HIV Testing and Insurance Applicants: Exploring Constitutional Alternatives to Statutory Protections

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Introduction

Acquired Immune Deficiency Syndrome (AIDS) poses one of the most serious public health threats in history. In the United States alone, an estimated two million people have been infected with Human Immunodeficiency Virus (HIV), the virus that causes AIDS.[1] Experts expect the number of reported AIDS cases to continue increasing.[2] Recent statistics estimate there are 211,337 people with AIDS in the United States, and 141,223 people have died from AIDS.[3]

AIDS' cost in human lives is immeasurable, but it is also having other profound effects. In particular, AIDS is proving an expensive burden on an already over-taxed health care system.[4] Even though patients diagnosed with AIDS once had an extremely short life expectancy,[5] new developments in AIDS drugs have extended the lives of those with AIDS.[6] Increasing availability of medication, combined with the nature of the disease, often results in expensive medical treatment and hospital stays.[7]

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1. Rosalind M. Kendellen, *AIDS: A Clinical Statement*, N.J. LAW., Jan.-Feb. 1989, at 14.

2. *Id.*

3. CENTERS FOR DISEASE CONTROL, U.S. DEP'T HEALTH & HUMAN SERVS., HIV/AIDS SURVEILLANCE 5, 13 (April 1992) [hereinafter CDC].

4. Ruth E. Kim & Kimball R. McMullin, *AIDS and the Insurance Industry: An Evolving Resolution of Conflicting Interests and Rights*, 7 ST. LOUIS U. L.J. 155, 164 (1988).

5. In 1986, the average person diagnosed with AIDS was not expected to live more than 24 months. *Id.* at 162.

6. Grace Brooke et al., *HIV Disease: A Review for the Family Physician*, 42 ASS'N FAM. PRAC. 971, 977-79 (1990).

7. Original estimates for medical treatment ranged from $30,000 to $150,000 per year. Kim & McMullin, *supra* note 4, at 164. Current estimates, however, place the lifetime costs of treatment between $50,000 and $80,000, often lower than costs for many other similar catastrophic illnesses. The aggregate health care cost of AIDS is 1% to 2% of total U.S. health

In a country with no national health care system,[8] the financial burden of AIDS falls primarily on three major groups: individuals with AIDS who have neither private insurance nor Medicare or Medicaid, government programs, and private insurance companies.[9]

Private insurance companies have experienced economic pressure from AIDS-related claims. Industry cost figures for 1990 were $273.6 million for individual life policies and $374.8 million for group life policies. Health insurance costs for insurers were $94.2 million for individual policies and $439.7 million for group policies. The total amount spent by the insurance industry on AIDS-related claims was $1.2 billion.[10]

Not surprisingly, the insurance industry has attempted to cope with these new developments. A favored method of controlling costs involves the use of HIV testing for health and life insurance applicants.[11] Use of these tests, however, has drawn criticism from those concerned with maintaining the confidentiality of test results.[12]

Unfortunately, reports of breaches of confidentiality by insurance companies have occurred.[13] Lack of uniformity in statutory regulation leaves individual applicants in some states with minimal or no protection. Public fear of AIDS, combined with the power of insurers, has led to a trend away from prohibiting HIV testing.[14] Even in states with a relatively high level of statutory protection, breaches of confidentiality occur, resulting in irreparable harm to individual applicants.[15] The failure of statutory schemes to protect testing privacy argues for alternatives to state statutory regulation. One unexplored alternative is the use of

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care expenditures. Robert A. Padgug & Gerald M. Oppenheimer, *AIDS. Health Insurance, and the Crisis of Community*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 35, 35-36 (1990).

8. Studies indicate that approximately 80 million Americans have inadequate or no private health insurance coverage. Kim & McMullin, *supra* note 4, at 164 n.59.

9. *See* Nancy Perkins, *Prohibiting the Use of the HIV Antibody Test by Employers and Insurers*, 25 HARV. J. ON LEGIS. 275, 279-83 (1988).

10. Jeanne Dugan Cooper, *AIDS Insurance Screening*, NEWSDAY, Nov. 10, 1991, at 3 (citing statistics provided by American Council of Life Insurance and the Health Insurance Association of America). In 1990, these figures were dramatically greater than comparable 1986 figures: $93.3 million for individual life, $79.4 million for group life, $34.7 million for individual health, and $84.8 million for group health. The total amount spent in 1986 was $292.2 million. *Id.*

11. Kim & McMullin, *supra* note 4, at 166.

12. *See, e.g.*, Benjamin Schatz, *The AIDS Insurance Crisis: Underwriting or Overreaching?*, 100 HARV. L. REV. 1782, 1800-01 (1987).

13. *See* Alexander Peters, *First Insurers Sued Under HIV Testing Privacy Rules*, THE RECORDER, Aug. 21, 1990, at 1.

14. Jerry V. McMartin, *AIDS (HIV) and Insurance: Discrimination Against HIV-Infected Individuals, available in* WESTLAW, TP-ALL File (Aug. 1990).

15. Peters, *supra* note 13, at 1; *see infra* notes 83-85 and accompanying text for further discussion.

constitutional protection to regulate or eliminate HIV testing by insurance companies.

This Note examines the possibility of extending constitutional protections to health and life insurance applicants currently required to submit to HIV testing. Section I reviews the background, nature, and details of AIDS and HIV testing, including the use of testing by insurance companies. Section II reviews the major types of state legislation currently used to regulate HIV testing by the insurance industry. Section III examines potential constitutional protections for applicants, focusing on privacy and confidentiality issues. Section IV analyzes claims made by insurance companies in support of their right to test applicants. Potential alternatives to HIV testing are also discussed. Ultimately, while proving difficult to establish and apply, constitutional challenges may be the only way protect insurance applicants.

I. Background

Acquired Immune Deficiency Syndrome, commonly known as AIDS, has become a household word since the disease emerged in the early 1980s.[16] AIDS results from infection by a virus known as the Human Immunodeficiency Virus (HIV).[17]

The HIV virus has been detected in human blood, semen, vaginal secretions, saliva, breast milk, tears, and urine.[18] Transmission occurs through an exchange of bodily fluids. Exchange usually happens in one of three ways: sexual contact,[19] pre or post natal infection,[20] or transmission through skin.[21]

Once in the body the HIV virus attacks cells crucial to the immune system.[22] These "T-cell lymphocytes" (T-cells) are responsible for triggering the body's immune response.[23] By interfering with the immune system, HIV infection leaves the body unable to fight disease. Eventually, the immune system becomes so weak that one dies.[24]

16. RAMZI S. COTRAN ET AL., ROBBINS' PATHOLOGIC BASIS OF DISEASE, 224-25 (1989).

17. COTRAN ET AL., *supra* note 16, at 227.

18. *Id.* at 226.

19. Either anal-genital, genital-genital, or anal/genital-oral. *Id.* at 227.

20. Prenatal transmission occurs through exchange of bodily fluids in utero. Postnatal transmission has been documented in breast feeding. *Id.* at 228.

21. This method, called parenteral inoculation, most commonly occurs when the virus enters the skin through needles or blood transfusions. *Id.* at 227.

22. *Id.* at 228.

23. Judith A. Berman, Note, *AIDS Antibody Testing and Health Insurance Underwriting: A Paradigmatic Inquiry*, 49 OHIO ST. L.J. 1059, 1060 (1989). Depletion of T-cells is a key event in causing AIDS. COTRAN ET AL., *supra* note 16, at 228-29.

24. Berman, *supra* note 23, at 1060.

A. The Three Major Stages of AIDS

AIDS is considered a "syndrome" because it has several distinct categories. Currently, the Centers for Disease Control divide HIV infection into three categories.[25] One category begins after exposure to the HIV virus. The body's immune system develops antibodies to fight off the HIV virus, just as it would in response to a cold virus. For unknown reasons, this antibody development may not occur immediately. Latency periods can range from six weeks to thirty-five months.[26] Prior to developing antibodies the individual may show no sign of infection and appear healthy.[27]

Another, later, category generally is marked by the development of AIDS-related complex (ARC).[28] ARC's signs include weight loss, night sweats, persistent fever, and fatigue.[29] Again, there may be a long latency period between exposure and ARC.[30] Notably, a substantial number of HIV-positive people never manifest signs of ARC prior to being diagnosed with AIDS.[31]

In the third, and final, category, the patient is diagnosed as having clinical AIDS. In addition to ARC symptoms, people with AIDS often develop rare cancers such as Karposi's sarcoma and opportunistic infections such as pneumocystis pneumonia.[32] This stage may occur well over three years after the original HIV infection.[33]

Although researchers have developed drugs that help slow the progress of AIDS and help the body fight off opportunistic infections,[34] no proven cure or vaccine currently exists for AIDS or HIV infection.[35]

B. Testing for AIDS

Developing a test for AIDS and HIV infection was a priority in the fight against AIDS. To date, several methods of detecting exposure to the HIV virus exist.

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25. COTRAN ET AL., *supra* note 16, at 224.

26. Ronald Goldschmidt, *Current Report—HIV*, 3 J. AM. BD. FAM. PRAC. 60 (1990). Once these antibodies develop, the person is considered HIV positive.

27. Kim & McMullin, *supra* note 4, at 160. It is important to note, however, that the virus can still be transmitted during this stage.

28. COTRAN ET AL., *supra* note 16, at 224.

29. *Id.* at 232; Kim & McMullin, *supra* note 4, at 160 n.34.

30. COTRAN ET AL., *supra* note 16, at 232-33.

31. Kim & McMullin, *supra* note 4, at 160.

32. *See* Brooke et al., *supra* note 6, at 1299-1308.

33. COTRAN ET AL., *supra* note 16, at 232-33.

34. *See* Brooke et al., *supra* note 6, at 1299-1308; *Drugs for AIDS and Associated Infections*, 33 MED. LETTER ON DRUGS & THERAPEUTICS 95, 95-102 (Mark Abramowicz ed., 1991).

35. *Drugs for AIDS and Associated Infections*, *supra* note 34, at 95.

The most common test for AIDS is a two step process. First, the tester administers the enzyme-linked immunosorbent assay (ELISA) test.[36] An ELISA test detects the presence of antibodies in the blood. When the test reveals antibodies, the result is seropositive, indicating HIV infection.[37] The ELISA test results in false positives three to fifteen percent of the time.[38]

The large margin of error in the ELISA test provides the main reason for using a follow-up test, usually the Western Blot test. Like the ELISA, the Western Blot measures the presence of antibodies in the blood. The Western Blot is far more accurate, however, than the ELISA.[39] A seropositive result using a Western Blot generally means that the patient has been infected with the HIV virus.[40]

Although these tests have proved crucial in the identification and treatment of HIV-positive individuals, commentators criticize them for problems in administration and accuracy.[41] Of specific concern is use of an ELISA test, without a confirming Western Blot test,[42] a decision often motivated by economic concerns.[43] The undesirable result is an increased chance of false positives.

Another, more fundamental, problem with current HIV testing is that a true seropositive result can have two different meanings. The result may mean that although the individual was exposed to HIV, she successfully fought off the infection, leaving only antibodies behind in the bloodstream.[44] On the other hand, a seropositive result could mean that the individual was exposed to HIV and that the body did not fight off the infection.[45] Unfortunately, because doctors still know relatively little

36. Goldschmidt, *supra* note 26, at 60.

37. *Id.* at 61.

38. *Id.* at 60; Berman, *supra* note 23, at 1061. False positive rates vary depending on the prevalence of HIV infection in the tested population. This consideration is important when administering the test. Cyril H. Wecht, *Considerations and Potential Pitfalls in AIDS Lab Testing*, 9 J. LEGAL MED. 623, 628-29 (1988).

39. Goldschmidt, *supra* note 26, at 60. As well as being more accurate, the Western Blot is much more expensive.

40. *Id.* Up to 18% of Western Blot tests can result in indeterminate results and up to 5% in false positives. Wecht, *supra* note 38, at 631.

41. *See*, Schatz, *supra* note 12, at 1784-85; Michael L. Closen et al., *AIDS: Testing Democracy-Irrational Responses to the Public Health Crisis and the Need to Privacy in Serologic Testing*, 19 J. MARSHALL L. REV. 835, 871-75 (1986).

42. Goldschmidt, *supra* note 26, at 60 ("Reactive ELISA tests require specific confirmation with a Western Blot or equally specific test . . . ."). Manufacturers of ELISA tests usually include warnings with the kits stating that it is an inappropriate test to use for diagnosis of HIV status. Wecht, *supra* note 38, at 627.

43. Groups accused of this practice include insurance companies. Schatz, *supra* note 12, at 1785-86; Berman, *supra* note 23, at 1061.

44. Berman, *supra* note 23, at 1061.

45. Berman, *supra* note 23, at 1061. Most doctors believe this is the correct assumption. Mike McKee, *Defense Puts AIDS Virus on Trial*, THE RECORDER, Jan. 17, 1992, at 1.

about how the AIDS virus affects people differently, there is no conclusive way to know which interpretation is correct in a given case. This problem is compounded by current testing methods that measure only the presence of antibodies, the body's reaction to the virus, rather than the virus itself.[46]

Other testing problems stem from the nature of the disease itself. Because of long latency periods, negative test results do not rule out HIV exposure.[47] In addition, the long latency period leaves unanswered whether, even if a patient has been exposed to HIV, he will always develop AIDS.[48] Thus, using an HIV test to predict AIDS remains imprecise.

C. HIV Testing and Insurance Underwriting

Insurance companies showed great interest in HIV testing since its introduction in 1985 and soon began to use test results as part of the underwriting process.[49] In one study, eighty-six percent of commercial insurers either screened or planned to screen individual applicants for HIV infection.[50]

Insurance is essentially a contractual obligation in which one party pays premiums to an insurance company in return for a promise that when certain contingencies are met, such as illness, theft, or death, the company will make payments to the beneficiary named in the policy.[51] In particular, health insurance reimburses certain medical expenses, and life insurance pays a predetermined amount upon the insured's death.[52] Most health and life insurance is obtained through group policies, often

46. *Update: Serologic Testing for Antibody to HIV*, 36 MORBIDITY & MORTALITY WKLY. REP. 833 (1988).

47. Berman, *supra* note 23, at 1062.

48. COTRAN ET AL., *supra* note 16, at 233. In 1986, the Centers for Disease Control estimated that only 20% to 30% of seropositive individuals would develop AIDS over the next five years, and other studies showed another 25% would develop ARC within two to five years. Karen Clifford & Russel P. Iuculano, *AIDS and Insurance: The Rationale for AIDS-Related Testing*, 100 HARV. L. REV. 1806, 1813 (1987). The causal link between HIV and AIDS is generally accepted by the medical profession. *See, e.g.*, COTRAN ET AL., *supra* note 16. Recently, however, some prominent AIDS researchers have challenged the assumption that HIV is the sole cause of AIDS. One scientist argues that AIDS is caused by "long-term use of psychoactive drugs, multiple sexual contacts," or hemophilia. Although this position remains unaccepted, if proven it would completely undermine HIV testing as a method to predict AIDS. McKee, *supra* note 45, at 1.

49. ROBERT M. JARVIS ET AL., AIDS LAW 134 (1991); Lisa M. Tonery, *AIDS: A Crisis in Health Care Financing*, 40 FED'N INS. & CORP. COUNS. Q. 133, 136-37 (1990).

50. U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, MEDICAL TESTING AND HEALTH INSURANCE 3 (1988).

51. 1 GEORGE J. COUCH ET AL., COUCH ON INSURANCE § 1:2, at 4-6 (2d ed. 1984).

52. *Id.* § 1:60, at 143; § 1:73, at 227-28. "Health or sickness insurance is often defined as insurance providing indemnification for losses caused by illness." "Life insurance is . . . a contract, whereby one for a stipulated consideration . . . agrees to pay another a certain sum of

provided by employers, social, or religious groups.[53] Those who do not qualify to take part in a group policy may purchase individual policies written exclusively for them.[54]

Individual insurance rates are determined using statistics based on actuarial principles.[55] Companies take different information about the applicant, such as sex, age, and occupation, and calculate how likely that person is to become ill or die. The higher the risk of illness attributed to the individual, the higher the rates charged for coverage. This process is known as "underwriting."[56] The resulting variance among different individuals' premiums is considered "fair discrimination."[57] This method of setting premiums is regulated by state statutes, by industry standards written by the National Association of Insurance Commissioners (NAIC),[58] and by case law interpreting the limits of "fair discrimination."[59] Theoretically, underwriting helps keep insurance companies running efficiently by matching costs with payments.[60]

In response to the AIDS crisis, some insurers attempted to identify certain demographic "markers" to single out people at a greater risk of contracting AIDS.[61] Marital status, unusual beneficiaries, and certain professions were used as key markers.[62] This technique was frequently employed for identifying gay men who insurers perceived as comprising a substantial number of AIDS cases.[63]

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money upon the happening of a given contingency which is the death of the insured under the ordinary contract." *Id.* § 1:73, at 227-28.

53. Mark Scherzer, *Insurance, in* AIDS AND THE LAW 188 (Harlon L. Dalton et al. eds., 1987). Group policies are based on one standard contract for all members and do not involve the process of underwriting described here.

54. Approximately 30% of health insurance and about 60% of all life insurance policies are written for individuals or small groups. Cooper, *supra* note 10, at 3.

55. Scherzer, *Insurance, in* AIDS AND THE LAW, *supra* note 53, at 188.

56. Clifford & Iuculano, *supra* note 48, at 1807-08. "The primary goal of underwriting is the accurate prediction of future mortality and morbidity costs." *Id.* at 1808.

57. *Id.* at 1810.

58. Section 4(7)(a) of NAIC's Unfair Trade Practices Act prohibits insurers from "making or permitting any *unfair* discrimination between individuals of the same class and equal expectation of life." Section 4(7)(b) contains a similar clause applicable to health insurance. National Association of Insurance Commissioners, An Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance. 1972 Proc. NAIC I 493, 495 (as amended). *See* Clifford & Iuculano, *supra* note 48, at 1810.

59. Clifford & Iuculano, *supra* note 48, at 1810. *See* Physicians Mut. Ins. Co. v. Denenberg, 327 A.2d 415 (Pa. Commw. Ct. 1974).

60. *See* Scherzer, *Insurance, in* AIDS AND THE LAW, *supra* note 53, at 188-89; Kim & McMullin, *supra* note 4, at 155-56.

61. Kim & McMullin, *supra* note 4, at 165.

62. Schatz, *supra* note 12, at 1787.

63. *Id.* at 1786-88. Mark Scherzer, *Insurance and Aids-Related Issues, in* AIDS PRACTICE MANUAL: A LEGAL AND EDUCATIONAL GUIDE ch. VIII, at 11 (Paul Albert et al. eds., 1988).

Other companies avoided writing policies in cities with high numbers of AIDS cases or specifically deleted AIDS from the policy's coverage. Each of these methods created a number of problems, including discrimination based on sexual orientation.[64]

Faced with discrimination claims and large numbers of undetected HIV-positive applicants, many companies determined HIV testing would be the best method to use in determining policy rates and coverage.[65] Insurers claimed that HIV testing would provide them with an accurate risk classifier, thus preventing potential economic harm.[66] The industry claimed that HIV testing would aid their twin goals of economic efficiency and fair risk distribution.[67] In addition, insurers argued it was unfair to favor those infected with HIV over other applicants with serious medical conditions who were barred from obtaining insurance.[68]

II. Statutory Responses to HIV Testing

The insurance industry's proposal to require HIV testing for applicants caused concern among commentators.[69] Under congressional mandate, states are permitted to regulate the insurance industry.[70] Thus, states individually adopted a variety of measures designed to regulate or even eliminate the use of HIV testing. State regulation generally follows three major approaches: (1) prohibiting the use of HIV tests by insurance companies, (2) regulating the use of HIV tests, and (3) adopting other provisions that limit discrimination against HIV-infected applicants.[71] Often there is an overlap of these approaches within one state.

The first approach is by far the most restrictive. Originally, states such as California[72] and the District of Columbia[73] banned the use of HIV testing for insurance purposes. Many states have since repealed

64. Scherzer, *Insurance and AIDS-Related Issues*, *supra* note 63 ch. VIII, at 11-12.

65. *See* Clifford & Iuculano, *supra* note 48.

66. Berman, *supra* note 23, at 1067-68.

67. Berman, *supra* note 23, at 1067.

68. Peter Hiam, *Insurers, Consumers, and Testing: The AIDS Experience*, 15 LAW, MED. & HEALTH CARE 212, 214 (1987).

69. *See* Schatz, *supra* note 12; Perkins, *supra* note 9, at 289.

70. Perkins, *supra* note 9, at 288. The McCarran-Ferguson Act of 1945 prohibits federal legislation of insurance, subject to narrow exceptions. *Id.* This is despite the industry's size and the fact that some insurers do business in all fifty states. Hiam, *supra* note 68, at 213.

71. McMartin, *supra* note 14, at 5.

72. California law provides, "The results of a blood test to detect antibodies to the probable causative agent of acquired immune deficiency syndrome . . . shall not be used in any instance for the determination of insurability . . . ." CAL. HEALTH & SAFETY CODE § 199.21(f) (Deering 1990).

73. As originally enacted, District of Columbia law stated, "An insurer may not deny, cancel, or refuse to renew insurance coverage . . . because an individual has tested positive on any test to screen for the presence of any probable causative agent of AIDS . . . ." D.C. CODE ANN. § 35-223(a) (1988).

these statutes, declaring them invalid.[74] The original District of Columbia statute, considered the strictest in the nation when it was adopted, was modified in 1988 to permit HIV testing if insurers complied with statutory guidelines.[75] Similarly, the California code, which was written to prevent HIV test results from impacting insurability,[76] has since been interpreted to allow HIV results to influence life, but not health, insurance applicants.[77] These statutes were successfully challenged by insurance companies who often refused to sell policies to individuals located in areas with restrictive legislation.[78] The lesson learned from challenges to the original generation of statutes is that, in order to survive, the laws must be narrowly tailored.[79] The difficulty of drafting workable legislation, combined with the possibility of an insurance boycott, discouraged many states from attempting to implement overly restrictive statutes.[80]

Instead, most states have chosen to adopt legislation that allows insurers to use HIV tests, but closely regulates usage.[81] These regulations usually involve some combination of the following six factors: confidentiality, consent, cost, prior tests, nondiscrimination, and notification.[82]

Confidentiality provisions generally prohibit unauthorized disclosure of test results.[83] Despite these provisions, loopholes may exist. If the statute specifically does not prohibit revealing HIV information to other insurers, companies can effectively identify and exclude certain individuals from coverage by exchanging HIV information.[84] In the alternative, insurers may be permitted to inform other insurers that an

74. McMartin, *supra* note 14, at 5-7. By June of 1987 only four states (California, Florida, Maine, and the District of Columbia) had laws which completely banned HIV testing for underwriting purposes. Perkins, *supra* note 9, at 291.

75. D.C. CODE ANN. § 35-223, 224 (Supp. 1989). McMartin, *supra* note 14, at 6.

76. CAL. HEALTH & SAFETY CODE § 199.21(f) (Deering 1990).

77. CAL. INS. CODE § 799.09 (West Supp. 1992). It is of interest to note that it was while applying for life insurance, and subsequently being tested, that basketball star Earvin "Magic" Johnson discovered his HIV-positive status. Cooper, *supra* note 10, at 3.

78. McMartin, *supra* note 14, at 6. After the passage of the District of Columbia act in 1986, approximately 80% of the insurers doing business in D.C. stopped writing individual policies. Perkins, *supra* note 9, at 297.

79. McMartin, *supra* note 14, at 7.

80. As of 1988, the vast majority of states (43) had no regulation prohibiting HIV testing for health insurance applicants. Ruth R. Faden & Nancy E. Kass, *Health Insurance and AIDS: The Status of State Regulatory Activity*, 78 AM. J. PUB. HEALTH 437 (1988).

81. McMartin, *supra* note 14, at 7.

82. *Id.* at 7-10.

83. *See* COLO. REV. STAT. § 10-3-1104.5 (1990); ILL. REV. STAT. ch. 111 1/2, ¶ 5403 (1988); IOWA CODE ANN. § 505.16 (West Supp. 1991); MO. REV. STAT. § 191.671(5) (1990); OHIO REV. CODE ANN. § 3901.46(C) (Anderson 1990); TEX. INS. CODE ANN. § 21.21-4(e) (West 1990).

84. *See* McMartin, *supra* note 14, at 7-8; CAL. INS. CODE § 799.07 (West Supp. 1992) (an example of a statute that explicitly bars such disclosure).

individual received a negative underwriting or coverage decision.[85]

Written, informed consent is also a common statutory requirement. Valid consent usually must include (1) a description of confidentiality limits and exceptions; (2) a description of the test, purpose, uses, limitations, and results; and (3) a description of the procedures to be used in notifying the applicant of test results.[86] The insurance company may be required to pay costs if applicants are required to submit to tests.[87] Insurers also may be prohibited from inquiring into prior HIV test results.[88]

Non-discriminatory testing regulations attempt to prevent selective testing based on demographic traits such as age, gender, and marital status. Insurers must require equal testing of all applicants to prevent unfair discrimination against certain groups.[89]

States may also regulate the notification process. Statutes can require that certain procedures be followed, such as notifying the applicant's doctor prior to the applicant.[90] In addition, health laws may require that notice be given to the state health department.[91]

Other states refrain entirely from restricting HIV testing and rely instead on more traditional approaches to protect against unfair discrimination in determining who must be tested. Often, these protections are aimed at gay men who are frequently targeted for testing. Legislation may specifically ban discrimination on the basis of sexual orientation.[92] Or there may be more broad prohibitions against discrimination based on gender, marital status, medical history, occupation, living arrangements, or territorial classification.[93] All of this information is often used to de-

85. *See* ILL. REV. STAT. ch. 111 1/2, ¶ 5403 (1988); OHIO REV. CODE ANN. § 3901.46(C)(4) (Anderson 1990).

86. McMartin, *supra* note 14, at 8. *See* CAL. INS. CODE § 799.03(a) (West Supp. 1992); D.C. CODE ANN. § 35-226(a) (Supp. 1989); FLA. STAT. ANN. §§ 627.429(4)(b), 641.3007(4)(b) (West Supp. 1992); HAW. REV. STAT. § 325-16 (1989); IOWA CODE ANN. § 505.16 (West Supp. 1992).

87. McMartin, *supra* note 14, at 8. California appears to be the only state that requires this. CAL. INS. CODE § 799.04 (West Supp. 1992).

88. McMartin, *supra* note 14, at 8-9. *See* CAL. INS. CODE § 799.06 (West Supp. 1992).

89. McMartin, *supra* note 14, at 9-10.

90. CAL. INS. CODE § 799.03(b) (West Supp. 1992); COLO. REV. STAT. § 10-3-1104.5(5) (1990); FLA. STAT. ANN. §§ 627.429(4)(c), 641.3007(4)(c) (West 1989); MO. REV. STAT. § 191.671(5) (1990); TEX INS. CODE ANN. § 21.21-4(f) (1990); WASH. REV. CODE § 7024.325 (West Supp. 1991).

91. McMartin, *supra* note 14, at 10.

92. McMartin, *supra* note 14, at 9. Many such provisions are modeled after the NAIC Model Bulletin which aims to prevent discrimination on the basis of sexual orientation. For specific statutes see CAL. INS. CODE § 799.05 (West Supp. 1992); COLO. REV. STAT. § 10-3-1104(f)(VI), (VII), (VIII) (1990); D.C. CODE ANN. § 35-230 (Supp. 1989); FLA. STAT. ANN. § 641.3007(4)(d) (West Supp. 1992); KY. REV. STAT. ANN. § 304.12-013(5)(c) (Baldwin Supp. 1990); OHIO REV. CODE ANN. § 3901.45 (Anderson 1990).

93. McMartin, *supra* note 14, at 9.

termine the applicant's sexual orientation, race, and other characteristics.

Despite the variety of regulations dealing with the use of HIV testing, a number of cases demonstrate the problems created by even the strictest statutory approaches.

A. Confidentiality Problems

Perhaps the most serious problems with testing are violations of applicants' confidentiality. Despite regulations specifically preventing nonconsensual revelation of HIV status, several breaches have been reported. In *John Doe v. Prudential Insurance Co. of America*,[94] the plaintiff, a life insurance applicant who was denied coverage due to a positive HIV test, alleged that the insurance company violated confidentiality regulations by publicizing his positive test result at a company event, which resulted in severe personal consequences.[95] Although the case settled out of court, it is a good example of an insurer's disregard for state confidentiality regulations.

In 1990, the first suit alleging violation of the confidentiality section of the California Insurance Code was filed.[96] In *Doe v. Knights of Columbus Insurance Co.*,[97] the plaintiff alleged that after the company performed the HIV test, it allegedly violated section 799.03 of the California Insurance Code by sending the results directly to her home instead of to her doctor.[98]

Breaches in confidentiality can lead to serious personal and professional consequences for the unsuspecting applicant. Such cases, happening even in states with strong regulation, call into question the adequacy of current statutory protection.

As the insurance industry continues its challenge of current statutes, many states are loosening HIV testing restrictions.[99] This trend, coupled with an increase in abuse allegations, raises the issue of whether current state statutory measures are adequate to protect the rights of individual applicants. Job security, education, and even child custody may be jeop-

94. John Doe v. Prudential Ins. Co. of Am., No. 87-CIV-2040 (D.N.Y. 1987).

95. Kim & McMullin, *supra* note 4, at 170; Mark Scherzer, *Insurance, in* AIDS LEGAL GUIDE §§ 5-1, 5-3 (Abby R. Rubenfeld ed., 2d ed. 1987).

96. Peters, *supra* note 13, at 1. Section 799.03 of the Code outlines California's rules on informed consent, privacy protections, and notification of results. CAL. INS. CODE § 799.03 (West Supp. 1990).

97. Peters, *supra* note 13, at 1; Doe v. Knights of Columbus Ins. Co., SCV-182566.

98. *See* Peters, *supra* note 13, at 9. Section 799.03 of the California Insurance Code states, "No insurer shall test for HIV or for the presence of antibodies to HIV for the purpose of determining insurability other than in accordance with the informed consent, counseling, and privacy protection provisions of this article . . . . (b) The insurer shall notify an applicant of a positive test result by notifying the applicant's designated physician." CAL. INS. CODE § 799.03 (West Supp. 1992).

99. David K. Nelson, *AIDS and Life Insurance: A Last(?) Look at Testing Prohibitions*, 4 AIDS & PUB. POL'Y J. 171, 171 (1989).

ardized by public disclosure of HIV results.[100] Raising constitutional protections as a way to limit an insurer's use of testing has been suggested as one possible solution.[101]

III. Constitutional Protections

A. State Action

Whenever a plaintiff brings a suit alleging violation of constitutional rights by a private individual or individuals, there must be a determination of whether the defendant's actions constitute state action.[102] If a court determines that the defendant had sufficient connection to the government, it will proceed to consider the alleged violations. Without sufficient contacts, there is no basis for the plaintiff to bring the suit, since the Court will not hold the actions of purely private actors to be constitutional violations.[103]

The Supreme Court has taken several different approaches in determining if state action is present.[104] If state legislation commands the activity that violated the plaintiff's rights, state action always exists.[105] The same is true if the legislation encourages the activity to such a degree that the practice is inevitable.[106]

Another, often overlapping, basis for state action centers on the relationship between the private actor and the government. This includes cases where the private actor is subject to extensive regulation by the government.[107] Along with a consideration of the degree of regulation, the Supreme Court has focused on whether the regulation commanded, encouraged, or sanctioned the constitutional violations.[108] The opinions of the Court suggest that state action will be found if the state compels or

100. *See infra* notes 252-59 and accompanying text.

101. *See generally* Edward E. Hollowell & James E. Eldridge, *Constitutional Law: Substance, Equal Opportunity, and the Individual Diagnosed with HIV*, 9 J. LEGAL. MED. 561 (1988); Donna Costa, Note, *Reportability of Exposure to the AIDS Virus: An Equal Protection Analysis*, 7 CARDOZO L. REV. 1103 (1986).

102. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 12.1, at 452 (4th ed. 1991).

103. *Id.* at 453-54.

104. *Id.* § 12.2-12.4, at 457-77. The three main approaches are public function, state commandment or encouragement of private activities, and mutual contacts. *Id.* Since supplying insurance is not traditionally the exclusive prerogative of the state, the insurance industry does not meet the public function test. Anne C. Cicero, Note, *Strategies for the Elimination of Sex Discrimination in Private Insurance*, 20 HARV. C.R.-C.L. L. REV. 211, 242 (1985). Therefore, this discussion of state action will focus on the other two approaches.

105. NOWAK & ROTUNDA, *supra* note 102, at 464.

106. *Id.* This type of encouragement can also occur by the state acting through its officers or agents, including the judiciary. *Id.* at 464-65.

107. NOWAK & ROTUNDA, *supra* note 102, § 12.4, at 470.

108. *Id.* at 471-73.

significantly encourages the conduct in some way.[109]

A recent Supreme Court case may provide an inroad into finding state encouragement in insurance testing situations.[110] In *Skinner v. Railway Labor Executives' Ass'n*,[111] railway labor organizations sued on Fourth Amendment grounds to block regulations which permitted drug testing.[112] Federal railroad regulations mandated drug testing for employees of private railroads after certain types of accidents.[113] The regulations also authorized, but did not require, private railroads to administer drug tests to employees who violated certain safety rules.[114]

The Court stated that determining whether a private party could be considered a government agent turns on the degree of government's participation in the private party's activities.[115] "The fact that the Government has not compelled a private party to perform a search [by drug testing employees] does not by itself, establish that the search is a private one. Here, specific features of the regulations combine to convince us that the Government did more than adopt a passive position toward the underlying private conduct."[116] These regulatory features included: preempting state laws, rules, or regulations covering the area;[117] giving the Federal Railroad Agency the right to receive test results;[118] and preventing the railroad from divesting itself of authority under the statute.[119] The Court found such evidence to be "clear indices of the Government's encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment."[120]

The regulatory features of many states' insurance codes contain similar elements to those in *Skinner*. Under the McCarran-Ferguson Act,

109. Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587, 620 (1991). *See* Peterson v. Greenville, 873 U.S. 244 (1963); Blum v. Yaretsky, 457 U.S. 991 (1982).

110. Traditionally, courts have been reluctant to find state action by private insurance companies. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 356-59 (1974) (denial of due process by highly regulated public utility not state action because of the lack of the violation's connection with legislation). Using the approach in *Jackson*, several courts have held that mere approval of policies by insurance commissioners did not rise to the level of state action. *See, e.g.*, Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298, 1312 (S.D.N.Y. 1979), *rev'd on other grounds*, 691 F.2d 1054 (2d Cir. 1982); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Murphy v. Harleysville Mut. Ins. Co., 422 A.2d 1097 (Pa. Super. Ct. 1980), *cert. denied*, 454 U.S. 896 (1981).

111. 489 U.S. 602 (1989).

112. *Id.* at 612.

113. *Id.* at 609.

114. *Id.* at 611.

115. *Id.* at 614.

116. *Id.* at 615.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 615-16.

states have exclusive jurisdiction over insurance companies. As discussed, state regulation of insurers is extensive in every state.[121] Insurance codes often list the situations where testing is prohibited and detail the narrow areas where it is permitted. Legislation may also establish what questions applicants can be asked, the type of consent required, discrimination to be avoided, and other detailed rules.[122] In addition, some states require private insurance companies to relay test results to state health agencies.[123]

The language in *Stern v. Massachusetts Indemnity & Life Insurance Co.*[124] supports this approach to finding state action.[125] In *Stern*, the plaintiff argued a civil rights violation under 42 U.S.C. § 1983, a claim requiring state action. The court reviewed the extensive regulations and role of insurance commissioners in controlling the industry.[126] It concluded "[i]n light of the pervasive regulatory scheme extant here, we find that the allegations of the Complaint sufficiently set forth the requirement of state action."[127] One commentator has interpreted this to mean that state action can be established if the plaintiff is challenging a rating or underwriting scheme that is an integral part of the business of insurance and the insurance commission held rate hearings regarding coverage.[128] This would arguably be the situation if applicants challenged the aspect of underwriting requiring HIV testing.

State action is an unsettled area of law, especially in the area of regulatory involvement.[129] Although restrictions on state action have been tightened in recent years,[130] the Supreme Court has repeatedly stated the necessity for resolving this question on a case-by-case basis.[131] Given a situation involving extensive regulation and management by state agencies, with a serious violation of constitutional rights, the court may be

121. Robert Nesslerroth, *State Discrimination in Automotive Insurance*, 39 FED'N INS. & CORP. COUNS. Q. 141, 164 (1989).

122. *See supra* notes 69-93 and accompanying text.

123. McMartin, *supra* note 14, at 10. *See* MO. REV. STAT. § 191.671(5) (1990); TEX. INS. CODE ANN. § 21.21-4(f) (West 1990); 1989 Wash. Legis. Serv. 387 § 1(c)(iii) (West).

124. 365 F. Supp. 433 (E.D. Pa. 1973).

125. *Id.* at 438.

126. *Id.*

127. *Id.* at 439. *But see* Life Ins. Co. of North Am. v. Reichardt, 591 F.2d 499 (9th Cir. 1979) (finding no state action under similar facts).

128. Cicero, *supra* note 104, at 243-44. *See* Blue Cross & Blue Shield v. Baerwalat, 593 F. Supp. 39, 42 (W.D. Mich. 1984) (holding insurance commissioner's actions in ordering insurer to cease and desist certain marketing practices constituted state action under 42 U.S.C. § 1983).

129. Strickland, *supra* note 109, at 620. Strickland notes that no recent case has been decided on this basis. *Id.*

130. *See* Blum v. Yaretsky, 457 U.S. 991 (1982); Kendell-Baker v. Kohn, 457 U.S. 830 (1982).

131. NOWAK & ROTUNDA, *supra* note 102, at 463-64. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

willing to find state action.[132]

The future of health and life insurance may render state action questions moot. With the adoption of national or state health insurance,[133] the government essentially will become the provider of insurance. As a result, its actions towards testing could be challenged under state or federal constitutions.[134]

B. Right to Privacy

One major area influenced by HIV testing for insurance purposes is the right of individual privacy. HIV-positive individuals often face widespread discrimination, sometimes resulting in loss of jobs, eviction, and loss of child custody.[135] The damage of breaching confidentiality goes beyond the individual's right to privacy. Experts believe that finding an AIDS cure depends upon keeping accurate public health records.[136] As the public learns of the potential risks in being tested, it is less likely to submit to voluntary testing. Individuals' hesitancy to be tested could delay needed medical attention, as well as contribute to the continued spread of the virus.[137] Even insurers have recognized the interest in protecting the confidentiality of an individual's HIV status.[138] Due to these concerns, constitutional protection of privacy is one potential way to protect confidentiality.[139]

The concept of privacy is rooted in the Supreme Court's interpreta-

132. Cicero, *supra* note 104, at 244. Another option to finding state action is to look to state courts. Some state courts, such as California, have held that state action may not always be required under the State constitution. *See* Gay Law Students Ass'n v. Pacific Tel. & Tel. 595 P.2d 592, 597-98 (Cal. 1979) (holding California's equal protection applied to actions of private utility); Hill v. NCAA, 273 Cal. Rptr. 402, 407-08, (Cal. Ct. App. 1990) (holding California's right of privacy reached both nongovernmental and governmental conduct). In addition, some states have less demanding tests for state action, even in the insurance area. *See* Hartford Accident & Indem. Co. v. Insurance Comm'r, 482 A.2d 542 (Pa. 1984) (finding gender-based insurance rates violated the state's equal rights amendment); Hathaway v. Commissioner of Ins., 399 N.E.2d 862 (Mass. 1980) (finding insurance regulatory scheme sufficiently comprehensive to qualify as state action); Pennsylvania Chiropractic Fed'n v. Foster, 583 A.2d 844 (Pa. Commw. Ct. 1990) (holding insurance regulations requiring insurers to contract with peer review organization constituted state action).

133. Spencer Rich, *Bush Accused of Health Care 'Cynicism'—Hill Democrats Cite Delay in Sending Up Detailed Reform Measure*, WASH. POST, Apr. 6, 1991, at A4.

134. Stephen R. Ryan, *The Elimination of Gender Discrimination in Insurance Pricing: Does Automobile Insurance Rate Without Sex?*, 61 NOTRE DAME L. REV. 748, 773 (1986).

135. John R. Dunne & Gregory V. Serio, *Confidentiality: An Integral Component of AIDS Public Policy*, 7 ST. LOUIS U. PUB. L. REV. 25 (1988). *See infra* notes 252-59.

136. Dunne & Serio, *supra* note 135, at 30-31.

137. Mark Barnes, *Confidentiality, in* AIDS LEGAL GUIDE § 4-1 (Abby R. Rubenfeld ed., 2d ed. 1987).

138. NAIC proposals suggest steps the industry could take to help prevent disclosure. Joyce Nixson Hoffman & Elizabeth Zieser Kincaid, *AIDS: The Challenge to Life and Health Insurers' Freedom of Contract*, 35 DRAKE L. REV. 709, 732-35 (1986).

139. Dunne & Serio, *supra* note 135, at 28.

tion of the Bill of Rights, especially the First,[140] Third,[141] Fourth,[142] Fifth,[143] and Ninth Amendment[144] guarantees.[145] Original concerns regarding search and seizure issues[146] were expanded to protect "people not places."[147] The Court subsequently used privacy to protect the use of contraceptives,[148] the limited right to abortion,[149] and the right to marriage.[150] These examples illustrate the Court's traditional interpretation of privacy, which can be stated as "the interest in independence in making certain kinds of important decisions."[151]

Recently, the Court expanded privacy to include "the individual interest in avoiding disclosure of personal matters."[152] This expansion was seen as a response to concern over unwarranted disclosure of private information caused by advancements in computer technology and information gathering.[153] The newer concept of constitutional privacy is more akin to confidentiality. Commentators refer to this type of privacy right as "informational privacy."

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140. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

141. "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

142. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S. CONST. amend. IV.

143. "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

144. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

145. Griswold v. Connecticut, 381 U.S. 479 (1965).

146. Boyd v. United States, 116 U.S. 616 (1886) (invoices sought by police protected by privacy concerns).

147. Katz v. United States, 389 U.S. 347, 351-52 (1967) (concerning the wire tapping of a public phone).

148. Griswold v. Connecticut, 381 U.S. 479 (1965) (married person's right to possess and use contraceptive guaranteed under Constitution); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the right to unmarried persons).

149. Roe v. Wade, 410 U.S. 113 (1973) (women's right to legal abortion during first two trimesters part of her constitutional privacy).

150. Loving v. Virginia, 388 U.S. 1 (1967) (Virginia's antimiscegenation laws violated individuals' privacy rights).

151. Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

152. *Id.* at 599.

153. William J. Winslade, *Confidentiality of Medical Records*, 3 J. LEGAL MED. 497, 518-19 (1982).

1. The Development of Informational Privacy

Since 1977, the Supreme Court has recognized the concept of informational privacy. The first argument in favor of such protection, made in *Paul v. Davis*,[154] was unsuccessful. After an arrest for shoplifting, but prior to trial, the police featured Davis by name and photograph in flyers distributed to local merchants.[155] Davis claimed this publication violated "a right to privacy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments."[156]

After consideration, the Supreme Court rejected this claim, holding that although the Constitution created certain "zones of privacy,"[157] Davis' case did not fall within any of these "zones." More specifically, the Court stated that privacy rights should be limited to those "implicit to the concept of ordered liberty."[158] Since Davis' claim was not one of the explicit fundamental rights, his case was decided using rational relationship standards.

Despite the Court's refusal to recognize informational privacy in *Davis*, it re-addressed the issue the next year, in the landmark case *Whalen v. Roe*.[159] In *Whalen*, the Supreme Court examined a New York statute mandating the recording of names and addresses of all those who had used a doctor's prescription to obtain any of a select list of drugs that had been chosen for their potential illegal use.[160] First, the Court concluded that the state had a legitimate purpose in requiring the record keeping. This interest fell under the rubric of "controlling the distribution of dangerous drugs."[161] Then, the Court turned to the appellees' claim that the statute violated constitutionally protected zones of privacy. Unlike *Davis*, the Court in *Whalen* acknowledged the existence of "at least two different kinds of [privacy] interests."[162] In the case at bar, the interest was "in avoiding disclosure of personal matters,"[163] rather than "in making certain kinds of important decisions."[164] In differentiating between these two interests, the Court acknowledged, for the first time, the right to informational privacy as a fundamental privacy right under the Constitution.[165]

Despite this recognition, after carefully reviewing the statutory safe-

154. 424 U.S. 693, 697 (1976).
155. *Id.* at 695-96.
156. *Id.* at 712.
157. *Id.*
158. *Id.* at 713 (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
159. 429 U.S. 589 (1977).
160. *Id.* at 591.
161. *Id.* at 598.
162. *Id.* at 599-600.
163. *Id.* at 599.
164. *Id.* at 599-600.
165. *Id.* at 599-600, 605.

guards, the Court upheld the New York statute.[166] In approving the statute's protective measures, the Court stated, "[t]he right to collect and use such data . . . is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures."[167]

The recognition of informational privacy in *Whalen* left many unanswered questions. The Court failed to identify which constitutional provisions supported recognition of this right.[168] *Whalen* also failed to clearly articulate what type of standard should be used when measuring the new right against asserted state interests.[169] As a substantive due process right, privacy has been considered "fundamental."[170] In cases where privacy is asserted, the Court uses a strict scrutiny analysis in reviewing the statute abridging the privacy right.[171] Strict scrutiny requires that for the legislation to stand the state interest must be compelling and the statute must be narrowly tailored.[172] If these requirements are not met, the legislation will be declared unconstitutional.

Despite gaps in *Whalen*, the Supreme Court reaffirmed its recognition of informational privacy in *Nixon v. Administrator of General Services*.[173] Here, President Richard Nixon claimed his right to informational privacy had been violated by a congressional act authorizing review of Presidential materials for archival purposes.[174] Citing *Whalen*, the Court recognized the President's privacy interest[175] and then used a balancing test—weighing the state's possible intrusion into individual privacy against the statutory purpose and the state's interest in collecting the information.[176] The Court concluded that the feared intrusion was minimal and did not outweigh the state interest in preserving historical documents.[177]

166. *Id.* at 600-02.

167. *Id.* at 605.

168. *Id.* at 599 n.24. The Court cited an article by Prof. Kurland (*See* Philip B. Kurland, *The Private I*, U. CHI. MAG., Autumn 1976, at 8. Kurland identifies three main spheres of privacy, of which informational privacy is one).

169. Gretta J. Heaney, Note, *The Constitutional Right of Informational Privacy: Does it Protect Children Suffering From AIDS?*, 14 FORDHAM URB. L.J. 927, 936 (1986). But see *Whalen*, 429 U.S. at 600-05, where the Court details the statutory protections and state interests.

170. NOWAK & ROTUNDA, *supra* note 102, at 393.

171. NOWAK & ROTUNDA, *supra* note 102, at 371, 388. *See* NAACP v. Alabama, 377 U.S. 288, 307 (1964) (abridgement of fundamental rights must not be achieved by means which invade the protected freedom).

172. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-22 (2d ed. 1988); NOWAK & ROTUNDA, *supra* note 102, at 371.

173. 433 U.S. 425 (1977).

174. *Id.* at 429, 457-58.

175. *Id.* at 458.

176. *Id.* at 458-59, 467-68.

177. *See Whalen*, 429 U.S. 589, 600-05 (using a similar approach).

2. *Informational Privacy—A Mixed Outcome*

As in many new areas of law, the confusion over informational privacy has led to a mix of lower court decisions.[178] The main split has been between courts following *Paul v. Davis*,[179] in which the Supreme Court failed to recognize information privacy as warranting anything more than mere rational relationship analysis, and those following *Whalen* and *Nixon*, in which the Court recognized a privacy right and balanced it against the relevant state interest.[180]

Several circuit courts have interpreted *Whalen* as requiring an intermediate level of scrutiny in informational privacy cases.[181] The Fifth Circuit, in *Plante v. Gonzalez*,[182] held that a state constitutional amendment requiring financial disclosure by public officials warranted a balancing test.[183] The court balanced the state's interest in ensuring public officials' fiscal responsibility against the individuals' interest in nondisclosure. It concluded that the state interest was greater.[184]

The Third Circuit, in *United States v. Westinghouse Electric Corp.*,[185] showed its willingness to award informational privacy rights greater scrutiny.[186] In *Westinghouse*, the National Institute for Occupational Safety and Health (NIOSH) requested access to health records of Westinghouse employees. Westinghouse refused, raising the employees' privacy interests in their records. The appellate court noted that the employees had a privacy interest in their medical information,[187] but, none-

178. Heaney, *supra* note 169, at 938-42; Bruce W. Clark, Note, *The Constitutional Right to Confidentiality*, 51 GEO. WASH. L. REV. 133, 139-42 (1982).

179. 424 U.S. 693 (1976).

180. One article characterizes the standard used in *Whalen* as "one which focuses on a consideration and balance of public and private interests in legislation." The same author concludes that the Court did not apply either a rational basis test or a strict scrutiny analysis to the legislation, but something in between. Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133, 146 (1991). This intermediate standard is similar to the standard adopted by the Court in equal protection cases dealing with gender or illegitimacy. Under the intermediate standard, the Court will uphold the legislation only if the government can show a substantial relationship to an important state interest. NOWAK & ROTUNDA, *supra* note 102, at 371. Although the Court has not formally adopted this new standard for substantive due process cases, it appears to be employing it anyway. NOWAK & ROTUNDA, *supra* note 102, at 371.

181. Chlapowski, *supra* note 180, at 146-47.

182. 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979).

183. *Id.* "[S]crutiny is necessary. The Supreme Court has clearly recognized that the privacy of one's personal affairs is protected by the Constitution. Something more than mere rationality must be demonstrated." *Id.* at 1134.

184. *Id.* at 1134-37.

185. 638 F.2d 570 (3d Cir. 1980).

186. *Id.* at 577-81.

187. *Id.* at 572-73. "There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection." *Id.* at 577.

theless, upheld NIOSH's statutory right to access.

In reaching its decision, the *Westinghouse* court balanced the following factors: (1) the type of medical record requested, (2) the information the record possibly contained, (3) the potential for harm from any nonconsensual disclosure, (4) injury to the patient from a nonconsensual disclosure, (5) the adequacy of safeguards to prevent disclosure, (6) the degree of need to access, and (7) the existence, or nonexistence, of an express statute or clear public interest supporting access.[188] Ultimately, the court relied on the strict safeguards and limited access built into the statute. Several other courts have followed similar approaches.[189]

Some appellate courts have proved reluctant to accord the concept of informational privacy with anything more than rational basis scrutiny. Like *Paul v. Davis*, these cases question the right of individuals to protect information about themselves. The Seventh Circuit, in *McElrath v. Califano*,[190] narrowly interpreted privacy rights. The plaintiffs, welfare applicants, claimed their privacy interests were violated by mandatory disclosure of social security numbers to the Illinois Department of Public Aid, required for eligibility to collect welfare payments.[191] The court avoided considering the issue of informational privacy by finding that "the contention that disclosure of one's social security account number violates the right to privacy has been consistently rejected in other related contexts."[192] This finding was supported by the court's holding that " '[w]elfare benefits are not a fundamental right.' "[193]

Again, the Sixth Circuit in *J.P. v. DeSanti*,[194] held that the right to privacy did not extend to a right to nondisclosure of personal information.[195] The *DeSanti* court explicitly relied on *Paul v. Davis*[196] in rejecting juvenile plaintiffs' claim that dissemination of social histories violated their constitutional rights.[197]

188. *Id.* at 578. In using this approach, the court expanded on the *Whalen/Nixon* balancing approach.

189. Chlapowski, *supra* note 180, at 148 n.110. *See* Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir. 1983); Schacter v. Whalen, 581 F.2d 35, 37 (2d Cir. 1978); Plowman v. United States Dep't of Army, 698 F. Supp. 627, 633 (E.D. Va. 1988); Woods v. White, 689 F. Supp. 874, 876 (W.D. Wis. 1988); Carter v. Broadlawns Medical Ctr., 667 F. Supp. 1269 (S.D. Iowa 1987), *cert. denied*, 489 U.S. 1096 (1989); Slevin v. City of New York, 551 F. Supp. 917, 930-31 (S.D.N.Y. 1982), *aff'd in part and rev'd in part*, 712 F.2d 1554, 1559 (2d Cir. 1983); Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028, 1037, 1045 (D. Haw. 1979).

190. 615 F.2d 434 (7th Cir. 1980).

191. *Id.* at 435-36.

192. *Id.* at 441.

193. *Id.* (quoting Lavine v. Milne, 424 U.S. 577, 584 n.9 (1976)).

194. 653 F.2d 1080 (6th Cir. 1981).

195. *Id.* at 1090. "For all of the foregoing reasons we conclude that the Constitution does not encompass a general right to nondisclosure of private information." *Id.*

196. 424 U.S. 693 (1976).

197. 653 F.2d at 1090-91.

Despite this split over the application of informational privacy and the breadth of its protection, a majority of cases have concluded that *Whalen* held the right to privacy included the concept of informational privacy.[198] These courts have generally used an intermediate form of scrutiny, rather than strict scrutiny or rational relationship.[199] In applying this middle scrutiny, courts have balanced state interests against interests in informational privacy.

3. *Application of Informational Privacy Protections to HIV Testing*

Despite the uncertainties remaining regarding informational privacy, there is precedent for applying the concept to HIV-testing information. The Court, in *Whalen*, acknowledged the potential cost to individuals upon disclosure of medical information which, "may reflect unfavorably on the character of the patient."[200] It was this type of disclosure that the Court considered in making its decision. Nonconsensual disclosure of HIV status would certainly have a negative impact on an applicant's reputation.[201]

Given the potential for severe and irreparable harm to the applicant, the outcome of a balancing test might invalidate current legislation. The balancing test would weigh competing state and individual interests. Factors of special importance, detailed in *Westinghouse*, would be the type of medical information requested and the harm from nonconsensual disclosure.[202] The state's interest in legislation permitting testing by private insurers may be, arguably, a combination of protection of public health and promotion of insurance availability.

Protection of public health traditionally has been considered a compelling state interest.[203] In *Whalen*, the Court held the state interest in controlling the distribution of drugs, by monitoring those who had been given prescriptions, permissible.[204] The state interest in *Westinghouse*, to conduct health-hazard evaluations on occupational safety, was also permitted by the Court.[205] Providing private insurers with access to individuals' HIV status is farther removed from public health goals. Thus, in weighing the state's interest, the court carefully should distinguish the

198. Chlapowski, *supra* note 180, at 149. *But see* J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir. 1981).

199. Chlapowski, *supra* note 180, at 149. See the balancing test in Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 458 (1977).

200. Whalen v. Roe, 429 U.S. 589, 602 (1977).

201. *See* Jeff Glenney, Note, *AIDS: A Crisis in Confidentiality*, 62 S. CAL. L. REV. 1702, 1714-15 (1989). *See infra* part III. C.1.b.

202. United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980). *See infra* part III.C.1.b.

203. *See* Glenney, *supra* note 201, at 1711.

204. 429 U.S. at 598.

205. 638 F.2d at 577-78. The inspection in *Westinghouse* was prompted by a written request for inspection made by an authorized union representative.

HIV testing situation from more traditional situations and treat it accordingly.

The interest of the individual in informational privacy is especially acute in HIV testing situations. Given the inadequacy of safeguards, the likelihood of disclosure is relatively high. Additionally, with the nature of the medical information, the resulting harm can be devastating.[206] Thus, individual privacy rights are more persuasive in an HIV testing situation.[207]

When courts have used this balancing approach they have been very careful to note the statutory measures protecting against disclosure.[208] In considering various states' legislation regarding HIV testing, the type of statutory safeguards present in *Whalen* and *Westinghouse* are frequently absent, especially in states with no restrictions on testing. This could be an important factor in encouraging courts to find current legislation unconstitutional.

The right of informational privacy, although relatively new and undeveloped, is likely to expand in future years, especially with the developments in computerized record keeping. HIV testing is one area that may be challenged under this new concept.

C. Equal Protection

Equal protection provides another potential constitutional source of protection for insurance applicants. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[209] To invoke equal protection, a party must be part of a "suspect class,"[210] or have a "fundamental right" infringed.[211] Once a court determines that equal protection is applicable, it reviews the case using one of three tests.[212] If the Court can find no basis for independent evaluation, such as a suspect class or fundamental right, it applies the rational basis test.[213] Under this standard, the legislation need only have a reasonable, rational, or fair relationship to a legitimate public purpose or governmental interest.[214] Mere rationality results in a great deal of deference to states' interests,[215] and rarely results in judicial

206. *See infra* notes 252-59 and accompanying text.
207. Dunne & Serio, *supra* note 135, at 30-31.
208. *See supra* notes 159-67 and accompanying text.
209. U.S. CONST. amend. XIV.
210. TRIBE, *supra* note 172, § 16-13.
211. NOWAK & ROTUNDA, *supra* note 102, § 14.3.
212. *Id.* § 14.3, at 574.
213. *Id.* at 579.
214. *Id.* at 599. *See* Dandridge v. Williams, 397 U.S. 471 (1970).
215. Costa, *supra* note 101, at 1115.

intervention.[216] In cases where the government uses a suspect classification or denies a fundamental right, the Court applies the strict scrutiny test.[217] To survive this test there must be a showing that the legislation is narrowly tailored and promotes a compelling governmental interest.[218]

In addition to strict scrutiny and mere rationality, the Court has developed an intermediate level of review for use with "sensitive" or "quasi-suspect" classes and "important," but not fundamental, rights.[219] When dealing with these classifications, "heightened" or "intermediate" scrutiny requires that the legislation be substantially related to an important governmental interest.[220]

1. Applying Suspect or Quasi-Suspect Classification to Insurance Applicants

Using equal protection as a method to protect insurance applicants could take one of two approaches. One approach would be to treat HIV-positive persons as part of a suspect or quasi-suspect class.[221] Another option would be to argue that applicants' fundamental rights, such as the interest in informational privacy, are infringed by state-sanctioned testing.[222] Either alternative would arguably invoke constitutional protection and stricter scrutiny.

Applying protected class status involves proving a history of discrimination, stigmatization, immutability of the characteristic common to the class, and political powerlessness.[223] If a court finds these factors sufficient to consider the group a suspect class, strict scrutiny must be used in reviewing legislation which relates to the class. To date, only a few groups, including race, religion, and alienage, have qualified for such protection.[224]

Other groups have qualified for heightened scrutiny protection as quasi-suspect classes, including gender,[225] alienage,[226] and illegiti-

216. William F. Flanagan, *Equality Rights for People with AIDS: Mandatory Reporting of HIV Infection and Contact Tracing*, 34 McGILL L.J. 530, 561 (1989).

217. NOWAK & ROTUNDA, *supra* note 102, at 579.

218. *Id.*

219. *Id.* at 576.

220. *Id. See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Mills v. Habluetzel, 456 U.S. 91 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications . . . must serve important governmental objectives and must be substantially related to achievement of those objectives.").

221. Barnes, *supra* note 137, § 4-4.

222. *Id.*

223. TRIBE, *supra* note 172, § 16-22.

224. Korematsu v. United States, 323 U.S. 214 (1944).

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

226. Mathews v. Diaz, 426 U.S. 67 (1976).

macy.[227] The difference between suspect and quasi-suspect classification is unclear.[228] Cases dealing with quasi-suspect classifications overlap greatly with traditional suspect class characteristics. Factors such as "discrete and insular minorit[y]" status,[229] stereotypes, stigmatization, immutability, and historical treatment, have all been cited as support for quasi-suspect classification.[230]

To use a class approach for analyzing insurance regulations, applicants could be included as part of a broader suspect or quasi-suspect class, or one limited to applicants. Arguably, the focus of this approach would concentrate on HIV-positive applicants whose privacy and welfare are most at risk.

a. Using Sexual Orientation, Intravenous Drug Use, and Physical Handicap as Protected Classes

Including applicants in a broader class requires finding a group which meets the court's classification requirements. One possibility is a class determined by sexual orientation.[231] Since the majority of people in the United States with AIDS are gay men,[232] and AIDS discrimination often reflects anti-gay sentiment, this approach would make logical sense.[233]

Arguably, sexual orientation could meet the four traditional criteria needed for a suspect class.[234] Courts have generally refused, however, to treat homosexuals as members of a suspect class.[235] The only court to

227. Mills v. Habluetzel, 456 U.S. 91 (1982); Mathews v. Lucas, 427 U.S. 495, 505 (1976); Trimble v. Gordon, 430 U.S. 762 (1977).

228. TRIBE, *supra* note 172, § 16-33, at 1614 ("The Court has never provided a coherent explanation of the characteristics which, either overtly or covertly, trigger intermediate review.").

229. United States v. Carolene Prods., 304 U.S. 144, 152-53 n.4 (1938).

230. TRIBE, *supra* note 172, § 16-33, at 1614-16.

231. *See* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985); Harris M. Miller, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984).

232. Overall, 58% of all men with AIDS contracted the disease through sex with other men. This rate is much higher for Asian and white men (76% and 75%), than for Black and Hispanic men (35% and 40%). CDC, *supra* note 3, at 8, 9. An argument can also be made that dissemination of HIV status reveals a person's sexual orientation.

233. Barnes, *supra* note 137, § 4-4.

234. "As subjects of age-old discrimination and disapproval, homosexuals form virtually a discrete and insular minority. Their sexual orientation is in all likelihood 'a characteristic determined by causes not within [their] control,' and is, if not immutable, at least 'extremely difficult to alter' . . . . Homosexuality should thus be added—and openly—to the list of classifications that trigger increased judicial solicitude." TRIBE, *supra* note 172, § 16-33, at 1616.

235. Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987); National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd by an equally divided Court* 470 U.S. 903 (1985).

consider homosexuality as a suspect classification has been the Ninth Circuit. In *Watkins v. United States Army*,[236] the court found that homosexuals constituted a suspect class under equal protection jurisprudence.[237] After analyzing the history of discrimination, unfairness of discrimination in relation to societal contribution, immutability, and lack of political power,[238] the court held, "our analysis of the relevant factors . . . ineluctably leads us to the conclusion that homosexuals constitute such a suspect class."[239] After this finding, the court applied strict scrutiny to the Army regulations which facially discriminated against gay men and lesbians.[240]

Despite this step to expand equal protection, only two years later the same court overturned the district court decision in *High Tech Gays v. Defense Industrial Security Clearance Office*,[241] which had also held homosexuals a suspect class. The court relied heavily on the Supreme Court's decision in *Bowers v. Hardwick*.[242] Thus, given the current judicial atmosphere, it is unlikely that gay men and lesbians will receive even heightened scrutiny protection in the near future.

Another, similar, approach would include HIV-positive individuals with other protected groups. Proposed classes include intravenous drug users and prostitutes.[243] These groups are unlikely to obtain status as a suspect or quasi-suspect class, however, due to the element of choice involved which arguably defeats the immutability requirement.[244]

Potentially the most promising approach includes HIV-positive applicants as part of a handicapped class.[245] Despite classification as handi-

236. 847 F.2d 1329 (9th Cir. 1988), *withdrawn*, 875 F.2d 699 (1989) (en banc).

237. *Id.* at 1349.

238. *Id.* at 1345-49.

239. *Id.* at 1349.

240. *Id.* 1349-50.

241. 668 F.Supp. 1361 (M.D. Cal. 1987), *rev'd*, 895 F.2d 563 (9th Cir. 1990).

242. Hank Pearson, High Tech Gays v. Defense Industrial Security Clearance Office: *Reconsidering Suspect Status for Homosexuals*, 23 ARIZ. ST. L.J. 871, 875 (1991); Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding sodomy laws as they applied to homosexuals).

243. Barnes, *supra* note 137, § 4-4.

244. *Id.*; *see* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (holding that refusal to hire person undergoing methadone maintenance treatment for heroin addiction was not a violation of Title VII, despite significant evidence of adverse impact on minority groups).

245. *See* Hollowell & Eldridge, *supra* note 101. Precedent exists for covering contagious diseases, such as AIDS, under disabled status. *See* School Bd. v. Arline, 480 U.S. 273, 280-86 (1987) (a teacher suffering from tuberculosis may be considered a "handicapped individual" under § 504 of the Rehabilitation Act of 1973). Notably, several lower courts have held that people with AIDS fall under the protection of § 504 of the Federal Rehabilitation Act. *See* Chalk v. United States Dist. Court, 840 F.2d 701, 704-09 (9th Cir. 1988) (HIV-positive teacher covered by § 504); Martinez v. School Bd., 861 F.2d 1502, 1506 (11th Cir. 1988) (HIV-positive child challenging educational segregation covered under § 504); Casey v. Lewis, 773 F. Supp. 1365, 1370-72 (D. Ariz. 1991) (HIV-positive prisoners challenging restriction of visits covered under § 504); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1986) (child with AIDS handicapped for purposes of § 504).

capped individuals under federal statutes, equal protection does not necessarily follow. The Supreme Court recently held that mentally retarded people are not a quasi-suspect class and are not entitled to heightened scrutiny.[246] Despite the presence of characteristics similar to those of existing suspect and quasi-suspect classes, the Court was concerned about extending the protection to a potentially unending series of new classes.[247] The Court's reluctance to extend suspect and quasi-suspect classifications bodes poorly for further expansion.

b. HIV Status as an Independent Suspect or Quasi-Suspect Class

Given the probable difficulty of expanding a base class to include HIV-positive applicants, an alternative method is to treat HIV status as its own class.[248] The emergence of AIDS has undoubtedly produced a "discrete and singular minority."[249] This group, while perhaps not qualifying as a suspect class, may qualify as a sensitive or quasi-suspect class warranting heightened scrutiny.[250]

HIV-positive individuals possess many, if not all, of the criteria outlined by the Court: discrimination, stigmatization, immutability, and political powerlessness.[251]

Ample evidence exists of discrimination against AIDS victims since the emergence of the syndrome.[252] Public fear about AIDS has resulted in employment discrimination,[253] educational discrimination,[254] housing discrimination,[255] denial or curtailment of insurance,[256] and denial of

246. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). *But see* Doe v. Roe, 526 N.Y.S.2d 718, 725 (N.Y. App. Div. 1988) (discussing need for heightened scrutiny where AIDS testing is at issue).

247. "[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm." 473 U.S. 432, 445-46.

248. *See* Costa, *supra* note 101, at 1115.

249. United States v. Carolene Prods., 304 U.S. 144, 152-53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

250. Costa, *supra* note 101, at 1119.

251. *See supra* note 223 and accompanying text for more detailed discussion of these criteria.

252. Costa, *supra* note 101, at 1119 n.117 (citing incidents where policemen refused to drive prisoner with AIDS to hospital; a doctor with AIDS patients was threatened with eviction; Haitians were denied jobs because of the association with AIDS; funeral director's association urged members not to embalm those who died of AIDS).

253. *See* Arthur S. Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681 (1985).

254. *See* Amy Tarr, *AIDS: The Legal Issues Widen*, NAT'L L.J., Nov. 25, 1985, at 29.

255. *Doctor Treating AIDS Gets Writ Against Eviction*, N.Y.L.J., Oct. 17, 1983, at 1.

medical treatment.[257] Even courts have acknowledged that victims of AIDS "have been faced with social censure, embarrassment, and discrimination in nearly every phase of their lives."[258] A wide variety of people all face similar HIV or AIDS related discrimination.[259]

Stigmatization is another important element in the classification of a group for constitutional protection.[260] One way of determining stigmatization is by the general attitude of society towards the group in question.[261] Despite widespread attempts at education, the public attitude towards AIDS is generally one of fear and ignorance.[262] Those with AIDS frequently find themselves ostracized by their communities.[263]

Immutability is a more ambiguous criteria. By definition, immutable characteristics are unchangeable. Arguably, AIDS is immutable because once contacted there is no way for the person to change their HIV-positive status. Once infected with the HIV virus there is no known method for combatting the virus.[264] In addition, immutability traditionally has not been one of the most critical factors. The Court has found suspect and sensitive classification despite its absence, notably in respect to alienage.[265]

The last major consideration is the political powerlessness of the group in question. Commentators argue that those with AIDS are at a distinct disadvantage in accessing political power, both because of the demographics of AIDS and the nature of the disease itself.[266] AIDS is most prevalent among traditionally disadvantaged groups. Gay men, minorities, the poor, and intravenous drug users compose a disproportionate number of AIDS cases.[267] These groups remain outside of the

256. *See* Tarr, *supra* note 254, at 28.

257. *See* Jerry Adler et al., *The AIDS Conflict*, NEWSWEEK, Sept. 23, 1985, at 20-21.

258. South Fla. Blood Serv. v. Rasmussen, 467 So. 2d 798, 800 (Fla. Dist. Ct. App. 1985).

259. Costa, *supra* note 101, at 1119.

260. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 373-76 (1978) (Brennan, J., concurring and dissenting).

261. Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 6 n.25 (1977).

262. Costa, *supra* note 101, at 1120.

263. Government of Virgin Islands v. Roberts, 756 F. Supp. 898, 902 (D.V.I. 1991) ("Disclosure of the latter information [HIV status] obviously can have devastating consequences .... AIDS has engendered such prejudice and apprehension that its diagnosis typically signifies a social death as concrete as the physical one which follows.").

264. *See supra* note 34-35 for more detailed discussion.

265. Plyler v. Doe, 457 U.S. 202 (1982) (using heightened scrutiny in considering disadvantageous law for aliens); Graham v. Richardson, 403 U.S. 365 (1971) (applying strict scrutiny to aliens). Physical disability is also not always an immutable characteristic, but is arguably sufficient for a heightened classification. *See* Hollowell & Eldridge, *supra* note 101.

266. Flanagan, *supra* note 216, at 562.

267. Fifty-nine percent of AIDS cases involve men who had sex with an infected man, 22% of AIDS cases involve intravenous drug users. CDC, *supra* note 3; Thomas C. Quinn, *Global*

mainstream political process.[268] In addition, the costly and debilitating nature of AIDS leaves patients ill-equipped to fight for political protection. Given these factors, those infected with AIDS have particular difficulty accessing the political arena.

Even if AIDS fulfills the Court's framework for a quasi-suspect class, serious obstacles remain. Precedent concerning similarly situated groups presents a problem. The Supreme Court has refused to extend suspect or quasi-suspect classification to physically or mentally disabled individuals.[269] This reluctance makes protected classification for HIV individuals less likely.

Another issue is the close link between homosexual activity and AIDS.[270] Traditional disapproval of homosexuality as violating the moral code[271] makes protection for homosexuals less likely.

If the Court would be willing to treat HIV status as a quasi-suspect class, legislation dealing with the subject would warrant a heightened level of judicial scrutiny. In analyzing statutes, the courts would have to find a substantial relationship between an important state interest and the terms of the legislation.[272] The state's interest in public health is given great weight by the court even when dealing with constitutional concerns.[273] Testing for insurance purposes is not a traditional public health consideration and, as existing legislation demonstrates, states have limited insurance companies' access to testing. In fact, commentators have argued that allowing insurer testing may even damage public health, due to people's fears about confidentiality and insurability.[274] Even if a sufficient state interest existed, many less intrusive alternatives may be just as able to satisfy insurers while protecting applicants.[275]

Epidemiology of HIV Infections, *in* THE MEDICAL MANAGEMENT OF AIDS 7-8 (Merle Sande & Paul Volberding eds., 1990).

268. "The relative political powerlessness of people infected with a contagious and widely feared disease, particularly when those at the greatest risk of infection are already members of disadvantaged and disfavored groups (in the U.S., primarily black and Hispanic IV drug users, and gay men), is also a compelling reason for judicial scrutiny." Flanagan, *supra* note 216, at 562.

269. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

270. Flanagan, *supra* note 216, at 563.

271. This disapproval was reflected in the Supreme Court's recent decision to uphold sodomy laws. The Court cited the tradition of public condemnation to support its decision. Bowers v. Hardwick, 478 U.S. 186 (1986).

272. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

273. Flanagan, *supra* note 216, at 562. Several cases have held that health regulations should not be reviewed even when faced with equal protection claims. *See In re* Caselli, 204 P. 364 (Mont. 1922); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding ordinance requiring mass public vaccinations). Flanagan questions these cases precedential value given the changes in knowledge of disease and the expansion of constitutional rights. Flanagan, *supra* note 216, at 562 n.126.

274. Barnes, *supra* note 137, § 4-3.

275. Costa, *supra* note 101, at 1135.

c. Fundamental Rights: Informational Privacy and Access to Health Care

In addition to protecting suspect and quasi-suspect classes, equal protection also extends to fundamental rights.[276] Traditionally, these fundamental rights have included the right to vote,[277] the right to travel interstate,[278] the right to criminal appeal,[279] and the right to privacy.[280]

The main right in question with AIDS testing is the right to informational privacy.[281] Because this right is relatively new and unsettled, some critics doubt that courts would apply traditional strict scrutiny when analyzing an informational privacy claim. Even if strict scrutiny were not used, informational privacy has been given enough deference by the Court to warrant heightened scrutiny.[282]

In weighing the right of informational privacy against the state interest in permitting insurer testing, it would be important for the Court to consider the policy argument that medical records deserve an extra layer of protection. Due to the often personal nature of the doctor-patient relationship, medical records often contain uniquely revealing information. To foster continued trust in the medical community, it is especially important to protect these records. This reality has been acknowledged by both federal and state governments, leading to special statutory treatment of medical information.[283] This consideration would give extra support to applicants' informational privacy claims.

Another way to expand equal protection is for courts to treat health care as a fundamental, or near fundamental, right.[284] Framing health care in this way might lead to increased government involvement. Increased regulations or state mandated health care might eliminate individual policies entirely, thus effectively eliminating HIV testing.

The Court has ruled that medical care for the indigent "is as much 'a basic necessity of life' . . . as welfare assistance."[285] In addition, because of the cost of health care, traditionally disadvantaged groups bear a greater burden. This fact may strengthen a claim based on equal protection.[286] Insurance plays an important role bridging the gap between

276. TRIBE, *supra* note 172, § 16-33.

277. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

278. Shapiro v. Thompson, 394 U.S. 618 (1969).

279. Griffin v. Illinois, 351 U.S. 12 (1956).

280. Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).

281. *See supra* part III.B.

282. Barnes, *supra* note 137, § 4-4.

283. Costa, *supra* note 101, at 1127 n.171.

284. Wendy K. Mariner, *Access to Health Care and Equal Protection of the Law: The Need for a New Heightened Scrutiny*, 12 AM. J.L. & MED. 345 (1986).

285. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 259 (1974) (striking down one year residential requirement for county paid hospitalization).

286. Scherzer, *Insurance & AIDS-Related Issues*, *supra* note 63, ch. VIII, at 12.

state-funded programs and private payment, providing health care for many who would otherwise have none.[287] Legislation effectively limiting access to health care by allowing HIV testing by insurers could warrant heightened or strict scrutiny.

This approach has had little success to date. At least one commentator believes that the Court's reluctance is due to the link between access to health care and economic class.[288] Wendy Mariner posits that the Court is troubled by treating classifications based on wealth as suspect because such a concept challenges the very nature of our economic system.[289] Therefore, the Court refuses to acknowledge the interdependency between economic power and health care.[290]

D. Procedural Due Process

A third type of constitutional challenge to HIV testing employs the concept of procedural due process. Procedural due process rights come from the Fifth Amendment,[291] as made applicable to the states through the Fourteenth Amendment. The Fifth Amendment entitles a person to adequate notice when rights or interests to which he or she has a "legitimate claim of entitlement" are deprived.[292] Property, employment, reputation, honor, and integrity have all given rise to legitimate procedural due process claims.[293] When the government harms one of these areas without providing the individual sufficient warning, a case for procedural due process arises. In AIDS cases, property, employment, and reputation may all be deprived when HIV status becomes known.[294] Such harm is likely to follow an insurers' nonconsensual disclosure of HIV status. Thus, those applicants who suffered a deprivation of rights, without proper notice, may have a basis for a procedural due process claim.[295]

Determining what procedural protection a person is due requires a balancing test. In making this determination, a court should consider the nature of the private interest, the risk of erroneous deprivation of such interest through government proceedings, the value of additional safe-

287. As one author wrote, "[w]hile not understating the severity of the AIDS epidemic, we must assert that . . . as long as adequate public health and welfare systems are not in place, it must be a social priority to maintain insurance coverage for a social group which already has suffered inordinate discrimination." *Id.*

288. Mariner, *supra* note 284, at 356. *See* Maher v. Roe, 432 U.S. 464 (1977) (women had no right to funding for elective, nontherapeutic abortions).

289. Mariner, *supra* note 284, at 355-56.

290. *Id.*

291. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

292. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

293. Closen et al., *supra* note 41, at 888.

294. *See supra* notes 232-43 and accompanying text.

295. Closen et al., *supra* note 41, at 891.

guards, and the government's interest, including the administrative burdens that additional procedural requirements would entail.[296]

One case that used procedural due process in an AIDS-related situation is *Rasmussen v. South Florida Blood Service*.[297] In *Rasmussen*, an individual who contracted AIDS through a blood transfusion sought information on blood donors' HIV status from the blood service.[298] In denying his claim, the Florida Supreme Court relied mainly on the privacy rights of the donors, but added an important footnote implicating procedural due process.[299] The court stated, "without fully addressing the issue as it is unnecessary to our decision, we note that because disclosure of the information requested threatens damage to the donors' reputation and other liberty interests, the donors' due process rights are also implicated."[300] This language implies that procedural due process may be sufficient to block access to individuals' HIV status without adequate notice.

Applying procedural due process to HIV testing of insurance applicants could take several forms. First, current legislation could be examined to determine whether it provides adequate procedural due process to applicants. The nature of the private interest is great and the risk of erroneous deprivation due to inadequate state legislation is high. In addition, the state interest in protecting individuals' privacy rights arguably outweighs any burden from closer state supervision. Since some legislation provides only minimal safeguards against breaches in confidentiality, chances are great that due process rights might be violated.

Another broader issue is whether procedural due process could be used to completely block insurers' access to HIV testing. If the insurer was seeking information from pre-existing medical information, the situation would be analogous to *Rasmussen*, where the court denied access. The issue becomes more complex when the applicant voluntarily submits to an HIV test in order to obtain insurance. In this case, there may not be enough state action to make a procedural due process claim.

Since many of the confidentiality breaches occur from inadequate or improper notice to the applicant, procedural due process provides a logical remedy. The goal of procedural due process, however, is not to prevent deprivations of rights, but to ensure adequate notice prior to their occurrence. As such, procedural due process is inherently limited in its potential application to insurers' use of HIV testing.

296. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

297. 500 So. 2d 533 (Fla. 1987).

298. *Id.* at 534.

299. *Id.* at 538 n.12.

300. *Id.*

IV. Proposals

The main focus of constitutional challenges to insurer testing are in the areas of privacy, equal protection, and procedural due process. Despite the potential basis for these new challenges, problems exist. Restrictive state action analysis may block challenges in states with no existing legislation. Conservative trends in judicial decisions may hamper expansion of individual rights, especially in the area of equal protection. Concerns over public health may prevent courts from carefully scrutinizing legislation.

The insurance industry has also raised issues, some of which commentators have questioned.[301] Insurers claim testing is needed to keep the industry financially solvent.[302] There is some evidence this concern is misplaced. While the cost of AIDS to health and life insurance companies is increasing,[303] the difference between group policies, not requiring testing, and individual policies requiring testing, is minimal.[304] In addition, the percentage of AIDS-related claims remains less than five percent of total industry claims.[305] The small percentage AIDS accounts for in the industry budget contrasts with the amount of pressure being exercised by insurers in support of testing. This contrast is sharpened when one considers that individual policies only comprise thirty percent of health insurance and sixty percent of life insurance.[306]

Although insurers insist testing is the best and most efficient way of doing business, other options exist. One alternative would be to use actual AIDS symptoms, such as swollen glands and weight loss, to detect infected individuals.[307] Using AIDS symptoms would reduce the stigma and the confidentiality risks attached to testing. Another approach uses different types of blood tests, such as testing for low white blood cell or T-cell count.[308]

Moreover, instead of using testing at all, there are other methods of reducing AIDS-related costs. Cost reduction alternatives include utilizing less expensive types of health care, such as home nursing, pooling together individual policies to spread costs over more policy holders, assigning each insurer a certain number of persons with HIV positive sta-

301. *See* Schatz, *supra* note 12.

302. Tonery, *supra* note 49, at 137.

303. *See supra* note 10.

304. *See* Steven Brostoff, *AIDS-Related Life Insurance Claims Jumped in 1990*, NAT'L UNDERWRITER, Oct. 7, 1991.

305. AIDS-related health insurance claims were 1.3% of the total for individual coverage in 1990, compared to 1.4% for group coverage. For individual life insurance, AIDS-related claims made up 2% of the total and 3.5% of group claims in 1990. *Id.*

306. Cooper, *supra* note 10, at 3.

307. Schatz, *supra* note 12, at 1795.

308. *Id.* Both of these tests show correlations with AIDS and HIV infection.

tus, and investing in prevention.[309]

Blocking insurers from testing is not a new proposal. Currently, insurance companies are not permitted to test for diethylstilbestrol (DES), sickle cell, or Tay-Sach disease, all of which occur in certain populations.[310] Even though AIDS is new from a medical perspective, it is similar to many other diseases. Treating it so differently may reflect public fear and ignorance.

Current legislation is not providing insurance applicants with adequate protection, especially when they are HIV positive. Although some commentators believe strengthening existing legislation is the solution,[311] constitutional-based challenges may be the only way to ensure that individual rights are respected.

Conclusion

The AIDS crisis highlights potential constitutional violations of privacy and equal protection. Due to the nature of the disease and the public stigma attached to it, many of these constitutional guarantees have been overlooked.

Insurers' concerns about costly policy benefits and adverse selection are legitimate. Protecting the solvency and efficiency of the private insurance industry is vital to the well being of all, but especially to those with serious illnesses such as AIDS.

Continual breaches of confidentiality, however, pose serious threats to the constitutional rights of applicants. Other dangers exist as well, such as eroding the public trust, discouraging voluntary HIV testing, decreasing insurance availability, and slowing the search for a cure. These interests must be given great weight and should be carefully protected. Since current methods are failing, constitutional claims may be one method to address the problem.

309. Schatz, *supra* note 12, at 1796-97; *See* Scherzer, *Insurance, in* AIDS & THE LAW, *supra* note 53, at 198-201.

310. Schatz, *supra* note 12, at 1797-98.

311. Scherzer, *Insurance, in* AIDS AND THE LAW, *supra* note 53, at 195-96.