

# FOR BETTER OR FOR WORSE? MANDATORY AIDS TESTING FOR MARRIAGE LICENSE APPLICANTS

## INTRODUCTION

The discovery of Acquired Immune Deficiency Syndrome (AIDS)<sup>1</sup> stimulated widespread public fear<sup>2</sup> similar to previous outbreaks of typhoid<sup>3</sup> and tuberculosis.<sup>4</sup> Because of the disease's fatal effects,<sup>5</sup> health

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1. Scientists at the Center for Disease Control (CDC) discovered AIDS in June 1981. They reported a rare form of pneumonia, *pneumocystis carinii pneumonia*, in five homosexual men. At about the same time, the CDC reported instances of Kaposi's sarcoma, a form of cancer usually associated with elderly Mediterranean men, appearing with frequency in young homosexual males. I. SLOAN, AIDS LAW: IMPLICATIONS FOR THE INDIVIDUAL AND SOCIETY (1988). By September 1982 the disease received its name. S. PANEM, THE AIDS BUREAUCRACY (1988).

*See also* U.S. Dept. of Health and Human Services Centers for Disease Control, *A Cluster of Kaposi's Sarcoma and Pneumocystis Carinii Pneumonia Among Homosexual Male Residents of Los Angeles and Orange Counties, California*, 31 MORBIDITY & MORTALITY WEEKLY REP. (June 18, 1982).

2. A 1985 poll revealed that over one-third of the public believed that AIDS was as contagious, or more contagious than the common cold. Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1274 n.6 (1986).

Also in 1985, a *Los Angeles Times* poll reported that fifty-one percent of respondents favored quarantining AIDS carriers; forty-eight percent favored requiring persons testing positive to the virus to carry an identification card; and fifteen percent favored tattooing AIDS carriers. N.Y. Times, Dec. 20, 1985, at A24, col. 1.

3. Typhoid traces its origins in the United States to the Jamestown settlement in the early seventeenth century. Of 105 persons who first landed in Jamestown, over one-half died the first summer. The disease is highly contagious and early epidemics were the result of infected sailors entering Eastern seaports. The disease's symptoms include swelling and burning fevers. G. MARKS & W. BEATTY, EPIDEMICS 164-67 (1976). *See, e.g.,* *People v. Robertson*, 302 Ill. 422, 134 N.E. 815 (1922) (upholding the constitutionality of a quarantine requirement for typhoid carriers).

4. The legal treatment of tuberculosis traces its origins to the Code of Hammurabi. The last full blown outbreak occurred in the nineteenth century, although the disease

officials responded by declaring AIDS the nation's primary health priority.<sup>6</sup> In many states AIDS legislation soon followed.<sup>7</sup> Louisiana and

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continues to infect people today. The mortality rate has diminished considerably in industrialized countries. In the United States, for example, the disease appears in six out of every 100,000 persons. The disease is contagious and is casually transmitted, usually through the air or in milk. Tuberculosis manifests in the lungs causing tissue scarring due to infectious eruptions. R. GALLAGHER, *DISEASES THAT PLAGUE MODERN MAN* 167-78 (1969).

In *Moore v. Draper*, 57 So. 2d. 648 (Fla. 1952), the Florida Supreme Court upheld the constitutionality of a state statute requiring the quarantine of persons afflicted with tuberculosis. The court stated that tuberculosis victims "left disease, misery, sorrow, and death in their wake." *Id.* at 648. See generally Gray, *The Parameters of Mandatory Public Health Measures and the AIDS Epidemic*, 20 SUFFOLK U. L. REV. 505 (1986) (comparing AIDS quarantine with tuberculosis quarantine).

5. See *infra* notes 21-28 and accompanying text for a discussion of the disease's destruction of the immune system.

6. Assistant Secretary of Health Edward Brandt labeled AIDS the Public Health Service's number one priority in 1983. Brandt admitted the statement may have been overly reactionary, but was necessary to alert Washington legislators to the disease's seriousness. PANEM, *supra* note 1, at 14.

Soon after Brandt's declaration, two committees — the Intergovernmental Relations and Human Resources Subcommittee of the Committee on Government Operations, and the Subcommittee on Science and Technology of the House Energy and Commerce Committee — formed to examine possibilities for federal funding of AIDS research. *Id.* at 31-32. Estimates of the disease's spread fueled the government's concern for the public health. One estimate indicates that by 1991, between 179,000 and 270,000 Americans will die from AIDS. SLOAN, *supra* note 1, at 2.

7. The following represents a sampling of the more controversial AIDS legislation:

Colorado's proposal of a quarantine of AIDS patients ultimately failed in the legislature. House Bill 1290, 55th General Assembly. See also *Lack of Accord Kills Colorado Bill*, 1 AIDS POL'Y & LAW (BNA) 2 (May 21, 1986). See generally Parmet, *AIDS Quarantine: Revival of An Archaic Doctrine*, 14 HOFSTRA L. REV. 53 (1985) (arguing that quarantine applied to AIDS patients must be narrowly tailored to the state's health interest). Instead, the Colorado legislature enacted an AIDS reporting requirement. According to the law, physicians treating AIDS-positive individuals must report findings to the State Department of Health. COLO. REV. STAT. § 25-4-1402 (1989). For a discussion of the Colorado reporting statute, see Note, *Reportability of Exposure to the AIDS Virus: An Equal Protection Analysis*, 7 CARDOZO L. REV. 1103 (1986) (challenging the law on right of privacy and equal protection grounds) [hereinafter *AIDS Reportability*].

In Texas, legislators contemplated criminalizing homosexuality as a means of protecting the public from the spread of AIDS. PANEM, *supra* note at 24. See generally Note, *AIDS-A New Reason to Regulate Homosexuality*, 11 J. CONTEMP. L. 315 (1984) (arguing that the AIDS epidemic ended the trend toward liberalizing anti-sodomy statutes) [hereinafter *A New Reason to Regulate*]. Also in Texas, legislators proposed a marital testing requirement if reports indicated a dramatic increase in the disease's spread. *Pre-Nuptial AIDS Screening Taxes Illinois Health System*, N.Y. Times, Jan. 26, 1988, at A1, col. 3.

Because of the flurry of reactionary legislation, some states enacted laws designed to

Illinois joined the ranks<sup>8</sup> by enacting mandatory premarital AIDS testing requirements.<sup>9</sup> These laws, however, were short-lived.<sup>10</sup> The recent repeal of the Illinois law<sup>11</sup> illustrated that mandatory premarital

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protect the AIDS patient from discrimination. Wisconsin, for instance, enacted laws aimed at specifically protecting the interests of AIDS carriers. One law prohibits employers from discriminating against employees on the basis of AIDS unless the state epidemiologist determines that the individual poses a significant threat to the community. WIS. STAT. ANN. § 103.15 (West 1988 & Supp. 1989). Another law only allows HTLV-III testing if an informed individual gives his consent. WIS. STAT. ANN. § 146.025(2)(1) (West 1989).

New York recently enacted a law whereby health officials possessed authority to inform individuals of the test results of AIDS positive partners. Disclosure, however, must accompany a court order authorizing the physician to disclose. N.Y. PUB. HEALTH LAW § 2785(2) (McKinney 1985 & Supp. 1990).

Municipalities also have reacted to the crisis. When AIDS first became an issue in New York and San Francisco, municipal officials immediately closed gay bathhouses. Leaders believed that incidents of multiple and anonymous sex were primary conduits for the disease's spread. Commentators suggest the move may have been too rash. They argue that the closings foreclosed a plausible avenue for educating those most in need of information about the disease. See Rabin, *The AIDS Epidemic and Gay Bathhouses: A Constitutional Analysis*, 10 J. HEALTH POL., POL'Y & L. 729, 742 (1986).

Similar to the Wisconsin law, Los Angeles and San Francisco responded to incidents of AIDS discrimination by enacting ordinances prohibiting AIDS discrimination in housing, education, and employment. The Los Angeles ordinance prohibits discrimination in housing, employment, education, and use of the city facilities and services against AIDS patients and those perceived as AIDS patients. Los Angeles Ordinance 160,289 (Aug. 16, 1985). Similarly, San Francisco enacted an ordinance prohibiting employers from discriminating against persons infected with AIDS. Moreover the ordinance also prohibits employers from mandatorily testing employees for AIDS. San Francisco Ordinance 49,985 para. 20,950B.

8. Louisiana enacted a law requiring couples to undergo a mandatory AIDS test. After much controversy, the Louisiana legislature repealed the law in 1988. Bill No. 345, effective July 7, 1988. The Illinois law is described *infra* note 11.

The Louisiana law suffered from many of the same problems as the Illinois law. For example, the Department of Health reported a decline in marriage license applications following the law's enactment. *Illinoisans Fault Prenuptial Test for AIDS*, N.Y. Times, April 16, 1988, at A6, col. 4. Additionally, couples avoided the law by traveling to neighboring states to marry. *Pre-Nuptial AIDS Screening Taxes Illinois Health System*, N.Y. Times, Jan. 26, 1988, at A1, col. 3.

9. ILL. REV. STAT. ch. 40, para. 204 (1980 & Supp. 1989) (repealed 1989). Interestingly, Missouri has a mandatory pre-marital AIDS testing requirement which is effective as soon as the Center for Disease Control deems pre-marital testing appropriate. MO. REV. STAT. § 191.692 (Vernon Supp. 1989).

10. Four months after the Illinois law became effective, AIDS specialists urged its repeal. Several bills appeared in the Illinois House of Representatives calling for repeal, of which one bill died in committee by only one vote.

11. On June 23, 1989, the Illinois legislature approved a bill repealing the AIDS law. The Senate approved the measure by a 33 to 23 vote, while the House approved the bill 65 to 48. Instead of mandatory testing, couples are now given AIDS informa-

testing is unfeasible. Because many states have legislation involving marriage and AIDS testing in some form,<sup>12</sup> an analysis of the Illinois law and its shortcomings will provide guidance to other states contemplating similar laws.

Briefly, the Illinois law required couples applying for marriage licenses to present proof of having taken an AIDS test.<sup>13</sup> Although the law did not absolutely bar marriage if either partner tested positive,<sup>14</sup> its requirements unnecessarily burdened couples desiring to marry.<sup>15</sup>

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tional brochures upon application for a marriage license. *Pre-Nuptial Test for AIDS Repealed*, N.Y. Times, June 24, 1989, at A6, col. 1.

On September 11, 1989, Illinois Governor James R. Thompson signed the bill repealing the pre-marital AIDS law. As of Monday, September 11, 1989, the tests revealed only 52 AIDS-positive individuals out of 250,000 people tested. *Mandatory AIDS Test is Repealed in Illinois*, N.Y. Times, September 12, 1989, at A16, col.2.

12. At present, other states enacting legislation relating to AIDS and marriage include: California, which conditions licensing upon proof that the clerk offered the applicants an opportunity to undergo an AIDS test, CAL. CIVIL CODE § 4300(c) (West 1983 & Supp. 1990); Georgia, which allows voluntary AIDS testing and distribution of AIDS pamphlets for couples, GA. CODE ANN. § 19-3-35.1 (1982 & Supp. 1989); Hawaii, which requires the state to provide AIDS information upon applying for a license, HAW. REV. STAT. § 572-5 (1985 & Supp. 1989); Idaho, which requires marrying couples to present proof that they received an AIDS informational pamphlet, IDAHO CODE § 32-412A (1983 & Supp. 1989); Indiana, which requires the issuing clerk to distribute AIDS information packages and offer voluntary testing, IND. CODE ANN. § 31-7-3.5 (Burns 1987 & Supp. 1989); Kansas, which distributes AIDS educational materials, KAN. STAT. ANN. § 65-6006 (1985); Rhode Island, which requires the clerk to offer voluntary testing for applicants, R.I. GEN. LAWS § 15-2-3 (1988); and Virginia, which distributes AIDS information packets to marrying couples, VA. CODE ANN. 20-14.2 (1983 & Supp. 1989).

State legislative proposals include: Alabama House Bill 2 (introduced Jan. 14, 1986); Michigan House Bill 5276 (introduced Jan. 8, 1986); New Jersey Assembly Bill 1485 (introduced Jan. 14, 1986); New York Assembly Bill 8436 and Senate Bill 7006 (both introduced Jan. 8, 1986); Pennsylvania House Bill 2032 (introduced Jan. 22, 1986); and South Carolina House Bill 3246 (introduced Jan. 14, 1986).

13. ILL. REV. STAT. ch. 40, para. 204(b) (Supp. 1988).

14. *Id.*

15. Following the law's first year, officials at the Illinois Department of Health reported a 20% decline in marriage license applications. In Cook County, for example, marriage license applications fell from 44,755 in 1987 to 35,158 in 1988. *AIDS Test Has 40,000 Fleeing the State to Wed*, Chicago Tribune, January 4, 1989, § 1, at 1, col. 2.

For those who desire to avoid the expense and delay of the testing procedure, they must leave the state to wed. For instance, health officials in Milwaukee reported an increase in Illinoisans travelling to Milwaukee to wed. A Milwaukee deputy clerk stated that "people are looking here out of desperation. With most of them, it seems to be a planned effort to avoid the AIDS test." *Pre-Nuptial Screening Taxes Illinois Health System*, N.Y. Times, Jan. 26, 1988, at A1, col. 5.

Testing proved costly<sup>16</sup> and time consuming.<sup>17</sup> Although the Illinois legislature overturned the law merely because it was impractical, the law posed difficult legal, moral, and philosophical questions. When a state enacts AIDS legislation,<sup>18</sup> it embarks on the difficult task of balancing public health interests<sup>19</sup> against an individual's freedom from government intrusion.<sup>20</sup>

This Note considers whether mandatory premarital AIDS testing would achieve the proper balance in light of current medical knowledge and constitutional doctrine. Additionally, this Note uses the Illinois law as a model in its discussion of premarital AIDS testing laws. Part I briefly covers the disease's background and available testing procedures. Part II discusses the Illinois law as illustrative of mandatory premarital testing laws. Part III examines premarital testing and the constitutional questions testing raises under right to privacy, due process and equal protection doctrines. Finally, Part IV presents less intrusive alternatives.

## I. BACKGROUND

### A. *Medical*

Scientific research revealed that a retrovirus known as human T-cell lymphotropic virus type III (HTLV-III) causes AIDS.<sup>21</sup> HTLV-III

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16. The cost of an AIDS test falls between \$25 and \$300 depending if the applicant must undergo confirmatory testing. *Illinoisans Fault PreNuptial Test For AIDS*, N.Y. Times, April 16, 1988, at A6, col. 4.

17. The time element varies from laboratory to laboratory, ranging from two days to two weeks. Telephone interview with representative from the Center for Disease Control (March 1989).

18. At present 43 states have enacted specific forms of AIDS legislation.

19. Illinois' goal was to prevent the transmission of AIDS from husband to wife and mother to child. In the AIDS Confidentiality Act, the Illinois legislature indicated that testing provides a valuable mechanism to protect the public health. ILL. ANN. STAT. ch. 111 1/2, para. 7302-2(1) (Smith-Hurd 1988 & Supp. 1989). See *infra* notes 67-74 and accompanying text for a discussion on the state's broad police power when health concerns are at issue.

20. See *infra* notes 75-94 and accompanying text for a discussion of the individual's privacy concerns.

21. CENTERS FOR DISEASE CONTROL, AIDS RECOMMENDATIONS AND GUIDELINES 11 (Nov. 1982-May 1987). Dr. Robert Gallo of the National Institute of Health discovered HTLV-III in the fall of 1982. Closen, Conner, Kaufman & Wojcik, *AIDS: Testing Democracy—Irrational Responses to the Public Health Crisis and the Need For Privacy in Serologic Testing*, 19 J. MARSHALL L. REV. 835, 855 (1986). Simultaneously, Dr. Luc Montagnier, from the Pasteur Institute in Paris, discovered lymphadenopathy associated virus (LAV). Lymphadenopathy refers to swollen lymph nodes which house

contains genetic material appearing in human chromosomes.<sup>22</sup> Once in the chromosomes, the virus reproduces at a rapid rate,<sup>23</sup> thus progressively destroying the immune system.<sup>24</sup> This renders the body vulnerable to a variety of opportunistic infections<sup>25</sup> and malignant conditions<sup>26</sup> not typically associated with AIDS-free persons.<sup>27</sup> Moreover, discovery of a vaccine combatting HTLV-III has proven extremely difficult because the virus rapidly changes its genetic structure.<sup>28</sup>

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many of the body's T-cells where AIDS resides in the body. *Isolation of a T-Lymphotropic Retrovirus From a Patient At Risk for Acquired Immune Deficiency Syndrome (AIDS)*, 220 SCIENCE 868-71 (1983).

One of the early international problems concerning AIDS centered on the split between the National Health Institute's HTLV-III categorization and the Pasteur Institute's LAV categorization. Both the American and French researchers desired patents for the antibody test under their respective categorization. Ultimately, the French filed suit against the U.S. government claiming misappropriation of its technology. The two sides resolved the dispute by agreeing to share the rights and royalties of patent applications filed before May 25, 1985. The two sides also agreed to allocate eighty percent of the royalties to a fund devoted to AIDS research. PANEM, *supra* note 1, at 28-29.

22. *Aids Reportability*, *supra* note 7, at 1108 n.40 (noted in FETTNER & CHECK, *THE TRUTH ABOUT AIDS* (Rev. Ed. 1985)).

23. *Id.*

24. The immune system fights foreign matter, including a host of bacteria and cancers which bombard the body daily. Only when the immune system is oppressed does an infection or cancer develop. Closen, Connor, *supra* note 21, at 856-58.

T-cells regulate the immune system. The virus infects these T-cells known as T-lymphocytes. Over time the victim's immune system weakens, eventually resulting in the victim's death. SLOAN, *supra* note 1, at 1.

25. An opportunistic infection is any infection which an intact immune system would ordinarily suppress. Closen, Connor, *supra* note 21, at 858. *Pneumocystis carinii pneumonia* is an example of an opportunistic infection. See *supra* note 1 for a discussion of *pneumocystis carinii pneumonia* and its frequent appearance in homosexual males suffering from AIDS.

26. Two kinds of malignant conditions appearing with frequency in AIDS patients are Kaposi's sarcoma and non-Hodgkins lymphoma. See *Kaposi's Sarcoma and Pneumocystis Pneumonia Among Homosexual Men—New York City and California*, 30 MORBIDITY & MORTALITY WEEKLY REP. 305, 305-08 (1981). See also *Non-Hodgkins Lymphoma in 90 Homosexual Men: Relation to Generalized Lymphadenopathy and Acquired Immunodeficiency Syndrome*, 311 NEW ENG. J. MED. 565, 568 (1984) (discussing the increase in non-Hodgkins lymphoma in homosexual men since the outbreak of AIDS in the 1980's).

27. SLOAN, *supra* note 1, at 1.

28. *Aids Reportability*, *supra* note 7, at 1108 n.40. "Development of a vaccine is likely to be slow. The Institute of Medicine and National Academy of Sciences [predicts] that development of a vaccine is at least five to ten years away." SLOAN, *supra* note 1, at 4.

The virus' primary modes of transmission are sexual contact,<sup>29</sup> blood transfusions, organ transplants and perinatally from mother to child.<sup>30</sup> Although the disease is communicable, it cannot spread by casual contact or through the air in the same manner the common cold spreads.<sup>31</sup> Certain groups of persons have been identified at high risk. High risk candidates include: (1) homosexual and bisexual men,<sup>32</sup> (2) present or past intravenous drug users,<sup>33</sup> (3) hemophiliacs who received infected blood products,<sup>34</sup> and (4) newborn infants of high risk or infected mothers.<sup>35</sup>

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29. Blood, saliva and semen house the virus. Persons transmit the virus either through intimate sexual contact or by sharing contaminated hypodermic needles. Provisional Public Health Service, *Inter-Agency Recommendations for Screening Donated Blood and Plasma For Antibody to the Virus Causing Acquired Immunodeficiency Syndrome*, 34 MORBIDITY & MORTALITY WEEKLY REP. 2 (1985).

30. Center for Disease Control, *supra* note 21, at 58.

31. See OR. REV. STAT. (1989) (finding that AIDS does not spread by casual contact); *AIDS Reportability*, *supra* note 7, at 1109.

In 1985, a New York Times poll indicated that about half of the American public believed casual contact could spread AIDS. *Poll Finds Many AIDS Fears That the Experts Say Are Groundless*, N.Y. Times, Sept. 12, 1985, at B11, col. 3. In a 1988 poll, respondents appeared more educated about the disease: three out of four respondents understood that AIDS spreads primarily through sexual contact. Also, eighty-one percent of the respondents supported increased federal funding for AIDS research. N.Y. Times, Jan. 8, 1988, at B6, col. 5. See also Sande, *Transmission of AIDS: The Case Against Casual Contagion*, 314 NEW ENG. J. MED. 380-382 (1986) (arguing that the medical community must play an active role in quelling hysteria over the casual spread of AIDS).

32. "In the United States, over seventy-three percent of adult AIDS patients are homosexual and bisexual men." Within that group, eleven percent experienced a history of intravenous drug use. Center for Disease Control, *supra* note 21, at 11.

33. Heterosexual men and women engaging in intravenous drug use account for seventeen percent of adult AIDS patients. Center for Disease Control, *supra* note 21, at 11. See also *The Prevalency of HILV-III/Lay Antibodies Sharing of Needles Among Users of Intravenous Drugs*, 314 NEW ENG. J. OF MED. 446-447 (1986).

34. Transfusion related AIDS represents about one percent of AIDS cases in the United States. *Acquired Immune Deficiency Syndrome Associated With Transfusions*, 310 NEW ENG. J. MED. 69, 74 (1984).

35. Most children infected with HTLV-III received the virus perinatally. In utero transmission occurs with less frequency. In one case reported from Australia, a child acquired the virus postnatally, possibly from breast-feeding.

Seventy percent of pediatric AIDS cases occurred among children whose parents either suffered from the disease or were members of a high risk group. Twenty percent of the cases occurred among children receiving blood or blood products. In ten percent of the cases investigations were incomplete. Center for Disease Control, *supra* note 21, at 56.

Heterosexual transmission is generally less prevalent.<sup>36</sup> Transmission may occur, however, if persons engage in sexual relations with others deemed at high risk or with persons from countries where heterosexual transmission frequently occurs.<sup>37</sup> Apparently, male to female transmissions occur with greater frequency<sup>38</sup> than female to male transmissions.<sup>39</sup>

### B. AIDS Testing

The enzyme-linked immunosorbent assay (ELISA) test represents the most common antibody test used to identify the AIDS virus.<sup>40</sup> The test is inexpensive<sup>41</sup> and provides a high sensitivity<sup>42</sup> threshold which is

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36. As early as 1982, reports of heterosexual transmission existed. One case reported the disease in a female sexual partner of a heroin addict. *Heterosexual Transmission of HTLV-III*, 85 EPIDEMIOLOGY BULLETIN 1 (Nov. 1985).

37. Center for Disease Control, *supra* note 21, at 11. Heterosexual transmission is the primary mode of spreading the disease in Africa. See Closen, Connor, *supra* note 21, at 865. Haitians were at one time considered a high risk group because of the frequency of heterosexual transmission in Haiti. The CDC guidelines no longer identify Haitians as high risk. *AIDS Reportability*, *supra* note 7, at 1107-08.

38. Male to female transmission ordinarily involves men who are characterized as high risk candidates — either intravenous drug users or bisexual men. *Heterosexual Transmission of HTLV-III*, 85 EPIDEMIOLOGY BULLETIN 1 (Nov. 1985).

39. The most prevalent form of female to male transmission is by prostitutes. *Id.* For example, health officials in Seattle tested ninety-two prostitutes for the HTLV-III virus. The tests revealed that five percent of the prostitutes carried the virus. See *Heterosexual Transmission of Human T-Lymphotropic Virus Type III Lymphadenopathy-Associated Virus*, 34 MORBIDITY & MORTALITY WEEKLY REP. 561 (Sept. 20, 1985).

40. "The test [uses] HIV proteins which have been grown in tissue cultures and coated in plastic dish wells. Scientists remove blood from the patient and sandwich it between the HIV protein and an antibody probe. When applied to the blood sample, the probe causes a color reaction. The higher the antibody level in the blood sample the stronger the color reaction. [Accordingly,] the degree of color change determines the positivity level." Barry, Cleary & Fineberg, *Screening for HIV Infection: Risks, Benefits, and the Burden of Proof*, 14 LAW, MED. & HEALTH CARE 259, 260 (Dec. 1986).

41. See *supra* note 16 for a discussion of the test's cost.

42. The test's predictive value calculates the blood sample's sensitivity and specificity. Sensitivity refers to the probability that a test result will be positive when the disease is present. Griner, Magewski, Mushlin & Greenland, *Selection and Interpretation of Diagnostic Tests and Procedure*, 94 ANNALS OF INTERNAL MED. 553, 557 (1981). Specificity, on the other hand, refers to the probability the test result will be negative when the antibody is not present. *Id.* at 557. For example, a test with a ninety-five percent sensitivity threshold will give ninety-five positive results and five false negative results. Banks & McFadden, *Rush to Judgment: HIV Test Reliability and Screening*, 23 TULSA L. J. 1, 6 (1987). Because ELISA primarily operates as a blood screening mechanism, the test has a higher sensitivity rate which results in an increased false positive rate. *Id.* at 16.

useful in mass screenings of infected blood.<sup>43</sup> The medical community emphasized the test's limitations as a screening device and refused to endorse it as a diagnostic test.<sup>44</sup> Their reasons focus on: (1) the test's unreliability in detecting the virus in low risk populations<sup>45</sup> and (2) its ability only to detect the AIDS antibody rather than the AIDS virus itself.<sup>46</sup> Consequently, ELISA fails to provide an indicia of AIDS or the possibility that a person testing positive could develop the syndrome's effects.<sup>47</sup> Moreover, ELISA yields more false positives and false negatives than desirable.<sup>48</sup> The test's inaccuracy becomes greater when applied to marriage license applicants. Generally, when administered to low risk groups, the test yields greater false positives.<sup>49</sup>

43. The fear of transfusion-related AIDS prompted the United States Department of Health and Human Services to approve the ELISA test for the limited purpose of screening blood. *Update: Public Health Service Workshop in T-Lymphotropic Virus Type III Antibody Testing—United States*, 34 MORBIDITY & MORTALITY WEEKLY REP. 477 (1985).

44. *AIDS Reportability*, *supra* note 7, at 1110. Although the medical community declined to use the test for diagnostic purposes, persons testing positive are presumed infected with the virus and capable of transmitting the disease to others. See Banks & McFadden, *supra* note 42, at 5 (1987). See also Petricciani, *Licensed Tests For Antibody to Human T-lymphotropic Virus Type III*, 103 ANNALS OF INTERNAL MED. 726, 728 (1985) (noting that the nature of commercial testing kits, such as the ELISA, are useful for averting infected blood, but should not be used as a basis of notifying HTLV positive individuals).

45. The test has a greater accuracy rate when applied to high risk populations. In lower risk populations, however, the test reveals more false positives and false negatives. See *infra* notes 48-49 and accompanying text for a discussion of the test's inaccuracy.

46. *AIDS Reportability*, *supra* note 7, at 1112.

47. ELISA and Western Blot are indirect tests, which means the tests merely infer the disease's presence. As a result, an indirect test is usually less specific in pinpointing the existence of the disease than a direct test. Banks & McFadden, *supra* note 42, at 5.

48. False positives refer to individuals who the test erroneously depicts as housing the AIDS antibody. False negatives refer to individuals who are infected, but who the test erroneously depicts as AIDS free.

49. Suppose 100,000 marriage license applicants submit to the ELISA test. Of those who take the test, thirty are actually infected. Using the standard sensitivity threshold of 93.4% and specificity threshold of 99.78%, twenty-eight of the infected individuals and 220 non-infected individuals would test positive. See the chart below.

Abbott Elisa Test

Low Risk Population

Sensitivity 93.4% and 99.78% Specificity

	Actually Infected	Not Infected	Total	% True Results
Positive Elisa	28	220	248	11.3%
Negative Elisa	2	99,750	99,752	
Total	30	99,970	100,000	

To counter ELISA's inaccuracies, health officials ordinarily administer a confirmatory test known as the Western Blot test.<sup>50</sup> The medical community refrained from using the Western Blot test in mass blood screenings because it is expensive and time intensive.<sup>51</sup> Although the Western Blot test may reduce some false positives, it nevertheless may fail to identify all of ELISA's false positives.<sup>52</sup> Researchers believe that similar biological factors causing ELISA's false positives may also lead to false Western Blot results.<sup>53</sup> Additionally, those testing falsely negative under ELISA will probably avoid any confirmatory testing.

Serious concerns arise when an individual's liberty interests and reputation depend on tests with limited reliability and predictive value.<sup>54</sup> The frequent incidents in which AIDS victims suffer discrimination and public hostility necessitate that legislation substantially promote the legislative purpose without unduly burdening the individual.<sup>55</sup> Thus, an analysis of AIDS legislation must consider whether the law promotes the state's purpose without contributing to misconceptions or fuelling hostility toward socially and politically unpopular groups.

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Barry, Cleary & Fineberg, *supra* note 40, at 263. See also *When Results Are Wrong*, L.A. BAR J., Sept. 11, 1987, at 4, col. 1, for a discussion of ELISA's false positives and false negatives.

50. Because the Western Blot test is an indirect test the same concerns associated with ELISA are also associated with Western Blot. See *supra* notes 48-49 and accompanying text for a discussion of ELISA's high false positive rate. Consistent with testing guidelines, the Illinois law required a confirmatory Western Blot test. ILL. REV. STAT. ch. 40, para. 240(b) (1980 & Supp. 1989).

51. Barry, Cleary & Fineberg, *supra* note 40, at 262.

52. *Id.*

53. *Id.* Suppose now the 248 applicants who tested positive to the ELISA take the Western Blot test. The Western Blot test would confirm thirty-nine as positive of whom twenty-eight are true. *Id.* at 263.

54. In an analogous context, courts have begun hearing challenges to mandatory drug testing requirements. On the whole, courts have not been receptive to constitutional challenges to drug testing requirements. See, e.g., *Skinner v. Ry. Labor Executives Ass'n*, 109 S. Ct. 1402 (1989) (no fourth amendment violation to require mandatory drug testing of rail employees involved in accidents); *Spence v. Farrier*, 807 F.2d 753, 756 (8th Cir. 1986) (urinalysis test followed by confirmatory test contained sufficient indicia of reliability to provide evidence of drug use); *Harmon v. Auger*, 768 F.2d 270 (8th Cir. 1985) (urinalysis testing finding consumption of marijuana held valid); *Peranzo v. Coughlin*, 608 F. Supp. 1504, 1507 (S.D.N.Y. 1985) (although testing reliability is a serious concern, due process rights do not require scientific exactitude); *Wykoff v. Resig*, 613 F. Supp. 1504 (N.D. Ind. 1985) (marijuana testing sufficiently reliable to justify disciplinary action).

55. See generally *A New Reason to Regulate*, *supra* note 7, at 339 (arguing that the homosexual community should not suffer from indifference and undue burden when a life threatening epidemic is involved).

## II. PREMARITAL AIDS TESTING—THE ILLINOIS STATUTE

AIDS is primarily an urban concern.<sup>56</sup> Because states ordinarily delegate health matters to municipal governments,<sup>57</sup> municipalities face severe economic and social costs in combatting the syndrome.<sup>58</sup> Despite the financial burden, governmental responses must reflect reliance on existing medical data.

Generally, legislatures may justify premarital AIDS testing because it falls within the state's police power to monitor the public's health and welfare.<sup>59</sup> For example, the Illinois law aspired to prevent the spread of AIDS between husband and wife, or mother and child<sup>60</sup> by requiring marriage license applicants to undergo an AIDS antibody test.<sup>61</sup> If either party tested positive, the state required administering physicians to inform both marriage partners of the test results.<sup>62</sup> Additionally, physicians reported the result to the Illinois Department of Public Health.<sup>63</sup> Follow-up counselling was available for individuals who tested positive.<sup>64</sup> Estimates revealed that the annual cost of imple-

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56. The following represents reported AIDS cases as of February 20, 1989: New York City, 21,021; Chicago, 2,241; Los Angeles, 6,270; San Francisco, 6,884. Telephone interview with representative from the Center for Disease Control (March 1989).

57. See Damme, *Controlling Genetic Disease Through Law*, 15 U.C. DAVIS L. REV. 801, 804 (1982) (stating that local health authorities, under authority from the state, initiate most measures controlling the spread of infectious diseases).

58. The health costs of AIDS are staggering. Some estimates indicate that by 1991 health care for AIDS patients will be about \$8.5 billion. *Study Finds Most Health Insurers Screen Applicants For AIDS Virus*, N.Y. Times, Feb. 18, 1988, at A1, col. 2. Additionally, there are increased shortages of public hospital space and medical administrators, particularly in New York where AIDS is most prevalent. *Lack of Nurses Impedes New York AIDS Care*, N.Y. Times, Feb. 23, 1988, at A1, col. 2.

59. For a discussion of the state's traditional role as protector of the public health, see *infra* notes 67-74 and accompanying text.

60. Premarital AIDS testing was part of a package of AIDS legislation in Illinois which also permitted the state to trace contacts of AIDS positive individuals and impose limited quarantine on AIDS victims. Illinois Governor James R. Thompson said the law's intention was "to balance our obligation to protect the public health while preserving the individual rights of our citizens." L.A. DAILY J., Sept. 22, 1987, at 5, col. 3.

61. ILL. REV. STAT. ch. 40, para. 204(b) (1980 & Supp. 1989).

62. *Id.* See also S.C. CODE ANN. § 44-29-146 (Law Co-op 1985 & Supp. 1989) (exempting a physician from liability when notifying the spouse of an AIDS-infected person).

63. *Id.*

64. *Id.*

menting the test is about \$5.6 million.<sup>65</sup> After approximately one year, premarital testing revealed only twenty-three AIDS positive persons.<sup>66</sup>

### III. CONSTITUTIONAL RAMIFICATIONS

#### A. Background

State health laws present the challenger with a formidable obstacle—the state's police power. The state possesses considerable power to regulate individual lifestyles when public health is a concern.<sup>67</sup> In *Jacobson v. Commonwealth of Massachusetts*,<sup>68</sup> the Supreme Court upheld a state's smallpox vaccination requirement over due process challenges.<sup>69</sup> The Court indicated that an individual's liberty interests were not absolute<sup>70</sup> and often subject to governmental restraints.<sup>71</sup> These restraints overcome constitutional challenges when they are reasonable and prove "essential to the safety, health, peace, good order and morals of the community."<sup>72</sup>

There is a natural tension between the individual's desire for personal autonomy and the government's responsibility to ensure an orderly and safe society. The state concededly possesses the ability to require forms of testing, vaccination, and quarantine when confronting

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65. *AIDS Test Has 40,000 Fleeing State to Wed*, Chicago Tribune, January 4, 1989, § 1, at 3, col. 2.

66. *Id.*

67. States derive authority to police health matters from the tenth amendment of the United States Constitution. Courts traditionally have given the states broad power to regulate matters of local health. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824), the Court stated that "[i]nspection laws, quarantine laws, health laws of every description . . . remain subject to state legislation." See also *People v. Strautz*, 386 Ill. 360, 365, 54 N.E.2d 441, 443 (Ill. 1944) (noting "[i]t has almost universally been held in this country that constitutional guaranties [sic] must yield to the enforcement of the statutes and ordinances designed to promote the public health as a part of the police powers of the State").

Historically, the American public health establishment traces its origins to 1798 with the passage of the Act for the Relief of the Sick and Disabled Seamen. This Act provided medical care to sailors and established funds for construction of hospitals. The Act's purpose was less for the care of the sick and more for the protection of the public health by preventing the entry of diseases via incoming sailors. PANEM, *supra* note 1, at 36.

68. 197 U.S. 11 (1905).

69. *Id.* at 39. The statute required all inhabitants of Massachusetts to submit to a smallpox vaccination. Those over twenty-one who refused were fined. *Id.* at 12.

70. *Id.* at 26.

71. *Id.*

72. *Id.* (citing *Crowley v. Christensen*, 137 U.S. 86, 89 (1890)).

threats to the general health.<sup>73</sup> Only necessity and efficacy, however, justify significant intrusions. When the intrusion invades constitutionally-determined fundamental rights, the state must consider less burdensome alternatives.<sup>74</sup> Constitutional doctrines, therefore, provide the individual with a significant check against governmental overreaching.

### B. *Right to Privacy*

The right to privacy is one check on government intrusion.<sup>75</sup> Although the Federal Constitution fails explicitly to mention a privacy right,<sup>76</sup> the Court has recognized constitutionally protected privacy zones.<sup>77</sup> Specifically, the Court has recognized that marital relations fall within a protected privacy zone.<sup>78</sup> When a law interferes with an individual's right to privacy, the law limiting the right must serve a compelling state interest and the means used to effectuate the law must be narrowly drawn to serve the interest.<sup>79</sup> In short, the Court applies strict judicial scrutiny to laws interfering with privacy interests.

The difficulty in challenging mandatory premarital AIDS testing is proving the existence of a privacy right. An AIDS blood test involves only a minor personal invasion. In light of the acceptability of testing marriage applicants for venereal diseases,<sup>80</sup> challenging the test on grounds of personal invasion alone is insufficient to warrant strict judi-

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73. See, e.g., *People v. Robertson*, 302 Ill. 422, 134 N.E. 815 (1922) (upholding a quarantine requirement for a woman with typhoid).

74. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-2, at 1306 (1988). See generally Craven, *Personhood: The Right to Be Left Alone*, 1976 DUKE L.J. 699 (states have complete discretion to regulate lesser rights of individuals).

75. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (a law criminalizing the use of contraceptives among married persons invalidated on right to privacy grounds). Also, the Illinois Constitution incorporates an express right to privacy. ILL. CONST. art. I, § 6.

76. In *Roe v. Wade*, 410 U.S. 113, 156 (1973), the Court infers the right to privacy from the fifth and fourteenth amendments of the United States Constitution. Justice Goldberg in his concurrence in *Griswold v. Connecticut*, 381 U.S. at 487, based the right to privacy on the ninth amendment of the Constitution. See generally TRIBE, *supra* note 74, § 15-3, at 1308.

77. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973).

78. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 389 (1978) (recognizing the marital relationship as a fundamental right). See *infra* notes 122-28 and accompanying text for a discussion of *Zablocki*.

79. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

80. For a discussion of venereal disease testing, see *infra* notes 130-35 and accompanying text.

cial scrutiny. Courts traditionally uphold statutes allowing bodily invasions for vaccinations<sup>81</sup> and syphilis testing.<sup>82</sup> An AIDS testing requirement should differ, though, because of the possible disclosure of guarded personal matters and the social stigma attached to AIDS carriers.<sup>83</sup>

If the Court recognized an AIDS patient's right to informational privacy, then statutes such as the Illinois law must fall. Although a state's interest in containing and preventing the spread of AIDS would prove compelling, the means would not be narrowly tailored to achieve this end. Premarital testing laws are grossly underinclusive because they would omit testing those who are at highest risk while burdening those who are least likely to carry the virus. Laws similar to the Illinois law would impose unnecessary anxiety and burdens on a low risk group. In contrast, those more likely to pose a health threat would avoid altogether the law's requirements. Thus, if the right to privacy means anything, it means an individual should control dissemination of personal information.<sup>84</sup> This especially holds true when disclosure of AIDS carries a great potential for abuse and discrimination.

The Supreme Court addressed the right to informational privacy in *Roe v. Whalen*.<sup>85</sup> The plaintiffs in *Whalen* used the right to privacy to challenge a New York law<sup>86</sup> requiring patients receiving certain kinds

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81. See *supra* notes 68-73 and accompanying text for a discussion of the State's power to require vaccination.

82. See, e.g., *Baker v. Strautz*, 386 Ill. 360, 54 N.E.2d 441 (1944) (upholding mandatory testing of prostitutes for venereal disease for health reasons).

83. AIDS victims suffer extreme forms of discrimination in housing, education, health care, and insurance coverage. With respect to the disclosure issue, see generally Note, *Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1288 (1986) (asserting states enacting mandatory testing must provide sufficient safeguards to ensure the information will not be disclosed publicly, made accessible to unauthorized persons, or used to deprive the individual of government benefits).

84. See *TRIBE, supra* note 74, § 115-16, at 1389. See generally Gentry, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 288 (1977) (the threat of misusing personal information is "as permanent as the records themselves"). See also Shattuck, *In the Shadow of 1984: National Identification Systems, Computer Matching and Privacy in the United States*, 35 HASTINGS L.J. 991 (1984) (arguing the increased use of computer technology for record-keeping poses serious threats to privacy interests). But see Thompson, *Secrecy of Tests Is Unjustified on Legal and Economic Grounds*, L.A. DAILY J., July 3, 1987, at 4, col. 3 (confidentiality rules should be relaxed for AIDS carriers because the tort system does not address the harms they inflict by the time of suit the AIDS carrier is either dead or bankrupt).

85. 429 U.S. 589 (1977).

86. N.Y. PUB. HEALTH LAW § 3300-3397 (Consol. 1985 & Supp. 1990).

of prescription drugs to register themselves with state health agencies.<sup>87</sup> The Court upheld the registry law, but with reservations.<sup>88</sup> First, Justice Stevens identified two traditional privacy interests — the interest in avoiding disclosure of personal matters and the interest in making important personal decisions.<sup>89</sup> Second, Stevens acknowledged that accumulating personal information threatened privacy interests.<sup>90</sup> Because patients suffered no adverse effects from registration, the Court was satisfied that the New York law provided sufficient safeguards to protect the patient's privacy interests.<sup>91</sup>

Mandatory premarital AIDS testing, on the other hand, threatens to expose an individual's past intimate experiences. This undeniably falls within the ambit of the right to privacy.<sup>92</sup> These kinds of laws also impair an individual's interest in safeguarding personal information and making important decisions.<sup>93</sup> For example, the Illinois law allowed full disclosure to the prospective spouse but did not prohibit the prospective spouse from disclosing the test results. The law should have more fully restricted access to this type of information because testing positive for AIDS often labels an individual as promiscuous, as a homosexual or as a drug addict. Strained or abandoned relationships

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87. Physicians and patients challenged the New York law requiring doctors to report to state health agencies patients to whom they prescribed dangerous, but legitimate drugs. A lower federal court invalidated the law because it interfered with the doctor-patient relationship — a zone of privacy — with a needlessly broad sweep. 429 U.S. at 596.

88. *Id.* at 606-07 (Brennan, J., concurring).

89. *Id.* at 599-600.

90. *Id.* at 605.

91. *Id.* at 603. The statute provided for various safeguards protecting the registrants from accidental or intentional disclosure. The statute expressly prohibited public disclosure of the registration and imposed criminal penalties for willful violations. Additionally, other safeguards were taken. A locked wire fence, protected by an alarm system, surrounded the information room. Computer tapes storing the confidential information were kept under lock. Administrators only ran the tapes "off-line" to prevent computer access by terminals outside the information room. *Id.* at 594.

92. *See* *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (legislation prohibiting the use of contraceptives which operated directly on intimate relations between husband and wife violated the right to privacy); *see also* *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972) (expanding *Griswold* to include unmarried persons).

93. The Illinois legislature enacted the AIDS Confidentiality Act to protect AIDS patients from disclosure of their condition. ILL. ANN. STAT. ch. 111 1/2, para. 7301-7316 (Smith-Hurd 1988 & Supp. 1989). The premarital testing requirement, however, relieved the physician administering the AIDS test from liability when he disclosed the results to the non-infected partner and the Department of Health. ILL. REV. STAT. ch. 40, para. 204(b) (1980 & Supp. 1989).

with family and friends flow from such categorizations and often lead to severe discrimination and loneliness.<sup>94</sup>

Arguably, states are justified in alerting prospective spouses to AIDS carriers.<sup>95</sup> The crucial issue, however, is not whether it is immoral for an infected person to conceal his condition, but whether it is desirable for the state to interfere and make disclosure decisions for the individual. Even if the state is justified in intervening, testing marriage license applicants is not the most effective means of preventing the syndrome's spread.

If a state's purpose is preventing the virus' spread from one partner to another,<sup>96</sup> it is unlikely that couples have not already exposed each other to the virus by the time they plan to marry.<sup>97</sup> Premarital testing naively assumes that couples refrain from sexual intercourse before marriage. Alternatively, if the state's purpose is to prevent the syndrome's spread from mother to child, marriage licensing fails as an effective means of achieving this end.<sup>98</sup> Not all marrying couples desire or are able to bear children. Moreover, the high incident of unwed mothers illustrates that marriage is not a precondition to childbirth. Accordingly, premarital testing is overinclusive.

The AIDS epidemic presents a dilemma to an information-hungry

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94. Studies show AIDS patients suffer from higher incidents of suicide than other terminally-ill patients. Much of their depression results from abandonment by family and friends. *AIDS Patients Are Found to Have an Extremely High Suicide Rate*, N.Y. Times, March 4, 1988, at B5, col. 2.

95. Many cases exist in which AIDS carriers have intentionally infected their sex partners. In one poll of 134 high risk individuals, thirty-two indicated that during casual sex they would not inform their partners they carried AIDS. *AIDS Testing Without Consent Reported*, N.Y. Times, Jan. 9, 1988, at A7, col. 5. Note that a premarital testing requirement would not correct incidents of casual premarital sex where the infected party conceals his condition.

96. See *supra* notes 60-61 for a discussion of the Illinois statute's intent.

97. Jim Karpiak, Associate director of the AIDS Foundation in Chicago, said "[t]he virus is spread through sexual activity, not marriage vows. Most . . . couples have already engaged in sex with each other and, if one of them has the virus, the other has already been exposed." *Illinoisans Fault PreNuptial Test For AIDS*, N.Y. Times, April 16, 1988, at A6, col. 4.

98. The Center for Disease Control (CDC) recommends counseling and testing women who are: (1) intravenous drug users, (2) born in countries where heterosexual transmission occurs, (3) prostitutes, or (4) involved in sexual relations with intravenous drug users, bisexual men, hemophiliacs, or persons from countries where heterosexual transmission occurs. The CDC discourages counselling and testing women who are not in the recommended testing group. The CDC fears the inaccurate results of testing a low risk group. Center for Disease Control, *supra* note 21, at 59-61.

society.<sup>99</sup> No one would advocate limiting access to medical information concerning the disease and its transmission. The problem arises, however, when access to information carries the potential for abuse. AIDS reporting threatens to undermine our faith in confidential communications to physicians or other closely situated parties.<sup>100</sup> If an individual fears a breach of confidentiality, fewer volunteers will submit to testing lest they subject themselves to the community's wrath.<sup>101</sup> This would strain efforts in researching, updating, and controlling the disease.<sup>102</sup> Thus, laws such as the Illinois law<sup>103</sup> threaten confidential communications and ultimately prove counterproductive to the state's health interest.

Even if the threat to confidentiality fails as a compelling argument against premarital testing, the likelihood of falsely labeling an individual as a potential AIDS carrier should spell doom for premarital testing laws.<sup>104</sup> Premarital testing targets persons in the lowest possible risk group.<sup>105</sup> Marriage license applicants are the least likely to carry AIDS or possess a strong affinity for intravenous drug use.<sup>106</sup> Estimates indicate that if testing revealed 100 individuals testing positive to both tests, about one third would constitute false positives.<sup>107</sup>

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99. TRIBE, *supra* note 74, § 15-16, at 1389.

100. See generally Note, *Between a Rock and a Hard Place: AIDS and the Conflicting Physicians Duties of Preventing Disease Transmission and Safeguarding Confidentiality*, 76 GEO. L.J. 169 (1987) (analyzing the complex relations between physician and AIDS patient in the context of physician liability).

101. Note, *Doctor-Patient Confidentiality Versus Duty to Warn In The Context of AIDS Patients And Their Partner*, 47 MD. L. REV. 675, 687 (1988).

102. *Id.* at 687.

103. The Illinois law released the physician from liability when he communicated the test results to the non-infected couple. The law provided in part:

Such notification of the other party to the proposed marriage, and of the appropriate public health authority, shall not be deemed a violation of any duty or right of confidentiality established by law, but the physician shall maintain the confidentiality of such test results with respect to other persons, except as otherwise provided by law.

ILL. REV. STAT. ch. 40, para. 204(b) (1980 & Supp. 1989).

104. See *supra* notes 48-49 and accompanying text for a discussion of the law's high false positive rate when applied to low risk groups.

105. See Barry, Cleary & Fineberg, *supra* note 40, at 262 (categorizing marriage license applicants as members of the lowest risk population).

106. *Wedded to a Stupid Idea*, L.A. DAILY J., Feb. 2, 1988, at 4, col. 1.

107. *Id.* See *supra* notes 48-49 and accompanying text for a discussion of the inaccuracy of AIDS testing.

### C. *Due Process and Equal Protection Analysis*

Because premarital testing would condition marriage upon proof of an AIDS test,<sup>108</sup> due process concerns also arise. Just as they regulate health, states traditionally possess substantial authority to regulate marriage.<sup>109</sup> In *Maynard v. Hill*,<sup>110</sup> the Supreme Court stated that the state traditionally possesses the power to govern marriages.<sup>111</sup> Consequently, state marriage laws requiring venereal disease testing<sup>112</sup> and prohibiting same sex<sup>113</sup> or incestuous marriages<sup>114</sup> constitute permissible restrictions on the marriage right.<sup>115</sup>

108. The law provided:

It shall be unlawful for the county clerk of any county to issue a license to marry to any person who fails to present for filing with such county clerk a certificate issued and signed by the physician who administered the [AIDS] test.

ILL. REV. STAT. ch. 40, para. 204(b) (1980 & Supp. 1989).

109. States derive authority to regulate marriage from the tenth amendment of the United States Constitution. See *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("domestic relations have long been regarded as a virtually exclusive province of the States").

110. 125 U.S. 190 (1888).

111. *Id.* at 205. The Court stated that "[m]arriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature." *Id.* *Maynard* involved a challenge to an Oregon territorial statute allowing dissolution of marriage. The two issues presented to the Court were (1) whether the dissolution of the marriage statute was valid; and (2) if the law was valid, whether it permissibly defeated the wife's right to a donation of land which the husband held. The Court upheld the dissolution law, *id.* at 207-08, and denied the wife any portion of the husband's land. *Id.* at 216.

112. Cf. *Curry v. Corn*, 277 N.Y.S.2d 471, 52 Misc. 2d 1035 (1966) (marriage partners have a right to know whether prospective spouse suffers from a diseased condition); *Fisher v. Sweet* 35 A.2d 756, 154 Pa. Super. 216 (1944) (enacting syphilis testing requirement is a public health measure and within the province of the state's power).

113. See, e.g., *Jones v. Hallahan*, 501 S.W.2d. 588 (Ky. 1973) (invalidating a marriage between two females because same sex marriages did not constitute a recognizable marriage in Kentucky). See, e.g., FLA. STAT. ANN. § 741.04 (West 1986) (providing "no county court judge or clerk of a circuit court in this state shall issue a license for marriage of any person . . . unless one party is a male and another a female"). See generally Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973) (arguing that denial of same sex marriage denies individual equal protection of the law).

114. See, e.g., *Catalona v. Catalona*, 148 Conn. 288, 170 A.2d. 726 (1961) (denying widow's benefits to claimant because she was her husband's niece, thus violating a state law against incestuous relationships).

115. See *Zablocki v. Redhail*, 434 U.S. 374, 397 (1978) (Powell, J., concurring) (the Court has not held yet that "all regulations touching upon marriage implicates [sic] a 'fundamental right' triggering the most exacting judicial scrutiny"). See also UTAH CODE ANN. § 53A-13-101 (1989) (marriages of AIDS carriers are void).

Until *Loving v. Virginia*,<sup>116</sup> the Supreme Court had not held any state restriction on marriage unconstitutional.<sup>117</sup> In overturning a Virginia miscegenation statute,<sup>118</sup> the *Loving* Court held that racial restrictions on the freedom to marry violated the equal protection clause.<sup>119</sup> In addition, the Court invalidated the law on due process grounds because the restrictions violated a couple's liberty interest in choosing whom they desired to marry.<sup>120</sup> The Court noted that "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness. . . ."<sup>121</sup>

The Court in *Zablocki v. Redhail*<sup>122</sup> added to *Loving* and explicitly deemed marriage a fundamental right.<sup>123</sup> The Court overturned a Wisconsin law requiring persons owing child support to obtain a court order before marrying.<sup>124</sup> The Court based its decision on equal protection grounds because the classification unduly burdened indi-

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116. 388 U.S. 1 (1967).

117. J. AREEN, *FAMILY LAW CASES AND MATERIALS* 29 (2d. ed. 1985).

118. The Lovings violated § 20-58 of the Virginia Code which prohibited whites and blacks from leaving the state to marry and then returning to the state to live after the marriage. Section 20-59 provided a one-year prison term for whites and blacks who intermarried. *Id.* at 4.

119. *Id.* at 12.

120. *Id.*

121. *Id.* *Loving* follows and establishes a trend of case law which gives marriage heightened constitutional protection. *See, e.g.,* Cleveland Board of Education v. La Fleur, 414 U.S. 632, 639-40 (1974) ("freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment"); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (the right to privacy in marital relations is older than the Bill of Rights); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (the right "to marry, establish a home and bring up children" falls within the liberty interests the due process clause protects).

122. 434 U.S. 374 (1978).

123. *Id.* at 383. The *Zablocki* Court noted that recent decisions placed the marriage right within the right to privacy framework, deriving from the fourteenth amendment's due process clause. *Id.* at 384.

124. *Id.* at 387. Justice Marshall, writing for the majority, compared the right of marriage to the right to privacy. He stated that the "decision to marry and raise the child in a traditional family setting must receive equivalent" protection as other rights affecting family matters, such as procreation, childbirth, child rearing and family relationships. *Id.* at 386. *See generally* Eisenstadt v. Baird, 405 U.S. 438 (1972) (rights associated with childbirth); Prince v. Massachusetts, 321 U.S. 158 (1944) (rights associated with family relationships); Skinner v. Oklahoma ex rel Williamson, 316 U.S. 535 (1942) (rights associated with procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (rights associated with child rearing and education).

The Wisconsin statute's purposes were to (1) induce the marrying parent into seeking

gents with respect to the marriage right.<sup>125</sup> The statute absolutely barred the marriage of persons who were either too poor to comply with child support requirements or who could not prove that their children would not become wards of the state.<sup>126</sup> For some, compliance with the law proved so burdensome that they abandoned their right to marry.<sup>127</sup> The Court failed to hold all restrictions on marriage invalid, but did enunciate a requirement applying to laws affecting the marriage right. The Court noted that laws imposing "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship" are permissible.<sup>128</sup>

Laws aimed at preventing the spread of AIDS are compelling because they purportedly address public health concerns.<sup>129</sup> The issue, therefore, is whether the state has chosen a reasonable method of achieving the legislative purpose. One difficulty in challenging premarital AIDS testing rests with distinguishing between an AIDS testing requirement and a syphilis testing requirement, the latter of which courts traditionally have upheld.<sup>130</sup> As Justice Stewart indicated in *Zablocki*, states may condition marriage on passing a venereal disease examination.<sup>131</sup> Arguably, the same health interests that justify syphilis<sup>132</sup> testing apply to AIDS testing. Like AIDS, syphilis spreads

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financial counseling before undertaking new financial obligations, and (2) encourage non-custodial parents into making child support payments. *Id.* at 388-89.

Justice Marshall rejected both justifications. Counseling could not have been one of Wisconsin's justifications because the statute failed to provide counseling or release the court order requirement after the person sought counseling. *Id.* Marshall rejected the second rationale because indigent parents could not make their child support payments. Thus, the requirement acted as an absolute obstacle to their right to enter marriage. For those who could afford to make payments, other alternatives existed to enforce child support payments. *Id.* at 389.

125. *Id.* at 377, 383. Justice Stewart concurred only in the result because he believed the majority erroneously placed the constitutional analysis within the framework of the equal protection doctrine. He would have placed it within the fourteenth amendment's due process analysis. *Id.* at 391-92 (Stewart, J. concurring).

126. *Id.* at 387.

127. *Id.*

128. *Id.* at 386.

129. *See supra* notes 69-74 and accompanying text for a discussion of the state's public health interest.

130. *See supra* note 112 for cases upholding venereal disease requirements.

131. *Zablocki*, 434 U.S. at 392 (Stewart, J., concurring).

132. Syphilis is a chronic and highly contagious disease. Venereal syphilis, communicated by sexual contact, accounts for about ninety to ninety-five percent of cases. The disease develops in three stages. In the primary stage, lesions appear on the genitals and occasionally in the mouth. As the disease progresses to the secondary stage, bodily

by sexual contact;<sup>133</sup> it slowly deteriorates the body;<sup>134</sup> and before the 1940s, it was incurable.<sup>135</sup>

Significant differences exist, however, between AIDS testing and syphilis testing.<sup>136</sup> Premarital syphilis testing at least tenably represents a closer connection between the state's health interest and the means the state employs to protect that interest. Unlike AIDS, which afflicts a narrowly defined group, syphilis afflicts a broad segment of the population.<sup>137</sup> Heterosexuals, who are apt to marry, are as capable as any group of spreading the disease. Accordingly, marital testing is an effective way to trace the disease. The same does not hold true for AIDS testing because the syndrome afflicts narrowly defined groups not likely to enter into marriage.

Furthermore, justification for premarital syphilis testing rests on outdated medical information and historical accident. Some states recognize that syphilis testing requirements fail to reflect current medical knowledge and refuse to impose testing requirements.<sup>138</sup> Historically, support for syphilis testing requirements occurred during an era when application of due process principles to fundamental values lay dormant.<sup>139</sup> Thus, judicial deference to premarital venereal disease testing finds support with the venerable ghost of the past-judicial precedent.

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disturbances, such as fever and anemia, develop. The tertiary stage is the most ruinous as bone lesions, deterioration of the bones, paralysis and deterioration of the flesh progresses to the point of death.

Transmission occurs when syphilis organisms enter the host through skin breaks. It is rarely transmitted by indirect contact with contaminated articles. GALLAGHER, *supra* note 4, at 151-66.

133. *Id.* at 153.

134. *Id.* at 160. Similar to AIDS, syphilis is a slow borer. When the victim dies it is usually the result of another symptom, such as paresis or heart attack. *Id.*

135. *Id.* at 160-61. In the 1940s scientists began using penicillin to combat the disease. As a result, the disease dramatically declined because the syphilis organism never developed a resistance to penicillin. Scientists have yet to develop a vaccine. *Id.*

136. *See supra* notes 75-94 and accompanying text for a discussion under the right to privacy analysis.

137. "Venereal syphilis is one of the most widespread communicable diseases." GALLAGHER, *supra* note 4, at 164.

138. Twenty-five states do not require a venereal disease test before marriage. They are: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Indiana, Kansas, Kentucky, Maine, Maryland, Minnesota, Missouri, Nevada, North Dakota, Ohio, South Carolina, Tennessee, Texas, Utah (does not require testing, but voids the marriage if one or both spouses are infected), Vermont, Virginia, Wisconsin and Wyoming.

139. G. GUNTHER, CONSTITUTIONAL LAW 503 (11th ed. 1985). Professor Gunther believed that due process principles lay dormant between the decision rendered in *Lochner v. New York*, 198 U.S. 45 (1905), and *Griswold v. Connecticut*, 381 U.S. 479

AIDS legislation, in contrast, follows a revitalization and expansion of due process principles.<sup>140</sup>

Because premarital AIDS testing differs from syphilis testing, *Zablocki's* reasonable regulation principle should apply.<sup>141</sup> Statutes similar to the Illinois law would fail to reasonably regulate the spread of AIDS without burdening the right to marry. Although, on its face, a premarital testing law would not bar individuals testing positive for AIDS from marrying, its practical effects are such that it may indeed work as an absolute bar.<sup>142</sup> Once prospective spouses receive notice of their partner's positive test results, the future marriage quite likely will not occur. Also, the law may delegate in an off-handed way choices of who individuals may marry, thus violating *Loving's* principles.<sup>143</sup>

In addition to creating due process concerns, the law implicates equal protection principles.<sup>144</sup> Because of the high cost of confirmatory testing, the law distinguishes between the indigent and the non-indigent with respect to the marriage right.<sup>145</sup> Although the Court does not recognize indigency alone as a suspect classification,<sup>146</sup> it does apply strict scrutiny to state laws which classify with respect to fundamental rights.<sup>147</sup> Premarital testing laws, like the Wisconsin law in *Zablocki*, burden the poor who desire to marry.<sup>148</sup> A challenge solely

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(1965). *Id.* Syphilis was a medical concern primarily during the 1940's. See *supra* note 132.

140. GUNTHER, *supra* note 139, at 503.

141. See *supra* notes 122-28 and accompanying text for a discussion of *Zablocki*.

142. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (Virginia's miscegenation statute did not facially classify on the basis of race, but its underlying purpose was to racially discriminate).

143. See *supra* notes 116-21 and accompanying text for a discussion of *Loving*. Note also that one of the privacy interests the Court identified in *Roe v. Whalen* was the ability for the individual to make personal choices, unfettered by the government. See *supra* notes 85-91 and accompanying text for a discussion of *Whalen*.

144. The equal protection clause is in the fourteenth amendment of the United States Constitution. U.S. CONST. amend. XIV.

145. See *supra* note 65 and accompanying text for a discussion of the cost.

146. When a law disadvantages a suspect class the Court will apply strict scrutiny. Generally, the characteristics of a suspect class are (1) a history of discrimination, (2) political powerlessness and (3) immutable characteristics.

See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (denying suspect classification to indigents opposing school financing system).

147. See *supra* notes 122-28 and accompanying text for a discussion of *Zablocki*.

148. See *supra* note 16 for the cost of testing. The Western Blot test is anywhere between \$150-\$300. Telephone interview with representative from the Center for Disease Control (March 1989).

to ELISA's cost is untenable because it imposes a minor financial burden, but the higher cost of the Western Blot test places a great burden on the poor.<sup>149</sup> Accordingly, premarital testing laws could act as a complete bar to marriage, and thus must fall as a result of *Zablocki's* principles.

#### IV. LESS BURDENSOME ALTERNATIVES

State laws may survive strict judicial scrutiny if the state shows that the law represents the least burdensome alternative.<sup>150</sup> Mandatory premarital AIDS testing fails to represent the least burdensome and efficient means of policing the spread of AIDS. For example, instead of requiring mandatory premarital testing, some states offer voluntary testing and distribute AIDS information to marrying couples.<sup>151</sup> The receipt of this information presumably opens communication between the parties, thus allowing them to discuss the effects of the disease.

Voluntary testing provides a better alternative, particularly for the poor. It relieves indigent couples of the financial burdens of confirmatory testing, thus not unduly interfering with their right to marry. Moreover, voluntary testing respects the individual's interest in choosing whether or not to subject himself to test results which carry a significant social impact. Under a voluntary scheme, the state, therefore, allows the individual the right to choose to take the test and disclose the results. The state does not unnecessarily intrude on confidential and personal matters.

Premarital testing requirements also unduly interfere with an individual's private communications. A less intrusive scheme would allow the AIDS positive individual the opportunity to disclose his condition to his prospective spouse. If the state were concerned that the infected partner would conceal his condition, it could intervene only after first giving the individual the first opportunity to disclose. According to this scheme, the state respects the individual's privacy interest and still preserves its public health interest.

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149. See *supra* note 16. The ELISA and Western blot tests are not independent of one another. When the state enacts mandatory testing, the confirmatory Western Blot test is necessary, particularly when liberty interests are at stake. Accordingly, any form of institutionalized testing, with the exception of blood screening, must include a confirmatory test.

150. See *supra* note 74 and accompanying text for a discussion of circumstances in which the court applies strict judicial scrutiny to laws interfering with fundamental rights.

151. See *supra* note 12 for a listing of states with voluntary testing.

Additionally, administering AIDS testing to marriage license applicants costs the state a considerable amount of money and strains medical resources.<sup>152</sup> Instead, the state should divert money and resources toward programs directed at those who pose the highest risk to the public. For example, a more controversial alternative would provide sterilized needles to intravenous drug users. This would reduce the use of contaminated and lethal needles. The state could provide condoms to sexually active individuals with a particular emphasis on bisexual and homosexual men. Finally, the state could implement educational programs aimed at teaching safe and responsible sex. These alternative programs would result in a much more efficient allocation of state's funds than testing individuals posing the least risk.

## V. CONCLUSION

The 1980s ushered in a new and deadly killer—AIDS. Public hysteria and fear accompanied the disease. Reacting to that fear, lawmakers proposed and enacted a host of AIDS legislation much of which is ill-advised and misinformed. Illinois recently repealed a premarital testing law which at best institutionalized AIDS hysteria in the form of a state law. Other states contemplating similar legislation should avoid Illinois' mistake both for practical and constitutional reasons. Premarital testing fails as a constitutional means of policing the disease's spread for three reasons. First, it targets those least likely to pose a public risk—marriage license applicants. Second, the burdens the law imposes on the individual's right to privacy and marriage far outweigh the slight health benefit to the state. Finally, premarital testing is not the most effective or cost-efficient method of controlling the spread of AIDS.

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152. See *supra* note 65 and accompanying text for cost analysis.

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