in 1974 to include “not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity . . . .” In determining whether the teacher was “otherwise qualified” for the position as required under section 504, the *Arline* Court took into account the safety and health risks involved in the job, and found that she was indeed qualified. Responding to

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104 Id. at 289 (teacher with tuberculosis considered handicapped under Rehabilitation Act); see Frank W. Volk, *HIV Positive Employees as “Handicapped” Persons Under State and Federal Law: West Virginia Follows the Trend to Cast Aside Irrational Fear and Prejudice in Favor of Competent Medical Evidence and Sound Public Policy*, 93 W. Va. L. Rev. 219, 238 (1990) (holding in *Arline* extended scope of Rehabilitation Act to persons with AIDS).
105 *Arline*, 480 U.S. at 276.
106 Id. at 289.
107 Id. at 278-80. The amendment reflected “Congress’ concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from ‘archaic attitudes and laws’ and from the ‘fact that the American people are simply unfamiliar with and insensitive to the difficulties confronting individuals with handicaps.’” Id. at 279 (quoting S. Rep. No. 1297, 93d Cong., Sess. 50 (1974)); see 29 U.S.C. § 706 (6)(B). The definition of “handicapped individual” was broadened in 1974 to read: “[A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such persons major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.” Id. The *Arline* Court found that the definition of “physical impairment” in the Code of Federal Regulations included tuberculosis, and that the regulations defined “major life activities” to include working. Id.; see also Waltzer, supra note 51, at 73. Because the HIV virus damages both the hemic (blood) and lymphatic systems, and destroys the blood cells needed for the immune system to work, the HIV infection is “indisputably” a physical impairment. Id.
106 *Arline*, 480 U.S. at 288. The *Arline* Court suggested applying the factors proposed in
the argument that tuberculosis should be distinguished since it is a contagious disease, the Court concluded that "[a]llowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of section 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." The *Arlene* decision, although not an AIDS-related case, was an important decision in determining how employees with AIDS would be treated. In 1988, the Civil Rights Restoration Act codified the decision in *Arlene* by amending the definition of a "handicapped individual" to include people with contagious diseases as long as the disease did not endanger the person or others. Following *Arlene*, a number of courts applied section 504 to safeguard the rights of AIDS-infected persons. However, it should be noted that the American Medical Association's brief which included: "(a) nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." *Id.*

109 *Id.* at 284.


111 David C. Wyld & Sam D. Cappel, *AIDS-Related Dementia and the Treatment of AIDS-Affected Individuals Under Changing Employment Law*, 42 LAB. L.J. 204, 207-08 (April 1991). In debating the extent to which others had to be endangered, the legislature concluded that "the threat posed by the contagious disease must be a significant risk of transmission or harm . . . to allow for discrimination based on a person having AIDS or seropositive status." *Id.* at 208 (citing Lawrence Gostin, *HIV-Infected Physicians and the Practice of Seriously Invasive Procedures*, 19 HASTINGS CENTER REP. 32, 32-39 (1989)).

112 See *Martinez v. School Bd.* of Hillsborough County, Fla., 861 F.2d 1502, 1506 (11th Cir. 1988) (segregation in school of mentally handicapped child with AIDS not supported by "remote theoretical possibility" of transmission, and therefore violated Rehabilitation Act); *Chalk v. United States Dist. Ct. Cent. Dist. of Cal.*, 832 F.2d 1158, 1158 (9th Cir. 1987) (classroom teacher with AIDS is "handicapped"), and "otherwise qualified" within the meaning of section 504 of Rehabilitation Act); *Cain v. Hyatt*, 734 F. Supp. 671, 685 (E.D. Pa. 1990) (plaintiff's removal from position as regional partner of Hyatt Legal Services because he had AIDS violated Pennsylvania Human Relations Act); *Doe v. Centinela Hosp.*, 57 U.S.L.W. 2034 (Rehabilitation Act violated when plaintiff was excluded from alcohol drug prevention program because he was HIV positive); *Ray v. School Dist. of Desoto County, 666 F. Supp. 1524, 1534-36 (M.D. Fla. 1987) (segregation in schools of hemophiliac children with AIDS is not allowed unless genuine threat is posed to rest of school population); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 383 (C.D. Cal. 1986) (HIV positive asymptomatic kindergarten children protected under § 504 of Rehabilitation Act as long as they do not pose significant risk to classmates or teachers); *District 27 Community Sch. Bd. v. Board of Educ.*, 130 Misc. 2d 398, 415, 502 N.Y.S.2d 325, 336 (N.Y. Sup. Ct. 1986) (children with AIDS considered handicapped under Rehabil-
scope of its protection is limited, since the Rehabilitation Act only covers employees of a program or activity receiving federal financial assistance and government contractors.\(^{113}\)

**B. Americans with Disabilities Act**

The recently enacted Americans with Disabilities Act ("ADA") seeks to set clear and consistent standards to eliminate discrimination of disabled individuals.\(^{114}\) Unlike the Rehabilitation Act, the ADA no longer limits the scope to government contractors and recipients of federal funds.\(^{115}\) The ADA will greatly expand the
protections from discrimination already provided under the Rehabilitation Act of 1973. By July 1992, the ADA will cover all organizations with more than twenty-five employees, and by July 1994, all organizations with fifteen or more employees.\(^{118}\)

The definition of “disability” under the ADA is essentially the same as under the Rehabilitation Act, and, it appears that it will include persons with AIDS, HIV and AIDS-Related Complex (“ARC”).\(^{117}\) Aside from increasing the number of employees covered, it is anticipated that the ADA’s broader definition of “otherwise qualified” individual and what is required from the employer in terms of “reasonable accommodation” will further broaden the coverage of AIDS patients.\(^{118}\)


\(^{118}\) See Wyld & Cappel, supra note 111, at 209. Under the Rehabilitation Act, a handicapped person had to be able to perform the essential functions of his or her job to be considered “otherwise qualified.” Id. Under the ADA, however, a handicapped person is “otherwise qualified” if he or she can “perform the essential functions of the job,” even if through “reasonable accommodation” made by the employer. Id. It appears that the legislature intended something different by “reasonable accommodation” in the ADA than in Rehabilitation Act and Title VII. Id. Under those statutes, the definition of “reasonable accommodation” concerned whether it was an “undue hardship” on the employer. Id.

In clarifying the term “reasonable accommodation” under the ADA, one commentator has stated:

The ADA gives a series of examples which include “job restructuring, part-time or modified work schedules, re-assignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials, or policies the provision of qualified readers or interpret-
C. Recent Application of Discrimination Laws to AIDS-Infected Employees

In 1989, the United States District Court for the Eastern District of Louisiana in *Leckelt v. Board of Commissioners of Hospital District No.* 1 was presented with the case of a nurse who refused to submit the results of an HIV test to the hospital where he was employed. His responsibilities in the hospital included “making rounds, assessments, giving medication, both orally and by injection, starting I.V.’s, changing dressings, performing catherizations, [and] giving enemas.” After being discharged by the hospital, he brought an action claiming the hospital violated the Rehabilitation Act by firing him based on a belief that he was HIV positive. The court rejected the plaintiff’s contention that the hospital had violated section 504, stating that the grounds for his discharge—non-compliance with the hospital’s infection con-

ers, and other similar accommodations for individuals with disabilities.” 42 U.S.C. § 12111(9)(B) Even with these examples, it is suspected that the interpretation of “reasonable accommodation” will be the most litigated aspect of the federal civil service handicap regulations, and for guidance parties will look to the earlier interpretation of “reasonable accommodation” in the federal sector. A defense that can be made by the employer is “undue hardship” and this will be determined on a case by case basis, with the courts looking at the company’s “overall size, budget and profitability of the employer, and the financial impact of the accommodation being suggested.

G. Jerry Shaw & William L. Bransford, *Americans with Disabilities Act to Affect Virtually Every Employer*, 8 American Corporate Counsel Association Docket 22, available in WESTLAW, TP-ALL library, at *8. In determining whether a person can fulfill the essential functions of the job, the federal civil service regulations give employers discretion in determining what the essential functions are. *Id.* at *4. It would be an abuse of this discretion if an Employer were to consider something an essential function which the present employee was not performing. *Id.* Employers will have to have a written job description of each position in order to defend themselves against a suit. *Id.* at *5; Jeffrey T. Johnson, *The Americans with Disabilities Act: A Primer for Employers*, 20 Colo. Law 473, 474-76 (1991) (effect of ADA on employers).


*Id.* at 1388. Employees of the hospital were aware of the fact that Leckelt was a homosexual, and that his roommate of eight years had recently died of a secondary infection incident to AIDS. *Id.* Moreover, the hospital was aware that Leckelt had gone to New Orleans and had been tested for HIV, although he asserts that he never picked up the results. *Id.* at 1383; see Waltzer, supra note 58, at 67-68.

*Leckelt*, 714 F. Supp. at 1382.

*Id.* at 1385. The court stated that Leckelt had failed to prove that the hospital perceived him as HIV positive, relying on the testimony of the witnesses from the hospital who all agreed that “no determination had been made with regard to the results of plaintiff’s test.” *Id.* at 1386. The court further reasoned that if the hospital perceived the plaintiff to be HIV positive, they would not have repeatedly asked him for his test results over a three week period before discharging him. *Id.*
control requirements—were proper.\textsuperscript{123}

The Superior Court of New Jersey, in \textit{Behringer v. The Medical Center at Princeton},\textsuperscript{124} applied its state discrimination law when a doctor was temporarily suspended and later restricted from surgical privileges after testing positive for HIV.\textsuperscript{125} The court found that although the plaintiff was protected under the state discrimination law, the Medical Center had justified its actions by showing a reasonable probability of harm to the patient.\textsuperscript{126}

It is suggested that although persons with AIDS may be protected under the Rehabilitation Act and the Americans with Disabilities Act, the decisions in \textit{Leckelt} and \textit{Behringer} demonstrate that the protection afforded by the statutes is not absolute. As in \textit{Leckelt}, hospitals can still discharge HIV-positive employees who do not follow the infectious disease standards.\textsuperscript{127} Further, as illustrated in \textit{Behringer} only a low level of potential harm to patients is needed to justify the hospital's suspension of health care workers or restriction of their privileges.

It is further suggested that through the Rehabilitation Act of 1973 and the Americans with Disabilities Act, Congress intended

\textsuperscript{123} \textit{Id.}
\textsuperscript{125} \textit{Id.} at 1283.
\textsuperscript{126} \textit{Id.} at 1255. When the president of the medical center first became aware of Behringer's HIV status, all Behringer's upcoming surgeries were canceled. \textit{Id.} at 1257. Later the department's chairman recommended that Behringer continue his surgical practice and eventually the board of trustees confronted the issue. \textit{Id.} A committee was assigned to investigate and found that "HIV positivity alone is not a reason for restricting a Health Care Worker from [the performance of] invasive procedures on the basis of data currently available." \textit{Id.} at 1257-58. At this time no cases had been reported of HIV transmission from a health care worker to a patient. \textit{Id.} at 1258. When the full board of trustees met, and in light of the committee's findings, they voted to require HIV-positive surgeons to get the patient's consent before performing invasive procedures. \textit{Id.} at 1258. The final policy adopted by the board of trustees read in pertinent part: "A physician or health care provider with known HIV seropositivity may continue to treat patients at The Medical Center at Princeton, but shall not perform procedures that pose any risk of HIV transmission to the patient." \textit{Id.} at 1260. The board also retained its prior requirement that a physician obtain "written informed consent from the patient prior to the performance of surgical procedures." \textit{Id.} at 1260. With regard to notifying a patient that he has been exposed to a health care worker's HIV-positive blood, the court addressed the additional injury of a patient thinking he or she may be HIV positive but not knowing. \textit{Id.} at 1265. The court concluded that if Behringer were to continue performing invasive procedures there would be a "reasonable probability of substantial harm." \textit{Id.} at 1283. Instead of concentrating on the probability of transmittal, the court balanced the risk to the patient against the value of having the infected health care worker perform invasive procedures. \textit{Id.} at 1281.
\textsuperscript{127} \textit{See supra} notes 119-23 and accompanying text.
Testing Health Care Workers

to discourage unjustifiable employment discrimination against persons inflicted with diseases such as AIDS. Placing burdensome restrictions on HIV-positive health care workers would clearly be inconsistent with such congressional intent and should be considered by states in complying with Amendment 781.\textsuperscript{128}

CONCLUSION

The Kimberly Bergalis case casts doubt upon one of the most vital relationships in our society: health care workers and their patients. The low risk of HIV transmission from health care workers to patients, however, does not warrant mandatory AIDS testing of such workers or the imposition of severe restrictions on their practices. Despite the tragedy which accompanies AIDS, states must give deference to the constitutional rights of health care workers and their protections under federal law.

Mary Carter & Pankaj Malik

\textsuperscript{128} See generally supra notes 23-35 and accompanying text.