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Liability for Transmission of AIDS in the Hospital Workplace: A Critique of Mandatory AIDS Testing of Hospital Patients

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LIABILITY FOR TRANSMISSION OF AIDS IN THE HOSPITAL WORKPLACE: A CRITIQUE OF MANDATORY AIDS TESTING OF HOSPITAL PATIENTS

I. INTRODUCTION

In this modern era of advanced medical technology, it is both perplexing and frightening that we are confronted with a disease that defies our knowledge in its complexity, frustrates scientific and medical efforts to prevent its deadly effects, and provokes dread in people of all ages and races. AIDS (Acquired Immune Deficiency Syndrome) cases have been reported in all fifty states, the District of Columbia, and four United States territories. As of December

1. To aid the reader in this discussion, several medical terms should be defined and some statistics brought forward:

DEFINITIONS

"AIDS" - Acquired Immune Deficiency Syndrome. Persons affected with the syndrome have a suppressed immunity mechanism. Present knowledge indicates that AIDS is always fatal. AIDS in the Workplace: How to Prevent the Transmission of the Infection, 33 INT. Nurs. REV. 117, 118 (1986).

"Persons infected with HTLV-III (human T-lymphotropic virus type III, commonly known as the AIDS antibody)" - Persons diagnosed by a physician as having AIDS, other illnesses due to infection with HTLV-III as well as those who have virologic or serologic evidence of infection with HTLV-III but who are not ill. Id. at 118.

"Health Care Worker" - Nurses, physicians, dentists and other dental workers, optometrists, podiatrists, chiropractors, laboratory and blood bank technologists and technicians, phlebotomists, dialysis personnel, paramedics, emergency medical technicians, medical examiners, morticians, housekeepers, laundry workers, and others whose work involves contact with patient, blood or other body fluids, or corpses. Id. at 118.

AIDS STATISTICS

Persons considered to be at the greatest risk of contracting AIDS can be placed in six categories: Homosexual/bisexual men who do not use intravenous drugs (representing approximately 66% of all reported cases of AIDS); heterosexual intravenous drug uses (17%); homosexual/bisexual men who use intravenous drugs (8%); recipients of blood or blood products (2%); heterosexual partners of AIDS victims (4%); and hemophiliacs (1%). These six categories account for 97% of all AIDS victims. Baruch, AIDS in the Courts: Tort Liability for the Sexual Transmission of Acquired Immune Deficiency Syndrome, TORT & INS. L.J., Winter 1987, at 168-69.

8, 1986, there were 28,098 reported cases of AIDS in the United States, 394 of which were children. Over seventy-nine percent of those persons diagnosed before January 1985 have died.

In pursuit of a solution to the growing AIDS problem, the nation has turned to health care professionals to prevent the spread of the disease. One measure being widely debated within the health care community is the establishment of mandatory AIDS testing of patients upon admission to hospitals. Assessing the desirability of this measure necessarily requires a balancing of the legitimate goals of mandatory testing against the individual privacy and liberty interests of patients seeking medical care. The commonly professed goals of such testing include allaying the fears of hospital employees and preventing transmission of AIDS in the hospital workplace. An additional unstated motivation behind mandatory testing is the desire of the health care community to be seen as taking decisive action toward controlling the disease.

The implementation of mandatory AIDS testing in the hospital setting would, of course, directly impact the privacy rights of the patients tested. Not only would patients be subject to a physically invasive procedure requiring the drawing of blood, but test results would constitute information of a very sensitive nature, the disclosure of which could have potentially devastating effects upon an individual’s personal and professional life. Assessing mandatory AIDS testing, therefore, involves striking a balance between individual privacy rights and society’s interest in controlling the transmission of the disease and providing a safe workplace for the nation’s health care workers. One must also consider whether there are viable alternatives to mandatory AIDS testing, which would strike an acceptable balance of these interests and thus minimize the infringement of individual rights.

3. Id.
4. Id.
II. PRESSURE TO TEST

A. Fear of Transmission

Undoubtedly, health care professionals have very real concerns about the protection of their health during the care and treatment of AIDS patients. Moreover, the possibility of hospital liability for the infection of health workers exists, and perhaps because of this potential liability, mandatory AIDS testing of hospital patients has received much support within the health care community. Such testing is commonly justified as a necessary prerequisite to the establishment of procedures for workers coming in contact with infected patients in order to optimize the workers' protection.7

To properly evaluate the risks of transmission of the AIDS antibody to health care workers, it is necessary to understand some facts about the virus generally accepted within the scientific and medical communities:

1) AIDS is caused by an infectious agent, and therefore is an infectious disease. Appropriate precautions, procedures, and policies should be applied to protect the community from the spread of the disease.
2) The extent to which the AIDS virus already has spread into the general population is not completely understood. Current projections are based on a number of unverified assumptions.
3) The transmission of the AIDS virus does not occur through casual contacts. Sexual contact, septic intravenous equipment, and the administration of infected blood and blood products are the main modes of transmission.
4) Heterosexual transmission of the AIDS virus, especially from males to females,

7. Delegates from the West Virginia Medical Association met this year at the Annual Delegates Meeting and passed a resolution to ask the state legislators to enact a law requiring mandatory testing for the AIDS antibody of all hospital patients, persons applying for marriage licenses, pregnant women, and those convicted of sexual crimes. Stevens, supra note 4. This resolution directly conflicts with the recommendations of the American Medical Association, a discussion of which appears later in this article. See infra note 5 and accompanying text. The Center for Disease Control (CDC), located in Atlanta, Georgia, had previously set forth guidelines specifying that hospitals should refrain from testing patients or health care workers. Just recently, however, the CDC changed its position on the issue of testing patients. This shift in position is evidently due to the new federal guidelines for protecting health care workers created by the CDC and adopted by the Occupational Health and Safety Administration (OSHA). The new guidelines still require that the testing be on an informed consent basis, but now the decision of whether or not to test patients is not in the hands of hospital administrators. Wagner, New Federal Screening Guidelines Mark Change in CDC's Stance on AIDS Testing, 17 MOD. HEALTH CARE No. 19, at 116 (1987).
does occur.
5) Seropositive pregnant females will transmit the virus to their babies in a high percentage of cases.
6) Health care workers, especially those who perform invasive surgical procedures, and emergency room and laboratory personnel, are at some risk when caring for AIDS patients.
7) No patient with a clinical case of AIDS has survived the disease. The disease has been uniformly fatal.8

These facts, the sensational publicity surrounding AIDS, and its fatal consequences have led to great concern among health care workers about exposure to the virus during the handling of patients and bodily fluids.9 To date, the AIDS antibody has been isolated in blood, semen, saliva, tears, breast milk, and urine and is likely to be found in other body fluids.10 Documented modes of transmission include only the sharing of blood and semen.11 Because casual, non-intimate contact is not considered a mode of transmission of the virus, health care workers engaged only in casual and non-invasive procedures would appear to be at little risk of infection.12 Despite the seemingly remote risk of infection for those workers engaged in casual contact with AIDS patients, the fear of health care workers of handling AIDS contaminated body substances is not without justification. To date, over ten health care workers have been infected with the AIDS antibody.13

8. Report YY of the Board of Trustees, supra note 5.
9. Refusal of health care workers to care for AIDS victims is more common than one might expect. It has been reported in England, for example, that area nurses and environmental health officers have refused to remove medical waste produced in connection with the care of AIDS victims. Emergency paramedics have refused to give resuscitation to accident victims, or if they have not refused care, have dressed in the equivalent of a “space suit” in order to protect themselves. Searle, supra note 6.

In the United States, certain health care facilities may not be able to refuse care to an AIDS victim. For example, it is unlawful under § 504 of the Rehabilitation Act of 1973 for a health care facility that received government money to refuse health care to “handicapped” persons. 29 U.S.C. § 794 (1982). In Nassau County School Bd. v. Arline, 107 S. Ct. 1123 (1987) the United States Supreme Court held that “a person suffering from the contagious disease of tuberculosis can be a handicapped person within the meaning of the [Act].” Id. at 1124. In a footnote to that opinion, however, the Court expressly announced that it was not addressing the issue as to whether a person suffering from AIDS would receive equal consideration. Id. at 1228 n.7.

11. Id. at 682.
12. Id. at 683-84.
13. American Hospital Association, Special Satellite Bulletin on AIDS (available through the

https://researchrepository.wvu.edu/wvlr/vol90/iss2/17
Clearly there is some risk of exposure to the AIDS antibody in the health care setting. Hospitals and health care professionals can minimize this risk by adopting procedures to control transmission and by making sure that their workers follow these procedures. Nevertheless, no matter how elaborate the procedures, a hospital will never be a zero-risk atmosphere. Some health care workers will be exposed to the AIDS antibody.

B. Potential Legal Liability for Transmission of AIDS

A health care worker infected with the AIDS antibody on the job potentially has a claim under the West Virginia Workers' Compensation Act\(^\text{14}\) which provides compensation to employees for losses sustained by a disability occurring "on the job."\(^\text{15}\)

While the Act was designed as a no-fault recovery system\(^\text{16}\) intended to remove from the common-law tort system all negligently caused industrial accidents,\(^\text{17}\) a health care worker contracting AIDS

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17. Id.
may also attempt to assert tort liability against his employer on the grounds that the employer's failure to identify patients infected with the AIDS antibody, given the known risks of transmission, constitutes "willful, wanton or reckless misconduct" under the "deliberate intent" exemption to the Workers Compensation Act, thereby removing the employer's statutory immunity from suit.\textsuperscript{18}

Moreover, a body of case law exists establishing under certain circumstances a duty for a physician or hospital to warn third parties about coming in contact with an infectious person.\textsuperscript{19} For example, it has been held that a physician has a duty to exercise reasonable care in advising members of patient's family and others likely to be exposed to the patient of the infectious nature of typhoid fever.\textsuperscript{20} This duty, of course, is predicated on the fact that the doctor diagnosed the person as having the disease. Once a contagious disease is evident, a duty arises to use reasonable care in advising and warning third parties of the risks of transmission.\textsuperscript{21} Potential liability may also exist where a physician or other health care provider fails to discover a disease.\textsuperscript{22} In \textit{Jones v. Stanko},\textsuperscript{23} it was held that where a doctor knew or should have known of a patient's infectious smallpox, he was held liable for not warning the patient's neighbors who cared for the patient and contracted the disease.\textsuperscript{24}

\textsuperscript{18} A landmark decision interpreting this area of law in West Virginia is the Supreme Court of Appeals decision in Mandolidis v. Elkins Indus., 161 W. Va. 695, 246 S.E.2d 907 (1978). In that case, three separate actions by employees against their employers for deliberately inflicted injuries were consolidated. The first action involved an injury sustained by an employee when his hand came in contact with a table saw that had no safety guard. The second action arose out of an incident where a platform collapsed killing and injuring several employees. The last action involved wilfully allowing employees to work in conditions that violated state and federal laws and the employees' collective bargaining agreement. All of the plaintiffs claimed that their employers had willfully and wantonly allowed an unsafe working condition to exist. The Court held that "deliberate intent" may be proved upon a showing that the employer acted willfully, wantonly or recklessly. \textit{Id.} at 706, 246 S.E.2d at 914. The West Virginia Legislature, as a result of the holding in this case, amended the Workers' Compensation Act to reflect the specific language of Mandolidis. See \textit{W. VA. CODE} § 23-4-2(b) (1983).

\textsuperscript{19} To date, there are no West Virginia cases establishing the duty of the physician to warn third parties of a patient's contagious condition.

\textsuperscript{20} Davis v. Rodman, 147 Ark. 385, 392, 227 S.W. 612, 614 (1921).

\textsuperscript{21} \textit{Id.}


\textsuperscript{23} Jones v. Stanko, 118 Ohio St. 147, 160 N.E. 456 (1928).

\textsuperscript{24} \textit{Id.} at 153, 160 N.E. at 458.
Arguably, a health care worker who contracts the AIDS virus on the job may be able to sue his employer in tort if the employer’s failure to warn the worker of an infectious patient was due to the employer’s “willful, wanton or reckless” disregard of its duty to exercise reasonable care in warning workers of the potential of infection. Further, doctors may be liable to any third parties when they negligently fail to identify those patients with the disease.

III. The Problems with Mandatory AIDS Testing of Hospital Patients

A. Invasive Nature of AIDS Testing

The implementation of mandatory AIDS testing in the hospital setting would necessarily have an impact upon the privacy rights of the patients so tested. Testing by state hospitals must be undertaken in a manner consistent with the guarantees of individual liberty contained in the United States Constitution. Private hospitals must also consider whether a program of mandatory testing would constitute an invasion of personal privacy. In assessing the legality of mandatory screening in both instances, the patients’ right to be free of invasive procedures must be considered.

Mandatory testing for AIDS, which necessarily requires the drawing of blood, clearly involves restraint and interference with an individual’s control of his own person. In the setting of a state-maintained hospital, this may constitute a violation of an individual’s constitutionally protected right to be free from unreasonable searches and seizures.25 For example, in Wragg v. Griffin,26 a plaintiff, upon being arrested for lewdness, was subject to a court order compelling him to be physically examined for the purpose of ascertaining whether he was suffering from venereal disease.27 The examination included the drawing of blood in order to test for syphilis and the taking of pus smears from his urethra to be examined for

27. Id. at 244, 170 N.W. 400.
The plaintiff contended he was deprived of his liberty of his person and that his Fourteenth Amendment right to be protected against unreasonable search and seizure was violated. The court order in question rested upon a rule adopted by the local board of health providing that the board could take action to detain a person infected with a contagious disease. The rule also provided that all persons found in a "disorderly house" were subject to examination. The rule additionally required local health officers to make examinations of all persons reasonably suspected of having a venereal disease and to detain them for the necessary amount of time in order to determine whether the person had contracted a disease.

In Wragg, the court held that there was no authority to force a person to subject himself to examination or the drawing of blood on a mere suspicion that he had a venereal disease.

Hospitals which implement a mandatory testing policy for AIDS clearly do not believe that every person walking through their doors is carrying the AIDS antibody. Unlike in Wragg, where authorities had at least a mere suspicion of the presence of a contagious disease, testing of all hospital patients for the presence of the AIDS antibody would be based on no individualized suspicion whatsoever. Therefore, such a mandatory testing program conducted at a state hospital could well be held to violate an individual's constitutional right to be protected from unreasonable search and seizures.

A private hospital, like a state hospital, must recognize the inherent conflict between individual privacy and liberty interests and mandatory AIDS testing. In E. I. du Pont de Nemours v. Finklea, a federal district court in West Virginia, relying on the United States Supreme Court decision of Whalen v. Roe, held that the Constitution does create zones of privacy. In that case, however, pro-

28. Id. at 246, 170 N.W. at 401.
29. Id. at 244, 170 N.W. at 400.
30. Id. at 249, 170 N.W. at 402.
31. Id.
32. Id. at 249-50, 170 N.W. at 402.
33. Id. at 252-53, 170 N.W. at 402-03.
tection of the zones of privacy did not preclude the discovery of medical records necessary to establish a high rate of cancer among particular employees at a plant where there was no showing that the information would be used improperly. 37

In *Sutherland v. Kroger Co.*, 38 the plaintiff brought action against a private employer for damages arising from an illegal search. 39 The case resulted from Kroger’s mistaking the plaintiff for a shoplifter and forcing her to open her grocery bag. 40 The Supreme Court of Appeals of West Virginia held that: “an illegal search by a private individual is a trespass in violation of the right of privacy.” 41 The court further stated: “[a]ny intentional invasion of, or an interference with, property, property rights, personal rights, or personal liberties causing injury without just cause or excuse is an actionable tort.” 42 In a case decided a year earlier, the Supreme Court of Appeals of West Virginia had also held that it was an invasion of privacy for a landlord to install a listening device in a tenant’s apartment. 43

Consequently, private hospitals must also respect their patients’ constitutionally protected right of privacy. The above analysis indicates that any program of AIDS testing, regardless of whether conducted in a private or public hospital, must necessarily address and respect patients’ privacy and liberty interests.

Testing hospital patients for AIDS is analogous to other kinds of testing of employees. Under most circumstances, employees have no real choice as to whether to undergo testing or not. While an employee may have a choice between submitting to testing or losing his or her job or not getting the job in the first instance, a patient may have very little choice when presenting himself or herself for treatment at a particular hospital. In *Cordle v. General Hugh Mercer*

37. *Id.* at 826.
39. *Id.* at 675, 110 S.E.2d at 719.
40. *Id.* at 676-77, 110 S.E.2d at 720.
41. *Id.* at 684, 110 S.E.2d at 723-24.
42. *Id.* at 684, 110 S.E.2d at 724 (quoting 86 C.J.S. *Torts* §40 (1954)).
employees brought an action against a private corporation alleging wrongful discharge after their employment was terminated following refusal to take a polygraph test. The West Virginia Supreme Court of Appeals held that it is contrary to public policy to require or request that an “employee submit to a polygraph or similar test as a condition of employment.” This public policy was found to be “grounded upon the recognition [by the state of West Virginia] of an individual’s interest in privacy.” The testing of all hospital patients, most of which do not pose any threat because they do not carry the AIDS antibody, arguably could be held to be against public policy by the West Virginia courts under the Cordle decision.

Wisconsin has enacted a statute whereby it is illegal for an employer to test employees for the AIDS antibody. This statute is based upon the lack of any competent proof establishing that individuals who carry the antibody may, through employment, transmit the antibody to other individuals. The basis for Wisconsin’s statute somewhat differs in an employment setting dealing with patients because the risk of transmission is greater in the hospital setting. However, as health care workers have always known, the hospital workplace will never be a risk-free environment. Hospitals have historically placed a great deal of emphasis on the control of the spread of all contagious diseases, and the threat of the spread of AIDS in the workplace presents no new technical problems, just new fears.

B. Right of Individual Privacy and Confidentiality of Test Results

Because of the derogatory connotations associated with AIDS and the groups perceived to be at high-risk, namely homosexuals, bisexuals and intravenous drug users, public disclosure of the identities of persons testing positive for the AIDS virus has the potential

45. Id. at 112.
46. Id. at 113 n.6 (quoting W. VA. CODE 21-5-5b (1983) (emphasis added)).
47. Id. at 117.
49. Id.
to cause embarrassment, damage to reputation and discrimination in employment and housing.

In *Whalen v. Roe*, the United States Supreme Court addressed the constitutionality of state compilation of potentially damaging character information. In *Whalen*, the plaintiffs challenged the constitutionality of New York legislation enacted to correct the problem of legal but dangerous drugs filtering into illegal channels. The law required, among other provisions, that the names and addresses of persons receiving these drugs by prescription be entered into a state computer bank and retained for a 5-year period. At the end of the 5-year period, the tapes would be destroyed. Access to the information was limited to health officials and certain investigatory personnel. An elaborate security system was provided for in order to prevent unwarranted disclosures of the information. The plaintiffs, persons receiving prescriptions for these drugs and their physicians, challenged the law on the grounds that it violated their right of privacy. In the opinion delivered by Justice Stevens, two types of privacy interests were recognized. The first was "individual interest in avoiding disclosure of personal matters," which found support in various dissenting opinions of earlier cases. The other privacy interest, which had for some time found support by the Court, is characterized as the "independence in making certain kinds of important decisions."

The plaintiffs in *Whalen* claimed intrusions on both levels. They contended that disclosure to health officials and the possibility of

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51. *Id.* at 591.
52. *Id.* at 592-95.
53. *Id.* at 593.
54. *Id.* at 594-95.
55. *Id.* at 594.
56. *Id.* at 591.
57. *Id.* at 599 n.25. *E.g.*, Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting, the right to be left alone), *overruled*, 389 U.S. 352 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965) ("privacy is protected from governmental intrusion").
60. *Id.* at 600.
unwarranted disclosures to persons not intended to see the information was an invasion into their privacy interests in non-disclosure of personal matters. The Court responded to this contention by stating that: "Disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient."

The Court held that this fear of disclosure was without support as neither evidence nor experience indicated that New York could not and would not properly administer the statute. In supporting the compiling of such information, the Court stated that:

[C]ollection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.

The plaintiffs also contended that because of the fear of disclosure, some persons would decline medication that they legitimately needed. The Court noted that the evidence showed that some use of the drugs in question had been discouraged but because a great number of prescriptions had been filled since the statute was enacted, it was clear that the statute did not deprive persons access to the drugs.

Similarly, since the persons at high risk for AIDS traditionally have been discriminated against or potentially have been subject to criminal penalties, these individuals might be less likely to seek health care if testing were mandatory, and they might be forced underground where they would receive no counseling or medical treat-

61. Id.
62. Id. at 602.
63. Id. at 600-01.
64. Id. at 605.
65. Id. at 602-03.
66. Id. at 603.
ment.\(^{67}\) Thus in this respect, a mandatory program may be depriving persons access to medical care. This claim would need to be substantiated by evidence before a court would find that the facts were sufficiently different than in \textit{Whalen} so as to justify a different result.

Disclosure to the West Virginia Department of Health of the identity of persons diagnosed with the full-blown disease is already mandatory in this state,\(^{68}\) as it is in all states. Other states have adopted statutes requiring the reporting of the names of persons who test merely positive for the antibody.\(^{69}\)

Health departments commonly arrange counseling for individuals that have been reported to them as either having AIDS or testing positive for the antibody.\(^{70}\) Health departments also commonly contact the sexual partners or drug sharing partners of the reported individual and inform them of their possible exposure.\(^{71}\) These “contact tracing” programs are effective only with the cooperation of the carrier of the AIDS antibody and clearly constitute an intrusion into the privacy of the individual.\(^{72}\) The individual may be required to admit that he has committed an offense such as the use of dangerous drugs and/or the commission of homosexual sodomy which remains illegal in a number of states, including West Virginia.\(^{73}\) Therefore, contact tracing programs, to be effective, must insure confidentiality.\(^{74}\)

The American Medical Association has taken the following position on the duty of a physician who learns that a patient has tested positive for the AIDS antibody:

\begin{itemize}
  \item See, e.g., Amend. to House Bill 1268 (1987) (to be codified in ILL. REV. STAT.).
  \item Id. at 215.
  \item Id.
  \item Gostin & Curran, supra note 70, at 216.
\end{itemize}
Physicians who have reason to believe that there is an unsuspecting sexual partner of an infected individual should be encouraged to inform public health authorities. The duty to warn the unsuspecting sexual partner should then reside in the public health authorities as well as the infected person and not in the physician to the infected person.

The AMA believes that mechanisms, analogous to those used by public health authorities to warn sexual partners about other sexually transmitted diseases, should be put in place to warn unsuspecting third parties about an infected sexual partner. Such warning may be appropriate whether the infected person is bisexual, heterosexual or homosexual.

This problem raises the general question of whether anonymous reporting should continue to be the standard for persons who test seropositive. Our recommendation at this time is limited to situations where physicians or health officials already know the identity of the AIDS carrier and have reason to believe a risk to third parties exists.\textsuperscript{75}

A conflict potentially exists between the position of the AMA and the confidentiality commonly associated with the doctor-patient relationship. West Virginia does not require the reporting of individuals who have tested positive for the AIDS antibody, only those diagnosed as having the full-blown disease.\textsuperscript{76} Therefore, disclosure of the identities of individuals testing positive for the antibody would appear to potentially violate the physician’s duty of confidentiality. However, the AMA encourages the reporting of positive test results to state health officials, under certain circumstances, and physicians may feel an ethical responsibility to do so.

As mentioned earlier, other states have adopted statutes requiring physicians to report individuals testing positive.\textsuperscript{77} Unless West Virginia adopts a similar provision, doctors will be faced with the dilemma of either complying with the non-disclosure law and possibly placing themselves in a position of liability for not warning others or accepting the responsibility of reporting these individuals and thus violating the confidentiality of patient information. One commentator\textsuperscript{78} believes, however, that reporting laws would likely be upheld following the rationale of \textit{Whalen} providing the following requirements are met: (1) the information is reasonably related to an important public health purpose; (2) the information is limited

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{75} \textit{Report of the Board of Trustees}, supra note 5.
  \item \textsuperscript{76} See supra note 68.
  \item \textsuperscript{77} See supra note 69.
  \item \textsuperscript{78} Gostin & Curran, supra note 70, at 215.
\end{itemize}
\end{footnotesize}
to public health departments; and (3) there exist adequate statutory confidentiality protections in place. 79

C. The Courts’ Deference to Medical Professionals’ Measures for Controlling Infectious Disease

In the past, courts have shown deference to the exercise of a state’s police power when it is used in the promotion of public health. 80 For example, in Jacobson v. Massachusetts, 81 the plaintiff refused to follow a court order to be vaccinated against smallpox on the grounds that some medical professionals believed vaccination to be ineffective and dangerous. 82 The United States Supreme Court held that common medical knowledge indicated vaccination to be an appropriate response to the increasing incidence of smallpox in the community. 83 The belief of a small group was not enough to contradict the medical soundness of the response to the disease. The Court recognized the state’s power to identify and address state public health problems. 84

The Supreme Court at the time of Jacobson showed great deference to medical knowledge and the solutions arrived at by health officials based upon such knowledge in seeking to control the spread of disease. 85 The courts today generally have retained that deference. For example, in LaRocca v. Dalsheim, 86 a New York court was called upon to assess the risk of transmission of AIDS in the prison setting. In that case prisoners were seeking quarantine of other prisoners with AIDS. 87 The court stated:

[The scientific knowledge . . . with regard to AIDS may be expected to change, with each new medical advance. In a month, a practice accepted today may be

79. Id. at 215.
82. Id. at 17, 24, 36.
83. Id. at 35.
84. Id.
85. Id. at 32-35.
87. Id. at 698, 467 N.Y.S.2d at 304.
discarded in favor of a new approach. . . .

In a matter of time, the ailment may be conquered, or inhibited by tactics which are as yet unfathomed. The Court cannot suitably act as an administrative body on an on-going basis.

The more practical solution is to dismiss the action [pending before the Court] with leave to renew the proceedings . . . upon a claim that the State has acted improperly. 88

Such deference to medical expertise, however, must be balanced with an individual's privacy and liberty interests. In Union Pacific Railway Co. v. Botsford, 89 the Court stated that:

[N]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. 90

It may be concluded that court deference to medical expertise, together with the holding in Whalen that reporting laws are constitutional, would seem to render reporting of AIDS victims and carriers to state health departments constitutionally sound. The enactment of reporting laws and the implementation of "contact tracing" programs, therefore, could prove to be helpful steps toward controlling the spread of AIDS. The implementation of standard procedures which will control the spread of AIDS in the hospital workplace may be the sole affirmative step needed to be taken by hospitals at this time to achieve the desired goals of the health care community.

C. The Questionable Effectiveness of a Mandatory Program of AIDS Testing

In addition to the concerns over individual privacy rights, certain practical problems with the effectiveness of mandatory testing draw into question the desirability of such programs. A negative test result for one recently exposed to the AIDS virus could give a false sense of security because of the incubation period between exposure and

88. Id. at 710, 467 N.Y.S.2d at 311.
90. Id. at 251.
seropositive testing. Conversely, the tests currently being used to
detect the presence of the AIDS antibody have demonstrated a high rate of false positives at the initial testing level. The ELISA screening test is initially performed but any positive test result must be confirmed by further testing.

Inaccurate disclosure of a patient’s HTLV-III status might give rise to law suits for emotional distress or other damages. In Molien v. Kaiser Foundation Hospitals, for example, a husband filed suit for emotional distress and loss of consortium after his wife was inaccurately diagnosed as having syphilis and was asked by her doctor to tell her husband and have him submit to a blood test. On the other hand, a negative test result might well lessen the motivation of a patient to practice “safe sex.” Moreover, if one of the rationales for testing is to protect health care workers, a false sense of security may also lessen the motivation of health care workers to take necessary precautions while caring for patients.

The American Medical Association, like the Surgeon General, does not recommend mandatory, routine testing of hospital patients. The AMA does recommend: (1) testing all persons wishing to be tested; (2) mandatory testing of blood donors and donors of organs, tissues, and semen or ova; (3) the voluntary, informed consent testing of (a) patients at sexually transmitted disease clinics; (b) patients at drug abuse clinics; (c) pregnant women in high risk areas in the first trimester of pregnancy; (d) individuals in high risk areas or those engaged in high risk behavior seeking family planning services.

91. Koop, supra note 67, at 1.
92. 2 Information on Aids for the Practicing Physician 11 (1987) (available through the American Medical Association).
93. The ELISA Screening test is the most widely used test for detecting the presence of the AIDS antibody in blood. Persons testing positive are presumed to be contagious. The test does not predict which individuals testing positive will actually come down with the full-blown disease. Id. at 11.
94. The Western Blot more precisely confirms that the antibody reacting to the ELISA test is the HTLV-III (AIDS) antibody. Id. at 12.
95. Molien, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831.
96. Id. at 917, 616 P.2d at 814, 167 Cal. Rptr. at 832.
With respect to patients who are from high risk areas or who engage in high risk behavior and present themselves for surgery or other invasive procedures at a hospital, the AMA recommends voluntary, informed consent testing. However, the AMA further notes: "[i]f the voluntary policy is not sufficiently accepted, the hospital and medical staff should consider a mandatory program for the institution."

IV. Conclusion

Mandatory AIDS testing of hospital patients may, at first blush, seem an appropriate response to the fear that health care workers coming into contact with AIDS carriers, will be infected with the AIDS antibody. Hospitals face pressure from health care employees to test their admission patients. Hospitals are also not unmindful of potential legal liability should health care workers become infected on the job. Moreover, hospitals may feel a responsibility to warn not only their health care workers of a patient's carrier status, but also third parties who come in contact with an infected patient.

Many problems, however, are attendant to any program of mandatory AIDS testing. Patients forced to submit to mandatory testing may believe with justification that their right to be free from an invasive body procedure has been violated. The confidentiality of test results raises other legitimate concerns with regard to individual privacy rights. In addition, mandatory AIDS testing has technical limitations which substantially hinder its effectiveness. The state-of-the-art tests for the presence of the AIDS antibody are not conclusive. Inevitably, persons will test negative but will in fact be carriers, and persons testing positive will not in fact carry the AIDS antibody. Moreover, mandatory testing may discourage those who need to present themselves for treatment but who fear possible invasion of their privacy.

The Center for Disease Control, in its report on three health care workers who contracted the AIDS antibody through exposures on
the job,\(^{101}\) pointedly notes that mandatory testing of admissions patients would not have prevented these exposures since two of the three exposures took place in the outpatient setting and the third occurred during a resuscitation effort in an emergency room shortly after the patient arrived.\(^{102}\) Moreover, knowing a patient’s AIDS antibody status will not necessarily prevent exposure resulting from inadvertent needlesticks or other accidents.\(^{103}\) Finally, knowledge of a patient’s serological status has not been proven to increase the compliance of health care workers with recommended infectious disease precautions.\(^{104}\)

Viable alternatives do exist to virtually eliminate the risk of AIDS transmission through contact with contaminated bodily fluids. Transmission of the AIDS antibody is very similar to transmission of the hepatitis B virus; however, hepatitis B is more infectious and likely to be spread than is the AIDS antibody.\(^{105}\) Both viruses may be transmitted through sexual contact, parenteral exposure to contaminated blood or blood products (needlesticks), and perinatal (during pregnancy) transmission from infected mothers to their children. Neither virus has been shown to be transmitted by casual contact, contaminated food or water, or through airborne or fecal-oral routes.\(^{106}\) Therefore, many of the precautions used to control the transmission of hepatitis B may be implemented to ensure that health care workers and other patients will not be exposed to the AIDS antibody. In fact, guidelines for infection control of hepatitis B have been promulgated by the Center for Disease Control for the handling of all patients and are presently mandated as an interim measure by the Occupational Health and Safety Administration.\(^{107}\) These guidelines are intended to minimize the risk of transmission of all

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101. See supra note 13 and accompanying text.
102. Update: Health Care Workers, supra note 13, at 287.
103. Stevens, supra note 5.
104. Update: Health Care Workers, supra note 13, at 287.
107. These Guidelines were adopted from the text contained in Recommendations for the Prevention of HIV Transmission in Health-Care Settings, 36 MORTALITY & MORBIDITY WEEKLY REP. 35, 36-37 (1987). Furthermore, OSHA can cite a hospital for failure to comply with the guidelines and fine the hospital based on the citation, Wagner, supra note 7, at 116.
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infectious disease in the hospital workplace. Therefore, the implementation by hospitals of these guidelines and the enactment of reporting laws and the arranging of “contact tracing” programs offer the best combination of measures for the solution to the threat of the spread of the AIDS disease at this time.

Given the concerns for individual privacy rights of patients, the potential legal complications inherent in any program of mandatory testing, as well as the questionable efficacy of mandatory AIDS testing, particularly in light of alternative methods of controlling the transmission of AIDS in the hospital workplace, mandatory testing does not appear to be the solution to the AIDS problem confronting health care providers. It is this writer’s recommendation that the health care community resist the current pressures to implement across-the-board mandatory AIDS testing of hospital patients.

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