ASSESSING THE HUMAN RIGHTS EFFECT OF THE PUBLIC HEALTH RESPONSE TO THE AIDS EPIDEMIC: A MODEL FOR BALANCING SOCIETY'S CONCERNS AGAINST INDIVIDUAL AND PATIENT RIGHTS

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INTRODUCTION

The Acquired Immune Deficiency Syndrome undeniably presents a critical health threat to our society[1] to which a rationally adequate health response is imperative. As a phenomenon of recent origin,[2] the legal, social and ethical dimensions of the disease are currently in the process of unraveling. Traditional public health tools which find legal support in the State's police power and the jurisprudence evolving from it[3] have been found to be inadequate if not repressive. Even so fundamental a human rights concept as the right to health has not been operationally defined by statute although it has gained the status of official state policy in the 1987 Constitution.[4] An organized body of statutes, administrative regulations and case law addressed towards the end of mapping out the parameters of the right to health as it affects the AIDS epidemic ought to be the leitmotif of official government policy.[5]

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[1] *See* Weiss, *Aids: Balancing the Physician's Duty to Warn and Confidentiality Concerns*, 38 Emory Law J, 279 (1989).

[2] The outbreak of AIDS as a yet-unnamed epidemic was first separately reported by the Centers for Disease Control as an unusual outbreak of Pneumocystiis carinii pneumonia and Kaposi's Sarcoma among homosexual men in 1981. *See* SHILTS,*supra*, note 1. *See also* Fauci, *NIH Conference- The Acquired Immune Deficiency Syndrome: An Update*, 102 ANNALS INTERNAL MED, 800 (1985).

[3] *See* for e.g., Greene v. Edwards, 265 S.E. 2d (1980); Hurst v. Warner, 65 S.E. 387 (1909); *Ex parte Cassel*, 204 P. 364 (1922).

[4] CONST., art.II, sec. 15.

[5] It has been suggested that the state policy provisions in Article II of the 1987

This paper is about AIDS and the public health response to the epidemic, generally. In looking at the human rights impact of government policy on those affected, the writer aims to focus on two areas, namely, confidentiality and mandatory testing, in the process of suggesting parameters for assessing the human rights impact of public health policy in AIDS.

II. MEDICAL BACKGROUND

A. Etiology and disease course

AIDS is caused by the Human Immunodeficiency Virus, a retrovirus that was variously called the human T-lymphotropic virus type III or the lymphadenopathy associated virus.[6] The virus enters the host cell's immune system by infecting T-lymphocytes, replicating within the reproductive machinery and gradually inhibiting it.[7] As a result, various functional defects occur in essentially all the limbs of the immune system, leading to its progressive destruction and rendering the infected host susceptible to a variety of opportunistic infections and malignant conditions not normally observed in individuals with intact systems. Following collapse, a variable combination of a number of well-recognized indicators[8] herald the full-

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Constitution are self executory.

[6]UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 1,9 (1986). The two terminologies reflect the politics involved in the early discovery of the AIDS virus. It is now recognized that Dr. Jean Luc Montagnier, leading a French research group from the Pasteur Institute in Paris, isolated a virus which he named the Lymphadenopathy Associated Virus(LAV). American Researchers at the National Institute of Health led by Dr. Robert Gallo laid claim to the discovery, setting off a transcontinental conflict which dragged both the U.S. and French governments into the fray and which was eventually resolved when Gallo was subsequently forced to admit that the virus he "discovered" might have been a "contaminant" from a sample sent to the NIH earlier by Montagnier's team. At stake in the conflict was a possible Nobel Prize. The now widely-used term HIV was a compromise, a relic from the early controversy.

[7]Ho, *Quantitation of Human Immunodeficiency Virus Type I in the Blood of Infected Persons*, 321 New Eng. J. Med., 1621 (1989).

[8]The CDC'c indicators are: 1) existence of one or more opportunistic diseases that are at least moderately indicative of an underlying immunodeficiency; 2) absence of all known causes of such deficiency other than HIV infection; and, 3) absence of all other known causes for reduced resistance to opportunistic infections other than infection with HIV. SLOAN, AIDS LAW: IMPLICATIONS FOR THE INDIVIDUAL AND SOCIETY, 2 (1988). The opportunistic infections associated with AIDS were originally classified into two groups:

blown condition, which include *Pneumocystis carinii* pneumonia, Kaposi's Sarcoma, other neoplasms, and other life-threatening manifestations indicative of immunosuppression. Recently, the Centers for Disease Control(CDC) expanded the definition of AIDS to include individuals suffering from recurring pneumonia, pulmonary tuberculosis, invasive cervical cancer and CD4 levels of less than one fifths of that of a normal individual.[9] Between initial infection and the full blown syndrome, the HIV infected individual may pass through various other stages of the disease.

Not all individuals infected with the HIV virus experience the symptoms and conditions associated with AIDS. Two stages intermediate between initial infection and full blown disease have been identified by medical experts as the assymptomatic stage and the Aids Related Complex(ARC) stage.[10] Assymptomatic individuals exhibit no other symptoms of the viral infection, apart from testing positive with HIV tests. Individuals with ARC experience weight loss, persistent diarrhea, lymphadenopathy, fatigue, fever and skin rashes.[11] A mild degree of cognitive impairment is possible.[12]

Aids is an invariably fatal disease. While an HIV-infected individual may be assymptomatic for many years, over 40 per cent of infected individuals will develop the full blown syndrome within eight and one half years, and all will develop AIDS within twelve to fifteen years of the initial infection.[13]

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infections and tumors. Infections identified in the early days of the syndrome include protozoal infections such as Toxoplasmosis; fungal infections such as, Cryptococcosis; various infections of the lung and the central nervous system; CMV, Candida, etc. Central nervous system malignancies and infections are now viewed as common. AGGLETON, AIDS: SCIENTIFIC AND SOCIAL ISSUES, A RESOURCE FOR HEALTH EDUCATORS, 9-10 (1989).

[9]41 MMWR, 1-19 (Dec. 18, 1992).

[10]Alternatively, a person infected with the HIV virus may at some stage following infection develop a stage of persistent generalized lymphadenopathy (PGL) without experiencing other symptoms of the disease. *See*, AGGLETON, *supra*, at 11.

[11]*Ibid.*

[12]Grant, *Evidence for Early Central Nervous System Involvement in the Acquired Immune Deficiency Syndrome and Other Human Immunodeficiency Virus(HIV) Infections*, 107 Ann. Int. Med., 828 (1987).

[13]NATIONAL ACADEMY OF SCIENCES, CONFRONTING AIDS- UPDATE, 35-36 (1988).

B. Transmission

There are three primarily recognized routes of transmission of HIV: 1) through infected blood or blood products; 2) semen; and 3) from mother to child either transplacentally or through breast feeding or other perinatal fluids.

There is no evidence indicating that the HIV virus may be transmitted through casual contact.[14] The routes of transmission reflect groups especially at risk of contracting the virus. In the early period of the epidemic, homosexuals formed the largest risk group, owing to unsafe sexual practices allowing for the free interchange of body fluids and the contact of semen with the bloodstream through anal intercourse. Of late, the number of cases spread through heterosexual transmission has increased, proportionately narrowing the number of cases arising from homosexual contact. While the risk of contracting AIDS from a single incident of vaginal intercourse with an HIV carrier is estimated between 1 in 500 and 1 in 1000[15], the risk of transmission is increased with additional exposures[16] and magnified by exposure to multiple sexual partners. Apart from transmission through sexual intercourse, transmission through the sharing of infected needles has been the other major route of spread of the infection. Blood transfusions, contaminated blood products (in hemophiliacs), etc., only form a small and insignificant proportion of the total cases.[17]

C. Testing

Tests are available for HIV infection, not AIDS. AIDS is a syndrome of over thirty life-threatening infections and tumors which follow infection with the HIV virus.[18] Under CDC parameters, individuals who exhibit a

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[14]AGGLETON, *supra*, at 6.

[15]Hearst *Preventing the Heterosexual Spread of Aids: Are We Giving Our Patients the Best Advice*, 259 J. Am. Med. A. 2429, 2429 (1988).

[16]Padian, *Male-to-Female Transmission of the Human Immunodeficiency Virus*, 258 J. Am. Med. A. 788, 789 (1987).

[17]Of the 33,245 cases of AIDS in adults and adolescents in the United States reported to the CDC as of April 6, 1987, 66% of those infected were homosexuals and bisexual males, 17% were I.V. drug users, 8% were homosexuals who used IV drugs, and 4% were infected through heterosexual intercourse." Berge, *Setting the Limits of Involuntary HIV Antibody Testing Under Rule 35 and State Independent Medical Examination Statutes*,44 Fla. L. Rev. 767 at 780, n.97, (1992) *citing* MACHER, AIDS AND THE LAW 1.2 (1987).

[18]AGGLETON, *supra*, at 46.

variable combination of conditions in the list including testing positive for HIV, are diagnosed with the syndrome.

Prior to 1984 only nonspecific immunological tests were used to determine the presence of HIV infection.[19] Current testing methods determine the presence of antibodies to HIV produced by the immune system in response to viral protein components. The major diagnostic tests for the HIV virus are the enzyme linked immunoabsorbent assay (ELISA) and the Western Blot Test.[20] As stated above, both are tests for the detection of antibodies to HIV from which infection with the virus is generally inferred. The first test, ELISA is highly sensitive and specific, i.e., it produces few false positive and false negatives.[21] In the clinical setting, the standard method utilized by diagnosticians is to first confirm a positive test obtained with the ELISA technique with the Western Blot Test.[22] A positive Western Blot Test is considered evidence of infection with HIV.

D. Problems

The absence of an infallible test creates potential problems in terms of analyzing the results and acting upon them. As stated earlier, a small proportion of those tested will prove to be either false positive or false negative. A false positive result identifies an uninfected individual as an HIV infected person exposing him to the social consequences of the disease. This alone provides substantial fodder for those opposed to universal mandatory testing. Moreover, it is now recognized that there is generally a three to twelve week delay after exposure before these tests would yield a positive result. Some individuals will test negative even after the twelfth week though this would appear extremely unusual by the sixth month. The danger with this situation is that an individual tested during this latency

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[19]Madhock, *Lack of HIV Transmission by Casual Contact*, 112 Lancet 823, 863 (1986). Hugging, kissing, shaking hands or even sharing utensils with an HIV infected individual or by being coughed at (droplet transmission) have not been found to cause AIDS.

[20]Kunin, *Aids and Rape: The Constitutional Dimensions of Mandatory Testing in Sex Offenders*, 238, 241 (1990), *citing*, M.J. Barry,et. al., *Screening for HIV Infection: Risks, Benefits, and Burden of Proof*, 14 Law, Med and Health Care 259,260, (1986);*see also* Bayer, *HIV Antibody Screening for the Human Immunodeficiency Virus*, 258 J. Am. Med. A., 1757, 1758(1987).

[21]SLOAN, AIDS LAW:IMPLICATIONS FOR THE INDIVIDUAL AND SOCIETY 4 (1988).

[22]ELISA is less reliable than the Western Blot Test but is also significantly cheaper. *See* note 20, *supra*.

period, unalerted, remains capable of unknowingly spreading the virus to others. The absence of HIV antibodies does not guarantee absence of infection.

These inherent limitations of the HIV tests compounded by errors in their administration and interpretation ultimately affect policy decisions influenced by the results of broad-based or even mandatory testing programs. As of the moment, medical researchers have not yet developed a test intended for mass screening that will indicate with certainty the presence of HIV infection. The lack of experience together with lack of guidelines in interpreting and correlating these tests further restrict their reliability. Consequently, society remains ill-equipped to deal with the special problems faced by individuals testing positive for the AIDS virus, particularly those who are unaware of the consequences of violations of their privacy and individual rights.

III. THE SOCIAL DIMENSION

Given the fatal nature of the disease and the fear surrounding AIDS, calls for Draconian measures to stem the tide of the epidemic were inevitable.[23] Calls for mandatory testing of high-risk groups were common.[24] Countries like Cuba and Saudi Arabia imposed strict quarantine measures.[25] Towards 1990, at least 20 states in the United States had some form of mandatory testing for certain high risk groups.[26] In the Philippines, calls for mandatory testing of commercial sex workers and the prison population have been made by no less than the Department of Health. However, apart form loosely implemented immigration control measures,

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[23]Branham, *Opening the Bloodgates: The Blood Testing of Prisoners for the Aids Virus*, 20 Conn L.R., 763, 763-764 (1988).

[24]*Mandatory Aids Testing: The Slow Death of Fourth Amendment Protection* (Note), 20 Pacific L.J. 1413 (1989).

[25]As of 1989, a total of 4 million persons were screened for HIV infection in Cuba and plans were afoot to screen the entire population. The Cuban official health policy on the AIDS epidemic includes life-long isolation of the sick. A disturbing facet of this program is that Cuba's entire AIDS campaign is under the direction of Cuba's counterpart of the KGB, the office of State Security. Gordon, et al, *Controlling AIDS in Cuba*, 321 N Eng J Med 829 (1990). Cuba, however incorporates the policies of the Pan American Health Organization (PAHO) but includes two other measures not practiced among Pan-American States, namely, the screening of the entire population and the isolation of seropositive persons. Quinn, et al, *Aids in the Americas: An Emerging Public Health Crisis* 320 N Eng J Med 1005, at 1007 (1989).

[26]Among the states: Arkansas, California, Colorado, Idaho, Nevada, Rhode Island and Washington.

measures directed at addressing the epidemic in the country have not reached the levels of hysteria experienced by others. It is from this juncture that a rational, uniform and comprehensive AIDS program, sensitive to individual rights, could take off.

From its onset, the AIDS epidemic has affected groups which are traditionally targets of social discrimination. Identification with the homosexual and intravenous(I.V.) drug population in the United States has been blamed for the relative paucity of research funding for AIDS during the early stages of the epidemic.[27] Currently, homosexuals and bisexuals still form the largest population of HIV infected carriers in the U.S. This is followed by I.V. drug users, and individuals using contaminated blood products, such as Hemophiliacs. In the Philippines, the largest group of HIV infected individuals have been the commercial sex workers, followed by homosexuals. IV drug use, relatively uncommon in our country, is a minor factor.

Demographics of the epidemic are important in formulating a rational health response. In connection with this, sensitivity to the special social concerns of high risk populations are an important aspect of dealing with the epidemic in terms of devising appropriate and effective health approaches because these unique concerns give rise to special legal problems in areas affecting individual and patient rights. Certainly, definite tensions arise when valid public health imperatives clash with individual rights. The task of determining which concerns ought to take precedence should be guided by established constitutional and legal principles in the area of individual rights.

IV. THE CONSTITUTION AND THE POLICE POWER

The 1987 Constitution for the first time enunciates an explicit "right to health" of the people. Article II provides:

> Sec.15 The State shall protect and promote the right to health of the people and instil health consciousness among them.

In the same context, the Constitution provides:

> Sec. 9. The State shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people

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[27]See SHILTS, AND THE BAND PLAYED ON (1987).

> from poverty through policies that provide adequate social services, promote full employment, a rising standard of living and improved quality of life for all.

The sanctity of family life, the strengthening of the family and the protection of the life of the mother and the life of the unborn from conception are likewise formally embodied in Article II of the 1987 Constitution. The new provisions ostensibly provide a basis for greater government participation in areas concerning the health of the people by showcasing "health" as a human right. However, it is submitted that the provision on the "right to health" is superfluous, except as an abstract expression of State principle because for all practical purposes, enactment of health measures have been traditionally subsumed by the police power. As the police power is an inherent attribute of sovereignty, some authors are of the opinion that the right to health provision in the 1987 Constitution is unnecessary. However, Professor Ruth Roemer, explains that:

> The principal function of a constitutional provision on the right to health care is symbolic. It sets forth the intention of government to protect the health of its citizens.A statement of national policy alone is not sufficient to assure entitlement to health care; the right must be developed through specific statutes programs and services, but setting forth the right to health care in a constitution serves to inform the people that protection of their health is official policy of the government and is reflected in the basic law of the land.[28]

It is to be noted, however, that another superfluous provision expressing the right of the people to a balanced and healthful ecology, might provide the Philippine Supreme Court with a basis for enunciating environmental policy in a case currently before it.[29] The petitioners in the case are minor children, assisted by their parents, invoking "intergenerational responsibility," for what remains of the planet Earth.[30] Whether the Philippine Supreme Court would treat the provision on the right to a balanced and healthful ecology as merely symbolic remains to be seen. However the decision may turn out, the Court's disquisition on the matter will inevitably influence the manner in which the right to health provision will be treated in future case law.

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[28]Fuenzalida-Puelma, et. al. eds *The Right to Health* 509 PAHO 20 (1989).

[29]Opposa v. Factoran, G.R. No. 101083.

[30]This case, dealing with issues of first impression, impugns the government's policy on the country's virgin forests and the log ban.

The right to health carries with it a correlative duty on the individual not to be a threat to the health of others. Proceeding from this principle the State, in the promotion of the public health, possesses the power to adopt regulations designed to foster the health of the people.

A. Police power in general

The Latin maxim *salus populi est suprema lex* embodies the character of the entire spectrum of public health laws aimed at promoting the general welfare of the people under the State's police power. As an inherent attribute of sovereignty which "extends to all public needs"[31] the power has been described in jurisprudence as the least limitable[32] and certainly the most insistent.

Describing the nature and scope of the police power, Justice Malcolm, in *Rubi v. Provincial Board of Mindoro*[33] wrote:

> The police power of the State," one court has said..."is a power coextensive with self-protection, and is not inaptly termed 'the law of overruling necessity.' It may be said to be that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety and welfare of society" Carried onward by the current of legislature, the judiciary rarely attempts to dam the onrushing power of legislative discretion, provided the purposes of the law do not go beyond the great principles that mean security for the public welfare or do not arbitrarily interfere with the right of the individual."[34]

In an early case involving an order of the Director of Health directing the owner of a residential house to improve sanitary conditions in his premises, the court, over the objections of the plaintiff noted:

> [P]olice power...extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the State. According to the maxim *Sic utere tuo ut alienum non laedas*, which being of universal application, it must of course, be within the range of legislative action to define the mode and manner in which every one may so use his own so as not to injure others.[35]

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[31]Noble State Bank v. Haskel, 219 U.S. 112 (1911).

[32]Smith, Bell and Co v. Natividad, 40 Phil 136 (1919).

[33]39 Phil. 660, 708 (1919).

[34]*Id.*, at 708-709.

[35]Case v. Board of Health 24 Phil 250, 280 (1913).

The scope of the power is therefore extensive, rendering it the most pervasive of the State's inherent powers.[36]The areas in which the power extends have been summarized over the years as including: "(a) the preservation of the state itself and the unhindered execution of legitimate functions; (b) the prevention and punishment of crime; (c) the purity and preservation of public morals; (f) *the protection and promotion of the public health*; (g) the regulation of business, trades, or professions the conduct of which may affect one or the other of the objects just enumerated; (h) the regulation of property and rights of property so far as to prevent its being used in a manner dangerous and detrimental to others; (i) the prevention of fraud, extortion, and oppression; (j) roads and streets, and their preservation and repair; and (k) the preservation of game and fish."[37]

B. Police power in public health regulation

The area which concerns this study is of course the area of public health regulation as it affects individual and patient rights in the AIDS epidemic. Legislation aimed at addressing the problems associated with AIDS essentially falls under the state's plenary power to enact measures protecting the public health. In *Guerin v. City of Little Rock*[38] the court capsulized the importance of this area by emphasizing that if the state cannot enact regulatory measures aimed at the protection of public health, disease spread would be unabated leading to damage to the state itself. Thus, regulations issued to deal with an epidemic have been sustained as an exercise of the police power.[39] In *The Health Department vs Trinity Church,* a court sustained orders affecting sanitation of premises on the basis of the police power.[40]

Laws enacted pursuant to the State's police power cannot be sigmatized as being unconstitutional if they reasonably tend to protect the public health from a real threat or menace, even if the effect of the statute is to deprive a citizen of a vested right. However, the government cannot act capriciously in invading private rights. There must be a showing that the power is in fact exercised to reasonably promote the public health.

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[36]CRUZ, CONSTITUTIONAL LAW 39 (1991).
[37]BLACK, HANDBOOK ON CONSTITUTIONAL LAW, 342 (1985).
[38]155 S.W. 2d 719, 721 (1941).
[39]Jen Ho v. Williamson, 103 F. 1020 (1900).
[40]145 N.Y. 32,49.

Furthermore, the statute must be narrowly drawn so as not to be oppressive.

V. INDIVIDUAL AND PATIENT RIGHTS

A. Rights in General

Rights are essentially justified claims that require some action or some exercise of restraint from others.[41] An enormous spectrum of rights exists, but this paper will only concern itself with the spectrum of individual rights affected by the AIDS epidemic, i.e., those belonging to the category of institutional legal rights and those affecting area of patient rights, which is essentially an extension of the right to privacy, *i.e.*, individual autonomy.

Institutional legal rights are generally created or abolished by decisions made by the appropriate people or appropriate authority, and include those enshrined in the Constitution and in statutes. Some rights impose obligations for the performance of certain acts while other rights impose the duty not to do certain things.[42] What is important is that "Individual rights are political trumps held by individuals and are crucial in representing the majority's promise to the minority that their dignity and equality will be respected."[43]

B. Individual rights affected by AIDS measures

Most governmental responses to the AIDS crisis, including such measures as obtaining lists of HIV-infected individuals from private physicians and entities for the purpose of making policy decisions, mandatory testing, and quarantine, etc. will set the government's power and duty under the police power to protect the public health against the individual's constitutionally guaranteed rights. The epidemic, its fatal nature, and the huge social and economic cost itself are enough justification for the exercise of the government's power to enforce laws designed to control the spread of the epidemic.[44] Violations of two sacrosanct individual rights namely, the right to privacy and the right against unreasonable searches

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[41] GILLON, PHILOSOPHICAL MEDICAL ETHICS, 54 (1991).

[42] *Id*, at 57.

[43] *Id.*

[44] *Mandatory Aids Testing* (Note), 43 Vanderbilt L.R., 1607, 1617 (1990).

and seizures are inevitable.[45]

1. Right to Privacy

"Privacy is a broad, abstract and ambiguous concept." Contrary to common impression, the American Constitution contains no explicit right to privacy, only an inference taken from "penumbras" found in various amendments to the U.S. Constitution. To compound the concept of delineating the exact nature of the privacy right, a survey of traditional privacy cases would reveal that there is no simple grouping of judicial decisions that allows one to discern a particular doctrine of privacy (which has been) adopted by the justices that can be easily conveyed.

The human body has been described to be the most private of all realms. In the defense of this realm Courts of late have been unusually vigilant in upholding violations of the right to make choices about what to do with one's body based on indeterminate and amorphous conceptions of privacy. The swords have been actively drawn in privacy battle grounds involving two main areas: 1) contraception,[46] and 2) abortion rights.[47] In both instances the privacy right to procreative control and the right over what to do with one's body has been upheld by the Court on the basis of the right to privacy. Even before its decisions in *Griswold* and *Roe,* the court previously had the occasion to affirm privacy rights involving procreation,[48] invasions of ones body,[49] to send children to private schools[50] and to travel abroad.[51] The privacy right in the United States has of course been more the product of theoretical logic than constitutional text.[52]

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[45]Even in the United States, with a fairly liberal and sympathetic over-all AIDS policy, overzealousness on the part of enforcement agencies could lead to potential violations. A temporary visitor from the Netherlands on his way to an international AIDS conference was detained at the customs and immigration area after AZT was found in his luggage. A judge upheld his exclusion but granted him a waiver. After an outcry, the INS made a tactical retreat, clarifying that the case was not a precedent. *In re Hans Paul Verhoef,* U.S. Immigration and Naturalization Service (Case) *cited in* Gostin, *infra.*

[46]Griswold v. Connecticut, 381 U.S. 479(1965).

[47]Roe v. Wade, 410 U.S 113 (1973).

[48]Skinner v. Oklahoma 316 U.S. 535 (1942).

[49]Rochin v California 342 U.S. 165 (1952).

[50]Pierce v Society of Sisters 268 U.S. 510 (1925).

[51]Aptheker v. Secretary of State 378 U.S.500 (1964).

[52]As Justice Douglas observed: "We deal with a right to privacy older than the Bill of Rights." Douglas, J. concurring opinion, See note 46, *supra.*

Its first coherent exposition was made in a seminal article written by two students of the Harvard Law School in the Harvard Law Review in 1890.[53] As stated earlier, the U.S. Federal Constitution contains no explicit right to privacy and the jurisprudential development of the right was aided immensely by the evolution of jurisprudence involving the 14th amendment. Nonetheless, conservative critics continue to view the right to privacy as enunciated in *Griswold* and *Roe* as an unwarranted expansion of judicial power and its resulting protection for immoral lifestyles. Proponents of the privacy right contend that its origins antedate even the U.S. Constitution. From this exposition, the relevance of the privacy right doctrine to our discussion on AIDS policy as it affects certain risk groups becomes evident. The right to privacy is a major factor to be considered in the enunciation of AIDS policy affecting high risk groups already traditionally stigmatized.[54]

An interesting development in the jurisprudence of the right to privacy in the United States was that while the U.S. Court has protected some aspects of sexual autonomy within the context of a right to privacy, the Court has rejected claims to an unqualified right to privacy in the area of consensual sexual relations among adults in the case of *Bowers v Hardwick*[55] It is said that the U.S. Supreme Court's surprising disquisition in *Bowers* was a by-product of the AIDS hysteria. In *Bowers,* the Court refused to construe the privacy right as protecting homosexual activity among adults within the privacy of their own homes. Moreover, the Court found a rational basis for upholding laws existing in 24 states outlawing sodomy. The Court's holding in *Bowers,* moreover, could be used as a springboard in this country for government to resist claims for protection by those affected by the AIDS epidemic.

The AIDS era has inevitably created new questions for the Supreme Court to deal with in the area of the right to privacy. As *Bowers* has demonstrated, the outcome may not be easily predictable even if the question centers on privacy rights doctrine. These questions will after all, inevitably focus upon the intrusiveness of measures designed to determine the scope of the epidemic or to control the spread of the epidemic. Specifically, they will unavoidably deal with questions involving 1) the

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[53]*See* Warren & Brandeis, *The Right to Privacy,* 4 Harv. L.Rev., 193 (1890).

[54]HIV positive individuals encounter all kinds of harassment and discriminatory practices. See Purnell, *Firm Action Quashes Harassment of Gays,* USA TODAY, Dec. 4, 1990, A6.

[55]78 U.S. 186, (1986).

privacy of communications between physicians and their patients; 2) disclosure of HIV status; 3) the propriety of broad mandatory testing policies; and 4) the propriety of mandatory tests for high risk groups. The creation of a "zone of privacy" deserving some form of constitutional or statutory protection against government intrusion for individuals affected in some way or another by the epidemic is a novel area in the public health field which requires unique ways of balancing other state prerogatives. Existing mechanisms to safeguard the "welfare" of the people will require a reassessment in the context of the epidemic.

a. Confidentiality of HIV Related Information

It is in the context of the right to privacy that the question of confidentiality of HIV related information arises.

Even before courts articulated a right to privacy, the concept of confidentiality formed an important part of the relationship of the medical profession with the community at large. The Hippocratic Oath, written in the fourth century B.C., intoned that "Whoever I shall see or hear in the course of my profession...I will not disclose, holding such things to be holy secrets."[56] Stated differently, medical information about a patient cannot be disclosed to others (except those connected with the care of the patient) because such information falls within a wall of individual privacy traditionally protected by law. In contemporary terms, the emerging consensus that medical data is appropriately within the sphere of a patient's private control is closely linked to the development of the idea of 'privacy' as a socially valued, and legally accepted area of constitutional rights."[57] This legally protected zone encompasses questions about who shall have 1) access to information about the patient's medical history; and 2) who should have control over such information, since it is universally acknowledged that the patient has an important stake in knowing who shall have access to and control of medical data about himself.[58]

These areas of control and access are particularly significant in the case of HIV-infected and AIDS-stricken individuals, because revealing the

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[56]*Cited in* BELITSKY, AIDS AND THE LAW 201 (1987).

[57]Particularly with AIDS. *See,* Macher, *supra* note 19. *See also,* SLOAN, supra, note 24.

[58]The gathering of individually identifiable medical information under statutory authority, should be controlled in a manner which prevents distribution of information beyond places or persons particularly authorized in the law itself.

results of a test or even of the fact of having undergone a test for the virus can have serious social consequences.[59] As a result of discrimination directed at HIV-infected individuals, protecting the confidentiality of such information is an integral aspect of any public health thrust designed to combat the epidemic.[60] The reason for this is obvious: public health officials need the trust, confidence and cooperation of people with AIDS and those closely working on the epidemic in order to get a hand on the problem.[61] The willingness of HIV infected individuals and AIDS sufferers to access the health care system is an important component of many basic public health tools particularly those involving identification, notification, screening, behavioral risk reduction, treatment and treatment trials.[62] However, an undercurrent of distrust directed against the public health establishment exists, since a majority of those affected have been traditionally on the receiving end of officially sanctioned and practiced discrimination by both government officials and members of the public health community.[63] For instance, the gay rights movement, whose fundamental tenet lay in the right to privacy from official government interference, early in the epidemic saw AIDS as a significant threat to gains it had won and a significant hurdle to its long-term goals liberation.[64] Consequently, AIDS advocates, mostly from the gay movement, vigorously challenged the validity of implementing a number of aggressive public health measures traditionally utilized against other infectious and communicable diseases, which posed a threat to privacy and to furthering the goals of the gay struggle.[65]

Thus, the factors which underscore a need for confidentiality in the handling of HIV-related information all center on the fact of the unusual social impact and consequences of the disease on people affected in one way or the other by the epidemic. These factors include:

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[59]AGGLETON *supra*, at 49.

[60]*Id.*

[61]Which might require a re-thinking of the entire official government policy on the AIDS epidemic.

[62]BAYER, PRIVATE ACTS, SOCIAL CONSEQUENCES: AIDS AND THE POLITICS OF PUBLIC HEALTH 142-146 (1989).

[63]*See, for eg.*, Villaflor v. Summers, 41 Phil. 62 (1920) and Villavicencio v. Lukban, 39 Phil. 778(1919).

[64]*See*,SHILTS, *supra*, note 1.

[65]*Id.*

1. The "disproportionately large" representation of socially stigmatized groups among those infected with HIV.[66]

2. Discrimination against people with the virus or with AIDS.[67]

3. Leakage of AIDS-related information, which leads to the suspicion that breaches in confidentiality are common.[68]

4. The need for public health officials to gain the confidence of affected groups in the fight against the disease.[69]

In spite of measures undertaken to prevent unauthorized release of HIV-related data, there are still, however, frequent disclosures of supposedly-confidential HIV-related information. These leakages only confirm fears by HIV-infected individuals that breaches of confidentiality are quite common and that the steps taken to prevent information leaks by those responsible for or who possess data -are not iron-clad.[70] This, together with the above-enumerated factors of social stigma, mistrust and discrimination, has created valid concerns about the appropriateness of cooperating with aggressive public health programs which were viewed as equivalent to a surrender of one's privacy and autonomy and exposing oneself to needless discrimination, violence, and hatred.[71] In the context of these well-founded concerns, the guarantee of confidentiality- apart from the fact of traditional statutory and constitutional protections which earmark a zone of privacy in these areas thereby meets a practical need in the public health arena: confidentiality assures access to the health care system by those who would otherwise shun it.

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[66]*Id.*

[67]*Id.*

[68]*Id.*

[69]*Id.*

[70]*See* Gostin, *The AIDS Litigation Project: A National Review of Court and Human Rights Commission Decisions, Part I: The Social Impact of Aids*, 263 JAMA 1961, 1965(1990). *See also*, Mydans, *Names List Leads to Ethics Debate*, N.Y. Times, July 30, 1991, A10.

[71]"Many AIDS-infected individuals fear the social consequences more than the physical aspects of the disease itself." Interview with Dr. Renato Dantes, Chief, Clinical Epidemiology Unit, U.P. College of Medicine- Philippine General Hospital, July 26, 1992.

b. Mandatory Reporting

The State's interest in controlling communicable diseases justifies mandatory reporting of those found to be afflicted with certain diseases. AIDS has been no exception and is currently subject to mandatory reporting requirements in all but two states of the United States.[72] Mandatory reporting of HIV positive individuals has likewise been ordered from health care facilities, both private and public, by the Philippine Department of Health. This compounds the problem of handling HIV-related data confidentially because those who undergo tests, or who are diagnosed with AIDS have a "reasonable expectation" that data thus gathered would fall only into the hands of those directly responsible for their care. In the United States, a number of mechanisms have been utilized by authorities to prevent disclosure of medical data in the hands of health officials.[73] The Center for Disease Control's right, for instance, to protect the records of participants in various epidemiologic researches has been upheld by the Court.[74] The U.S. Federal Rule of Civil Procedure, often used in protection of information cases, for instance provides that courts:

> ...may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery may be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that the deposition being sealed be opened only by order of the court; (7) that a trade secret or *other confidential research, development or information not be disclosed or be disclosed only in a designated way.*[75]

The rule is obviously framed to prevent disclosure of identifying characteristics of participants in scientific trials and has been utilized by a number of court decisions to address the privacy interest of research

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[72]AGGLETON, *supra*, at 133.

[73]Adams, *Medical Research and Personal Privacy*, 30 Vill. L. Rev., 1077, 1100-11 (1985).

[74]In Lampshire v. Procter and Gamble, 94 F.R.D. 58 (N.D. Ga 1982). A tampon manufacturer sought CDC data related to the relationship of a tampon brand with the Toxic Shock Syndrome. The court upheld the CDC's right to withold data which would lead to the identification of the participants in the trial.

[75]Rule 26(c)(Italics supplied).

participants against demands for disclosure. A similar provision in the Philippines may well be specifically crafted to address demands for iron-clad confidentiality in official HIV-related data. Any release of information relating to personally identifying characteristics of HIV afflicted individuals should undergo the strictest scrutiny under statutes designed to protect the HIV-infected individual's privacy concerns.

2. The Right Against Unreasonable Searches and Seizures:

1. Constitutional framework

Numerous administrative inspections and other intrusive investigations are made pursuant to regulatory legislation. The Constitution's proscription against unreasonable searches and seizures guards against unnecessary governmental intrusion in the area of individual privacy and security by imposing a two pronged standard before individual privacy and security could be intruded upon.

The 1987 Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.[76]

This provision of the Constitution has its roots in the Fourth Amendment of the U.S. Constitution. In its current form, the provision contains a number of modifications designed to strengthen the unreasonable search and seizure right as a reaction to the country's experience during martial law.

Unlike other provisions taken from the American Bill of Rights the Fourth Amendment traces its origins mainly in American, not English history. The provision signified the determination of the drafters of the U.S. Constitution to "prevent the occurrence of a specific historical grievance, the high-handed search measures in the American Colonies

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[76]CONST., art.II, sec.2.

preceding the American Revolution."[77]

2. Scope

The search and seizure provision protects an individual's expectation of security and privacy against unwarranted government intrusions. It limits the discretion of government agents to obtain evidence of illegal and improper behavior and guards against capricious invasions of the individual's "right to be let alone." [78] Constitutional Commissioner Fr. Joaquin Bernas expounds: "Section 2, however, is not just a circumscription of the power of the State over a person's home and possessions. More important, it protects the privacy and sanctity of the person himself."[79]

What are the limits of this constitutional protection?

In *Katz v. United States*,[80] Justice Harlan, in his concurring opinion explained that the provision protects those expectations of privacy "that society is prepared to recognize as reasonable."[81]

A clue to the limit of the application of the provision is found in the search and seizure provision's two clauses, that is, the fundamental law only protects those searches that are found to be "unreasonable."[82] Absence of a reasonable expectation of privacy places the intrusion outside the protective clause of the guarantee.

The "reasonableness" requirement, in turn, would depend on the circumstances surrounding the intrusion. In a medical context, for instance, a blood test taken from a semi-conscious individual after a driving accident will be found to be reasonable. While non-consensual blood extractions and tests under most other circumstances violate a person's physical integrity, invade reasonable expectations of privacy, and constitute a search and seizure, a number of exceptions have been identified under a "special needs

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[77]KERMIT HALL,THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 311 (1992).

[78]Olmstead v. U.S., 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[79]JOAQUIN BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES, 85 (1987).

[80]389 U.S. 347,361 (1967).

[81]*Ibid.*

[82]*Id.*

doctrine."[83] "Compulsory administration of a blood test," it has been held, "plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment."[84] Thus, the provision protects only against bodily intrusions which are not justified by the circumstances or those which are carried out in an improper manner.[85] In an early Philippine case, the Court upheld a forced physical examination on a woman accused of adultery not because it was "reasonable" or outside the strictures of the search and seizure provision but because the examination of the accused did not violate her right against "self-incrimination."[86] A statute authorizing local health officials to forcibly examine individuals arrested with valid warrants for vagrancy, prostitution, rape or other sex offenses in order to test for the presence of venereal disease was held to be a valid exercise of the police power by the legislature to prevent the spread of certain contagious diseases.[87]

As stated earlier, whether a test would be reasonable under the search and seizure provision would depend on the circumstances in which the subject's blood was extracted and would require a balancing of the State's need to conduct a search against the invasion which the search entails.[88] "In application, the Court has approached the balancing test from three different perspectives, depending on whether the search furthers law-enforcement aims, implements administrative regulations, or fulfills some special need."[89] Each perspective requires its own unique method of balancing.

A search which furthers law enforcement aims, i.e., a criminal search usually involves a bodily intrusion with intent to discover evidence

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[83]These are situations in which individual privacy interests are weakened and governmental interests are correspondingly heightened. In New York v. Burger, 482 U.S. 691, (1987), the United States Supreme Court expanded the scope of warrantless administrative searches to sanction those inspections occurring in situations of special need. In Marshall v. Barlows, Inc., 436 U.S. 307, 320-321 (1978) the Court merely required a "general administrative plan" to satisfy the warrant requirement for an administrative search.

[84]Schmerber v. California, 384 U.S. 757, 767 (1966).

[85]*Id., at 768.*

[86]Villaflor v. Summers, 41 Phil. 62, 64 (1920).

[87]United States v. Tan Teng, 23 Phil 145 (1912).

[88]Kunin, *supra*, at 247.

[89]*Id.*

to be used in a criminal proceeding.[90] "In the criminal context, the Court has demonstrated that a search's reasonableness lies in following procedures set out in the warrant clause of the Constitution."[91] In this context, a search and seizure is not reasonable unless probable cause has been determined personally by a judge following specific requirements set forth by the fundamental law. Probable cause is therefore the primary requirement for the issuance of a warrant, and its existence is also one of the requirements for those narrowly drawn instances where a search or seizure may be made without a warrant.[92]

The purpose of governmental intrusion in an administrative search is to obtain information that can be used to protect, for example, the public health or to ensure compliance with certain governmental regulations.[93] In cases of administrative searches, warrants are issued to inspect persons or premises if reasonable statutory or administrative standards require these intrusions.

In *Camara v, Municipal Court*[94] the United States Supreme Court relaxed the probable cause requirement utilized in criminal searches by seeking to strike a balance between the governmental and privacy interests in holding that the administrative search in question was valid because "reasonable legislative and administrative standards" allowed the inspection.[95] In 1987, the U.S. Supreme Court further relaxed the warrant requirement by holding that a number of circumstances will justify a warrantless administrative search[96] if the invasiveness of the administrative search is minimal; if the intrusion furthers a "substantial state interest"[97]; if it is appropriate, *i.e.*, it promotes the regulatory scheme;[98] and if it is sufficiently certain and regular.[99] The Court has acknowledged the impracticality of requiring individualized suspicion for

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[90]Schmerber, *supra* at 767.
[91]*Id.*
[92]BERNAS, *supra, citing* U.S. vs Addison 28 Phil. 566 (1914).
[93]*See* note 45, *supra*, at 1618.
[94]387 U.S. 523 (1967).
[95]*Id.*, at 538.
[96]New York v. Burger, 482 U.S. 691 (1987).
[97]*Id.*, at 702.
[98]*Id.*
[99]*Id.*, at 703.

every administrative intrusion, because such a requirement would likely thwart the purpose behind the search. This is especially true in searches aimed at determining the HIV status of certain high risk populations. It is important to lay stress to the fact that administrative searches attempt not to find evidence of crimes but to curtail various other types of conduct threatening to the public welfare. Nontheless, any inspection must alert the individual to the possibility of being subject to a search, which, in turn, must be circumscribed in time, place and scope.[100]

Compulsory testing: violation of the search and seizure provision?

In *Schmerber vs California,*[101] the U.S. Supreme Court held that a compulsorily obtained blood test constitutes a violation of the Fourth Amendment.[102] Finding that the evidence of intoxication was a circumstance which justified extraction of blood for alcohol level determination during police investigation of a vehicular homicide, the United States Supreme Court nonetheless held the blood test therein reasonable because possible evidence of driving under the influence of alcohol would have disappeared within the time it took to obtain approval for a warrant.[103]

The "special need" for mandatory testing

With a few exceptions, mandatory testing in AIDS has been universally viewed with suspicion. The discrimination and ostracism experienced by many of the highly publicized victims of the epidemic have prompted many individuals to avoid testing, even when the possibility of exposure to the virus is strong. Moreover, those tested feel a compulsion to have the results kept secret. The epidemic has inspired discrimination in the workplace and school and has prompted a varied number of immigration controls.[104] Thus, fear of disclosure creates a grave public

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[100] *Id.*

[101] 384 U.S. 757 (1966).

[102] *Id.*, at 767.

[103] *Id*, at 767-769.

[104] For eg., the United States Immigration and Naturalization Service(INS) amended the Medical Examination of Alien Regulations to include AIDS as a dangerous contagious disease. Under this amendment a mere positive HIV test would bar an individual from entering the U.S. The amendment was originally proposed by Dr. Otis R. Bowen, then Secretary of Health, who felt that it would be grossly anomalous to include other venereal diseases in the list, but not a highly fatal disease such as AIDS Those who opposed the new regulation feared that certain minorities would be barred or subjected to harsher immigration controls on mere suspicion of

health problem, affecting the ability of health care providers to address the AIDS crisis rationally. Mandatory testing might seem a logical solution, but it has been rejected by a vast majority of public health officials because of the possibility of driving those at risk underground.[105] Evaluating the effectiveness and possible consequences of mandatory tests is obviously a complicated and technical process which will invariably result in an increased rate of false-positives, particularly when low-risk groups are involved.[106] Conversely, when high-risk populations undergo widespread screening, a high rate of false negatives occur, giving many of those at risk a false sense of security and increasing the possibility of disease spread.[107] Moreover, though confidentiality is generally an integral part of any mandatory testing program, there is justified fear that through negligence or mismanagement, official action will lead to public disclosure of otherwise confidential test results. Thus, because current testing methods are not absolutely reliable, the actual benefits of universal testing are subject to much debate. Furthermore, because the coercive nature of widespread involuntary testing is incompatible with the degree of cooperation and trust needed to convince people to alter their lifestyles and behavior, public health officials are almost universal in rejecting involuntary testing.

3. Exigent Circumstances

There are, however, "special governmental needs" beyond the usual need for law enforcement, where searches may be made without a warrant, and which do not seek evidence of criminal activity. Recent jurisprudence on the subject matter suggests two general exceptions to the requirement for a warrant which would be applicable to cases involving possibly HIV-infected subjects, *i.e.*, 1) when exigent circumstances require exception to the warrant requirement; and 2) when regulation or law provides a constitutionally adequate substitute, narrowly drawn, under a "special needs" setting. A number of examples follow.

1) In *New Jersey v. TLO*,[108] the U.S. Supreme Court in 1985 allowed

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harboring the virus. AGGELTON, *supra* at 81.

[105]Lawrence Altman, *U.S. is Considering Much Wider Tests for AIDS Infection*, N.Y. Times, Feb. 4, 1987, A1.

[106]Barry, *supra*, at 265-66.

[107]*Ibid.*

[108]169 U.S. 325 (1985).

school officials to search students without a warrant and without probable cause to believe violations of specific laws or the school regulations on the basis of suspicion of wrongdoing reasonably related in scope to the need for calling the search. The Court held that to strictly require a warrant for school officials' administrative searches into student lockers would greatly interfere with the need for flexibility in maintaining order, in dealing with disruptive situations, and in undertaking "swift and informal" disciplinary procedures required to keep the peace in schools.[109] In a concurring opinion, Justice Blackmun asserted that the type of search conducted by the school officials in this case fell within "those exceptional circumstances in which special needs, beyond the normal need for law enforcement make the warrant and probable cause requirement impracticable."[110]

2) In *O'Connor v. Ortega*[111] and *Griffin v Wisconsin*[112] the Court utilized a balancing analysis in upholding the special need to search employee's desks and probationer's homes, respectively. In *O'Connor* the U.S. Supreme Court's majority maintained that expectations of privacy in the workplace are limited if the countervailing interest is the maintenance of order.[113] Requirement for a warrant might prove "unwieldy" because of the potential of impairing employee efficiency and discipline. [114] In *Griffin*, the Court upheld the warrantless search by Wisconsin probation officers, underscoring a "special need" which outweighed their individual privacy interests.[115]

Thus, the special need for an immediate response to a threatening situation justified the warrantless searches in these cases.

Closer to the subject which concerns this article, the U.S. Supreme Court in the *Skinner v. Railway Labor Executives' Association*[116] and the *National Treasury Employees Union v. Von Raab*[117] cases, sanctioned

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[109] *Id.*, at 340.
[110] *Id.*, at 351 (Blackmun J., concurring.)
[111] 480 U.S. 709 (1987).
[112] 483 U.S. 868 (1987).
[113] *Id* at 725.
[114] *Id* at 722.
[115] *Supra* note 81, at 873-874.
[116] 489 U.S. 602 (1989).
[117] 489 U.S. 656 (1989).

mandatory blood and urine tests, respectively, to meet two special needs:

> 1) the need to test railroad employees after a railway accident for evidence of drug use in the *Skinner case*; and
>
> 2) the need to test frontline drug personnel in the case of *Von Raab*.

The first case, *Skinner*, sought to address the need for the public safety of railway passengers and involved a mandatory drug testing program for all railroad employees involved in any train accident, a collision or any accident resulting in the death of a railway employee. In *Von Raab* the question of the integrity of drug enforcement agents directly involved in the frontline battle against drug smuggling was put to test by a program which required all customs officials applying for frontline positions- including those which involved drug arrests or which exposed the drug official to confidential information- to undergo mandatory blood tests. Both cases recognized that blood and urine tests for drug use were Fourth Amendment searches.[118] In any event, the regulations narrowly and specifically outlined the circumstances under which testing was to be conducted, vesting only minimal discretion in the administrators of the test, and were made only under circumstances which outweighed individual privacy interests. Because of the crafting of the statutes involved, the Court found virtually no facts for a neutral magistrate to evaluate.

These two cases clearly illustrate circumstances under which mandatory testing of certain individuals and groups can be made with little objection under the "special needs" doctrine. They suggest that suspicionless tests for HIV may be reasonable under the search and seizure provision, lowering the "constitutional floor" which requires strict individualized suspicion. Summarizing this relaxation suggested by the *Skinner and Von Raab* cases, what can be drawn from them are three conditions: first, that the government interest must be so important as to fall within a "special need"; second, that the "special need" outweighs the privacy interest, which must be minimal; and third, that the surrounding circumstances warrant a relaxation of the need for individualized suspicion which would otherwise place the government interest in peril. Many of the exceptions are founded on strict medical necessity and are extremely limited in scope, for instance:

> 1. Testing for blood transfusion or research or transplantation (as it is

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[118] The Skinner Court relied on Schmerber v. California, *supra*.

important to know whether the body fluids or organs are infected with HIV);

2. Testing of sex offenders to determine their potential to infect their victims;[119]

3. The special need to control the AIDS problem in prisons.[120]

In all these exceptions the expectations of privacy safeguarded by specific constitutional provisions must be carefully evaluated and balanced against the public health need. Because the "special needs requirement" demands specific circumstances under which the exceptions may be allowed, it would be difficult to conceive of specific situations allowing for widespread mandatory testing. Moreover, it is imperative that individuals forcibly tested under "special needs" exceptions should be guaranteed proper counseling and confidentiality.

VI. THE NEED FOR A COHERENT AND "BALANCED" PUBLIC HEALTH RESPONSE TO AIDS

The fatal nature of AIDS and the long latency period clearly allow for officially-sanctioned situations of mandatory testing, disclosure of HIV related information and occasional breaches in confidentiality. There will be rare exceptions where Draconian measures, such as quarantine would be unavoidable. Since public health policy in the AIDS epidemic ultimately rests upon measures which conflict with certain constitutional rights, illustrated in the first part of this article, it would be necessary to devise a method of assessing the impact of the public health response in these areas on the individual rights of those who harbor the virus; are in fact afflicted with AIDS; or who, for the reason of belonging to a high risk minority, may be singled out by the policy. The "special needs" exception only meets limited and specific situations. The complexity of the social aspect of the AIDS epidemic will provoke public health responses which might not fall under "special needs" situations, and which are bound to adversely impact on the individual rights of those affected. In formulating a public health response, it would be necessary to adopt a model which would alert government health officials on the possible impact of their AIDS-related programs. As Osborn warns, "private behavior is at issue, (and) the most effective policies will be those that enlist the cooperation of those at

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[119] *See* People v. Thomas 529 N.Y.S. 2d at 429-431 (1988) (where the court sanctioned HIV testing of a convicted rapist).

[120] Myers v. Maryland Div. of Correction, 782 F. Supp. 1095, 1096 (D. Md. 1992).

greatest risk, thus optimizing both human rights and the health of the public."[121]

The conflicts surrounding various state and local health policies in the United States, illustrated by some of the cases discussed in the first part of this paper have not been tested in our courtrooms. Given the relatively "pristine" state of AIDS policy making in the country, the models hinted at by current jurisprudence, particularly those involving government "special need" cases are limited and sometimes impracticable. It would be much more beneficial for the long term to devise or adopt an approach capable of addressing the multifarious concerns and problems surrounding AIDS policy-making.

VII. HUMAN RIGHTS AND THE AIDS EPIDEMIC

Apart from specific violations of the right to privacy and the constitutional right against unreasonable searches and siezures, the larger human rights dimensions of the epidemic have to be taken into consideration in analyzing the impact of various public health thrusts. While inconsequential derogations by government policy-makers are sometimes permitted on public health grounds on the basis of the police power, the general principle is that states, in dealing with HIV afflicted individuals, are bound to observe their human rights obligations towards these individuals in international law. While the specific observance and protection of these rights are left to national governments and legislatures, compliance with recognized human rights norms is virtually obligatory. This view is reinforced by the International Court of Justice's opinion in the *Barcelona Traction Case,* where it held that fundamental rights of an individual create obligations *erga omnes*[122] which limit states' discretion in determining the circumstances under which rights could be observed or ignored.[123]

Recognition of the nature of these obligations provides a counterweight against those who would argue that the Charter of the United Nations does not impose concrete obligations compelling member states to observe the corpus of human rights principles enunciated in various

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[121]Osborn, *Aids: Politics and Science,* 318 N Eng J Med 444(1988).

[122]Barcelona Traction Case (Second Phase) ICJ Reports (1970), 304.

[123]*See, contra,* GANJI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 164-165 (1962).

U.N. Documents. Moreover, the rights embodied in the UDHR have been substantially incorporated in the 1987 Constitution, creating a legally binding force, not merely on the basis of international human rights conventions but on the basis of Constitutional command. Our policy makers are thereby constitutionally bound to observe individual rights in dealing with the AIDS epidemic.

Not many public health officials are conversant with human rights doctrines. Health policy on AIDS is essentially crafted from a purely medical perspective, without regard for its effects on individuals from a human rights point of view. Whatever passes off in current policy as sensitivity towards individual rights is largely borrowed from foreign AIDS policy models. To compound this problem, the tools utilized by public health formulators are adapted from old battlefronts involving other sexually transmitted diseases, in which epidemiologic armamentaria were constrained by limited communications and scientific technology. For reasons explained earlier, traditional accoutrements appropriate for various other communicable and sexually transmitted diseases are inadequate and inappropriate, given the unique social dimensions of the epidemic and the scientific and technological milieu surrounding it.[124] In the absence of enabling statutes or jurisprudence on the matter, it is apparent that it would be necessary to develop effective built-in parameters designed to assist policy formulators in making strategies to address the AIDS epidemic.

First, define the public health goal.

A specifically tailored program will obviously lead to a more carefully thought out policy. A program whose purpose is to prevent the spread of the AIDS virus is too general and overbroad. But a preventive public health policy which is crafted to address the spread of AIDS among intravenous drug users targets a smaller population, focuses on the problem of needle-sharing and addresses that specific problem through a short-term program of providing for disposable needles and a long term program of drug rehabilitation. Well-defined policies mark and identify the goals of the intervention, promote discussion and awareness of legitimate health policy, and unmask unnecessary fears or biases.

Second, limit the public health goal.

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[124] *Id.* at 60.

The aim of a human-rights sensitive policy would be to limit the policy to those either directly affected or benefitted by a public health thrust. The strategy devised should not only be responsive to the problem but should be targeted to those who would best benefit from the policy. Well designed public health policies zero in on the "population in need", that is, it creates a group of people to whom the policy applies and one to whom it would not be applicable.[125] For instance, a policy of quarantining all persons positive for the virus would be grossly inappropriate, because it does not distinguish between assymptomatic carriers, HIV positive individuals who may have ARC, people with full blown AIDS who are not a threat to society and people with full blown AIDS who intentionally spread the virus to others. The last group may be an appropriate cohort for a quarantine study but not the rest. In other words, a sound policy should not be too broad, i.e., it should avoid the tendency to widen its reach to more people than necessary to achieve its purpose. Over-inclusive policies tend to target stereotypes or those minorities assumed to be at high-risk. The Cuban quarantine policy is an example of an over-inclusive policy. On the other hand, a policy narrow in scope targets such a small group of individuals that there would be a tendency to overlook a lot of people who ought to be reached by the policy.

Third, analyze the policy from a human rights perspective.

Aids policy making offers the greatest potential for formulating enlightened regulations designed to address a specific health concern with sensitivity for human rights. A policy neutral on its face, i.e., one which purports to affect all members of the same class, possesses possibilities for violating individual rights if it creates undue burdens on the individual or class of individuals affected. Requiring mandatory tests for all female commercial sex workers might seem to satisfy established constitutional requirements for a valid classification but it is a policy pregnant with potential violations of individual rights guaranteed by the fundamental law. Segregation in the classroom and denial of the right of a child to attend school,[126] is one area which has been addressed at a very early stage of the epidemic in the United States, although the Centers for Disease Control have suggested a restricted environment for school children in

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[125] *Id.*, at 63.

[126] CONST., art. XIV, sec. 1.

specific situations.[127] Nonetheless, most U.S. courts dealing with similar questions have affirmed the view that admissions requirements for the handicapped or disabled must not be unduly harsh or restrictive.[128] Discrimination in the workplace has been rampant, prompting a number of states in the United States to enact laws barring AIDS-based employment discrimination.[129] The spectrum of AIDS-related policy problems in the human rights arena is protean, but since these problems involve individuals with individual rights, they cannot be ignored.

Last, select the least-restrictive alternative.

The steps taken are aimed at selecting the least restrictive alternative. If this is woven into the policy then there would exist no circumstances under which extreme measures, such as quarantine, would be necessary.

CONCLUSION

The general model proposed by the last part of this article is a bare structure upon which future policy-making in the AIDS epidemic could be built. Though imperfect and certainly incomplete, it nontheless aims to address the confusion wrought by the absence of a body of organized jurisprudence and health laws for the purpose of meeting the concerns of HIV infected individuals.

AIDS is invariably fatal. It breeds irrational fears. The function of a public health policy which addresses some of these concerns is to liberate many from the bondage of those fears.

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[127] *Education and Foster Care of Children Infected with HLTV III*, 34 MMWR 517 (1985). A memorandum dated September 24, 1987 included AIDS as among illnesses protected by Section 504 of the U.S. Rehabilitation Act. *Cited* in *AIDS Balancing the Physician's Duty to Warn and Confidentiality Concerns* (Note), 38 Emory L.J., 279, 296 (1989).

[128] Brockman, *AIDS and Public Education*, 36 Emory L.J., 603, 613 (1987).

[129] Mathews, *The Initial Impact of AIDS on Public Health Law in the United States-1986*, J. Am. Med. A. 344, 347 (1987).