



## Public Health Law in the context of HIV/Aids Epidemic - A Deliberation

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### Introduction

Established precedent gives the state very broad powers to protect the public health. Nevertheless, constitutional law developments over the past quarters century have placed restraints on the use of the state authority in the public health field, including requirements of the process and the use of the least restrictive alternative to achieve the state's legitimate purposes. Legislation that specifically addresses AIDS is subject to scrutiny in light of the constitutional developments,

### Public health police power

Public health statues are enacted in accordance with specific powers invested in government. Federal public health legislation has been based on a broad interpretation of the constitutional clauses that direct the federal government to provide for the general welfare and regulate interstate and foreign commerce. Pursuant to the welfare clause, the federal government has established the United State Public Health Service (PHS) and the United States Centers for Disease control (CDC)

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The public health powers of a state are extremely broad, drawing on the inherent powers of sovereignty, and are not limited to the explicit constitutional

provisions. Police power is inherent in the exercise of sovereignty and extends to all public needs, such as the right to pass laws that are reasonably necessary for the protection and preservation of the peace, safety, health, morality and general welfare of citizens. State have delegated, through constitutional

The subject matter that has been dealt with through exercise of the police power in pursuit of the public health has been very extensive. The courts have upheld as valid the exercise of state power in almost any matter arguably related to the public health. These include exercises of the state's power to examine, treat and quarantine in the case of contagious disease.

Compulsory medical examination and treatment have upheld. For example, courts have approved requirements of vaccination prior to school attendance; state statues providing for compulsory examination of people applying for a marriage license; pre-employment testing for contagious diseases. In occupations where the person will be dealing with the public; and statues or ordinances requiring compliance with sanitation laws in private and public buildings,

Another broad police power of the state is the authority to involuntarily institutionalize individuals under certain



circumstances, The two existing forms of exercise of this power most relevant to AIDS are involuntary hospitalization of the mentally ill and institutionalization of drug abusers.<sup>2</sup>

Procedural limitations on the exercise of the state's public health powers derive from the due process clause of the Fifth amendment, which prohibits the federal government from depriving any person of life, liberty, or property without due process of law, and the Fourteenth Amendment, which imposes on the states a nearly identical obligation of due process. In most state constitutions there is a similar requirement that the state provide its citizens with due process of law. Due process requires that the government use fundamental fair procedures in exercising its police power. While rigorous procedural requirements have been imposed in criminal cases, courts scrutinize the procedures in civil cases less strictly

### **Aids Education**

While education generally has been a significant eminent of public health efforts to control infectious diseases, its role has been ancillary to biomedical interventions such as vaccination. However, AIDS education has been a principal instrument for combating the spread of infection. Educational programs are targeted to four populations: the general public, school and college-aged persons, persons at increased risk, and health care workers. The principal methods used in AIDS education have been: television and radio (including public service announcements and news coverage); news papers (feature stories, news coverage, and advertisements); posters (bill boards

and bus posters); brochures, newsletters, resource materials, presentations, workshops, outreach activities at bars, baths, bookstores, and on the streets; and counseling, testing and referral of sex and needle sharing partners.

The general public needs AIDS education to develop an understanding of the problems raised by the disease, to give support to prevention efforts and to avoid unjustified discrimination due to ignorance. AIDS education in schools and colleges provides information about sexually transmitted diseases and drug abuse to individuals at a time when they have the greatest curiosity about such matters. Uninfected persons whose behavior or circumstances puts them at increased risk are targeted for special education programs. Finally, there is a special need for outreach and education for health care personnel whose work puts them at risk of HIV infection.

By 1989, twenty-two states and the district of Columbia had mandated AIDS education by statute. More than one-third of all states required AIDS education at schools. The statutory drive to provide AIDS education in the schools has taken different forms: as part of comprehensive health education on sexually transmitted disease; as part of sex education on communicable diseases; and as part of the health curriculum as special AIDS education.

Public education programs directed at drug users have taken two principal forms: outreach programs to reach drug users on the street and educational programs incorporated into drug treatment programs. A typical outreach program is that developed by New Jersey State Department of Health. It employs



former drug users who have completed a methadone maintenance program and who are given intensive training on aids. These educational programs provide a description of AIDS and the means of transmissions, the need to consider drug rehabilitation treatment, the need to cease sharing drug paraphernalia, and the need to sterilize needles and syringes that are shared.

Some states have adopted legislative directives to state agencies dealing with drug dependency to develop educational programs dealing with AIDS. Typical of this legislation is the Illinois Department of Alcoholism and Drug Abuse to develop AIDS-related educational and training programs for persons engaged in the treatment and detoxification of alcoholics and drug addicts. The department also is directed to include an educational component to inform participants in treatment programs of the causes, means of transmission, and methods available to reduce the risk of acquiring or transmitting aids.

### **HIV testing and counseling**

The most common procedure to test for HIV consists of two tests performed in sequence. The first test known as ELISA, detects antibodies against the major individual proteins that make up HIV. If an initial ELISA is positive, the test is repeated. If it again positive, the western blot test is performed. This sequence of tests can give an accurate assessment of whether a person's blood contains HIV antibodies. Individuals with confirmed test results are presumed to be currently infected and capable of transmitting infection through blood or sexual contact. Unfortunately, these tests do not predict which infected asymptomatic

individuals will progress to AIDS diagnoses.<sup>3</sup>

Serologic testing for HIV is used for screening given population, such as blood donors, or for diagnosis of individual patients. The first use of HIV antibody tests was to screen units of blood and plasma collected for transfusion or for use in the manufacturing of blood products. The CDC issued the recommendations for screening donated blood and plasma for HIV antibody. These recommendations have been codified in state statutes and regulations.

### **Discovery of donor records.**

The principal areas of litigation arising in relation to the testing of donors of blood, organs or tissue are confidentiality and access to records of seropositivity. The issue commonly arises when someone sues a hospital or blood bank for providing them HIV-infected blood as a result of negligence in screening received blood. The plaintiff often seeks the name of the donor through discovery.

Some states have adopted confidentiality statutes protecting the identity of HIV antibody test subjects. California has the most comprehensive confidentiality statute. It provides that no person shall be compelled in any state or local proceeding to identify or provide characteristics that would identify any individual who is the subject of a blood test to detect antibodies to HIV.

### **Premarital testing**

At one time Illinois required as a pre-condition to issuance of a marriage



license that applicants obtain a medical examination including tests to determine whether either of the parties to the proposed marriage had been exposed to HIV or any other identified causative agent of AIDS. The Illinois statute made it unlawful for a country clerk to issue a marriage license to any person who failed to present a certificate signed by the physician who administered the requisite tests. The certificate had to indicate that the tests had been administered and that the results had been provided to the parties. It did not, however, have to indicate the test results. The Illinois law was repealed after the Illinois State Department of Public Health reported that only a very small number of positive test results had been obtained and that many state residents were avoiding the law by being married in a neighboring state.

### Testing of prisoners

The United States Bureau of Prisons (BOP) initially implemented a screening program that included: testing all incoming inmates; counseling all prisoners; screening all inmates every six months; and screening all negative inmates within sixty days of release with notification in accordance with regulations.

The BOP reassessed its policy and now limits the testing of inmates. The BOP still tests those inmates who, prior to release, exhibit clear clinical implications of infection; request testing; are released for community activities; or have exhibited promiscuous behavior. The BOP also tests a ten percent random sample of incoming inmates at six-month intervals.

Several states, including Alabama and Idaho, require that all inmates be tested for HIV. Other states require that certain groups be tested, such as prisoners convicted of sex crimes, prostitution, or intravenous drug use.

### Testing of aliens

Under current law, the attorney general has discretion to issue a waiver to a person, otherwise inadmissible on grounds of infection with a dangerous contagious disease, who is seeking temporary admission as a non-immigrant for purposes of receiving medical treatment. Similarly, the Attorney General may issue a waiver to a refugee seeking admission for humanitarian purposes to assure family unity, or otherwise to advance the public interest.

### Counseling

Several states' statutes require counseling by a physician who orders an HIV test for a patient. For example, the law in Illinois requires pre-test counseling, including information about the meaning of the test results, the availability of additional or confirmatory testing, if appropriate, and the availability of additional or confirmatory testing, if appropriate, and the availability of referrals for further information or counseling<sup>4</sup>.

It is generally agreed, whether required by statute or not, that HIV testing should be accompanied by pre- and post-test counseling. Pre-test counseling insures compliance with requirements of informed consent. Post-test counseling is needed to protect third parties, reduce the spread of HIV to others, and provide subjects with opportunity to protect their own health.



### **Reporting**

AIDS- related reporting requirements take three principal forms; statutes or regulations in every state that require reporting of CDC- defined caSES of aids; Specific statutory or regulatory requirements to report positive HIV antibody test results; and general statutory or regulatory provisions that do not specify HIV as reportable, but that require the reporting of any case , condition ,or carrier status relating to specific communicable and sexually transmissible diseases, including aids.

AIDS reporting statutes and regulations have as their purposes the gathering of epidemiologic data regarding the incidence of aids and permitting public health action , such as contact tracing , appropriate to a specific case.

Regulatory or criminal actions may be sought against licensed providers who fail to comply with reporting statutes or regulations . furthermore , a civil cause of action may be brought against a provider whose failure to report a condition required by the statue or regulation to be reported results in injury to a third party by preventing implementation of a program of contact tracing or partner notification that would have enabled the third party to take action to prevent infection or to obtain effective medical treatment.<sup>5</sup>

States vary in the manner in which they require the reporting of "communicable" and "sexually transmissible" disease .California, for example specifies by statute which diseases must be reporting . On the other hand , Illinios distinguishes between communicable and sexually transmissible diseases. As to the

former , Illinios simply provides the state public health department with broad powers to adopt, .promulgate , repeal, and amend rules and regulations and make such investigations and inspections as it may from time to time deem necessary. This permits the department to develop a list of reportable diseases. At one time, AIDS was designated a reportable communicable disease. Illinios now has special aids reporting legislation

### **Contact tracing**

Contact tracing, or partner notification has been a part of programs to control the transmission of communicable and sexually transmitted diseases for a very long time . For instance, the strategy of notifying all of the sexual partners of persons diagnosed with syphilis has been regarded as a major control measure since the 1940's.The rationale for traditional contact tracing was to treat infected individuals as early as possible in order to avoid unnecessary complications, to reduce the period of infection, and to break the transmission cycle. As treatment becomes available that interferes with HIV replicable , the full range of traditional objectives may be met by contact tracing

### **Death reporting**

some states have statutes requiring notification to funeral directors ,medical examiners , embalmers, and others handling or disposing of human bodies that an individual has died with an AIDS diagnosis or was HIV infected.<sup>6</sup>

### **Confidentiality**

Medial records



The professional licensing laws of some states require that physicians and health care providers maintain the confidentiality of information they obtain in the course of treating their patients. Consequently, physicians and other health care providers may be found to be engaging in professional misconduct if they improperly release confidential information.

Hospitals and other facilities making unauthorized disclosures may be civilly liable where the applicable licensing statute or regulation prohibits disclosure of confidential information concerning patients. Accrediting bodies impose similar duties that require facilities to keep medical information confidential. Improper disclosure of a patient's medical record may jeopardize a facility's accreditation.

#### **Public health records**

Where there is no specific AIDS confidentiality legislation in a state, AIDS-related records will be protected by general public health record confidentiality laws. If AIDS is classified as a sexually transmitted or venereal disease, records relating to AIDS have broad confidentiality protections that often include a shield from judicial subpoena. For example, until the passage of a specific AIDS confidentiality law, a New York state statute guaranteed the confidentiality of sexually transmitted disease reports, including those related to AIDS, in the possession of public health officials.

#### **Aids confidentiality legislation and regulations**

A number of states have passed laws specifically protecting the confidentiality

of HIV test results and AIDS diagnoses. Under federal law, certain federal institutions including the CDC, are required to assure the suppliers of research information that any material that is supplied will not be used for any purpose other than that for which it has been supplied for any purpose other than that for which it has been supplied unless the institution or individual supplying the information has consented to further release of the supplied information.

#### **Accidental potential exposures**

Some states permit disclosure of an individual's HIV test results to members of specified groups when there has been an accidental exposure to body fluids or tissue that may permit transmission of HIV. A number of states require notification of ambulance personnel and emergency medical technicians that they have transported or treated an HIV infected person.<sup>7</sup>

#### **Confidential health records and court orders**

Health care providers may be required to release medical record information pursuant to subpoena or court order. However, the question of what medical records in various contexts are open to discovery has been a matter of a great deal of litigation.

The power to quarantine persons with communicable diseases provided for by statute in every state and by federal law. Some states have enacted statutes that specifically extend quarantine or isolation authority to persons with AIDS or HIV infection.



### Isolation

Isolation or quarantine based on behavior, imposes restrictions on those HIV-infected persons whose actions are likely to facilitate transmission of HIV. Several states have enacted statutes which are directed at recalcitrant individuals with HIV infection who persist in behaviours likely to transmit HIV.

### Regulation of places

Certain public places such as bathhouses and bookstores with video booths, are locales in which high risk sexual activity may occur. Some states have enacted statute that specifically prohibit the operation of bathhouses. In other states, public health officials have sought to close such establishments under Regulations adopted pursuant to their statutory authority to act to protect the public health.

Using a least restrictive approach, a state trial court in San Francisco refused to grant the city's petition for an injunction to close all the bathhouses in the city. Instead the court ordered the proprietors of the bathhouses to prohibit high risk sexual activity; enjoined the bathhouse from renting private rooms; requires the donors to individual cubicles, booths, and rooms to be removed; and mandated a program of safe sex education.

### Conclusion

Three principal approaches have been taken in dealing statutorily with AIDS; treating AIDS as a communicable disease and. Treating aids as a sexually

transmitted disease; and treating AIDS by means of specific legislation. The public health techniques used to combat the spread of HIV infection include; education; testing and counseling; reporting and contact tracing and quarantine, isolation and regulation of public places. In order to obtain citizen cooperation and compliance a rigorous scheme of confidentiality of AIDS-related records has been developed in some states. Constitutional attacks on regulatory measures directed at gay bathhouses where anal intercourse or fellatio occur are not likely to be successful.

### Notes and references:

1. *Comment, quarantine: an unreasonable solution to the aids dilemma* 55U CIN.L.REV.217 (1986) provisions, part of their broad power over matters of public health to country and municipal levels of government. The scope of a country's or city's public health authority is dependent on the delegates of the power by the state.
2. *Gray, the parameters of mandatory public health measures and the AIDS epidemic*, 20 suffolk U.IL.REV.505(1986).
3. *MERITT, communicable disease and constitutional law* AIDS, 61N.Y.U.L.REV739 (1986)
4. *NOTE Constitutional Rights of AIDS CARRIERS*, 99 Harv.L.REV.1274(1986)
5. *SULLIVAN and field, AIDS and the coercive power of the state*, 23, Harv C.RR-C.L.L.REV 39(1988)