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COMMENT

AN OUNCE OF PREVENTION WHERE THERE IS NO CURE: AIDS AND PUBLIC HEALTH IN WYOMING*

Obituary: Belinda Mason of Utica, KY, short-story writer, wife, mother, and AIDS activist died Monday, Sept. 9, 1991, of AIDS-related pneumonia at age 33. In an August, 1991 interview, Mason said, "I have become the disease. When people talk to me now, they see the disease first. Nobody talks to Belinda Mason the short-story writer any more. My previous identity has dissolved I've become an AIDS poster child."¹

INTRODUCTION

The statistics on acquired immune deficiency syndrome ("AIDS") and human immunodeficiency virus ("HIV") indicate an epidemic which is still developing. The rapid spread of the disease nationwide from 878 reported AIDS cases as of December, 1982,² to 202,843 reported AIDS cases as of November, 1991,³ indicates a progressive epidemic. The epidemic victimizes the individual sufferers who comprise these statistics.

In Wyoming, fifty-three AIDS cases were reported to the Centers for Disease Control ("CDC") as of December, 1991.⁴ These fifty-three⁵ cases represent a low annual rate of infection compared to the country

* The author wishes to thank Professor John M. Burman, the people at the Wyoming Dept. of Health, and members of the health care community who cooperated in the research for this comment.

1. *Belinda Mason, Nationally-known AIDS Activist, Dead at 33*, THE LARAMIE DAILY BOOMERANG, Sept. 10, 1991, at 2. Mason was the only AIDS-infected member of the National Commission on AIDS, prior to Magic Johnson, and criticized the Bush administration's stance on AIDS as a moral issue instead of a public health issue. She contracted AIDS through a blood transfusion following childbirth. *Id.*

2. Richard, M. Selik et al., *Distribution of AIDS Cases, by Racial/Ethnic Group and Exposure Category, United States, June 1, 1981 - July 4, 1988*, 261 JAMA 201-05 (1989) [hereinafter *Racial/Ethnic Distribution*].

3. CDC, HIV/AIDS SURVEILLANCE REPORT 5 (Dec. 1991) [hereinafter *HIV/AIDS SURVEILLANCE*].

4. Telephone Interview with Wyoming AIDS Hotline (1-800-327-3577) (Jan. 17, 1992). Additional hotlines for AIDS/HIV information are the National AIDS Hotline, 1-800-342-7432, and the Teens AIDS Teaching Prevention Hotline, 1-800-234-TEENS. Robert R. Waller & Lynn W. Lisella, *National AIDS Hotline: HIV and AIDS Information Services Through a Toll-free Telephone System*, 106 PUB. HEALTH REP. 628 (1991); *Growing Up in the Age of AIDS* (ABC television broadcast, Feb. 2, 1992).

5. Telephone Interview with Wyoming AIDS Hotline (Jan. 17, 1992). Of the 53 AIDS cases, 28 are deceased, of whom 23 were male and 5 were female. As of December 31, 1991, there were 65 HIV-positive cases, including one pediatric case.

as a whole.⁶ Yet it is higher than the rate in South Dakota, North Dakota, Utah, and Nebraska.⁷ Furthermore, Wyoming's annual rate of infection has increased over time which indicates the disease is on the rise.⁸ Costs of treatment vary. One source estimated the lifetime cost of treatment to be \$150,000 per individual.⁹ Another source estimated the lifetime cost not to exceed \$80,000 per individual.¹⁰ AIDS is a public health and economic concern for states even with low rates of incidence, since a majority of patients depend on non-private health insurers¹¹ such as Medicaid.¹²

In 1989, the Wyoming Legislature added AIDS to the list of sexually transmitted diseases ("STDs") which it considered to be contagious, infectious, communicable and dangerous.¹³ At the same time, the legislature authorized the State Department of Health to develop rules and regulations pertinent to the state public health interest.¹⁴ Accordingly, the Wyoming Department of Health promulgated rules and regulations which deal with STDs, including AIDS/HIV. These regulations were adopted July 23, 1991.¹⁵ However, the law, as it is presently constituted, may hinder the control and prevention of AIDS/HIV more than it helps.

The purpose of this comment is three-fold. First, it evaluates the statutes and rules and regulations promulgated by the Wyoming Department of Health as they apply to AIDS and HIV; second, it identifies major flaws; and third, it proposes recommendations to correct the major flaws. To accomplish these stated purposes, the comment will proceed in the following manner. Part I reviews current AIDS and HIV etiology¹⁶ and epidemiology¹⁷ to provide an understanding of the nature of the disease. Part II discusses public health policy underlying the law. Part III outlines current Wyoming law on AIDS/HIV, analyzes problems with current Wyoming law, and proposes changes to

6. *Id.* Wyoming's annual rate of infection, in 1991, is 4.2 cases per 100,000 population which implies that 21 new cases per year can be expected.

7. *Id.* (SD - 0.4/100,000; ND - 0.6/100,000; UT - 2.9/100,000; NE - 3.7/100,000).

8. *Id.*; Wyoming's annual rate of infection, as of August, 1991, was 2.7/100,000. HIV/AIDS SURVEILLANCE, *supra* note 3, at 3.

9. This figure did not include expenditures on education, research, and lost income. CAL. HEALTH & SAFETY CODE § 199.47(a) (West 1992).

10. David E. Bloom & Geoffrey Carliner, *The Economic Impact of AIDS in the United States*, 239 SCIENCE 604 (1988).

11. *Id.* at 608.

12. Catherine M. Hutchinson et al., *CD4 Lymphocyte Concentrations in Patients With Newly Identified HIV Infection Attending STD Clinics*. 266 JAMA 253, 255. (1991) (sixty-eight percent of HIV-infected patients in this study relied on state or federally funded assistance or had no means of paying for treatment).

13. Public Health Act, ch. 218, 1989 Wyo. SESS. LAWS 418 (codified as amended WYO. STAT. § 35-4-130(b) (Supp. 1989)).

14. WYO. STAT. § 35-4-130(b), (c) (Supp. 1991).

15. Dept. of Health Rules and Regulations for Sexually Transmitted Diseases (1991) [hereinafter Wyo. AIDS/HIV Regs].

16. THE AMERICAN HERITAGE DICTIONARY 242 (2d college ed. 1983) (the study of the causes of disease or disorder as determined by medical diagnosis).

17. *Id.* at 238 (the study of the spread of contagious disease).

correct the problems.

AIDS AND HIV: THE NATURE OF THE BEAST

"Here I am saying it can happen to anybody,
even me, Magic Johnson."¹⁸

An understanding of AIDS/HIV, what it is and how it spreads, is necessary to an analysis of whether Wyoming law adequately addresses this public health problem.

AIDS Background

Sporadic cases of *Pneumocystis carinii* pneumonia, a rare type of pneumonia, and Kaposi's sarcoma, a rare type of cancer, began appearing in 1980 in numbers sufficient to alert epidemiologists, scientists who study epidemics, to study the phenomena.¹⁹ As a result, researchers found the mysterious phenomena were symptoms of what has become known as AIDS, a chronic suppression of the immune system caused by a virus, HIV.

Health care providers ("HCPs") and researchers knew relatively little about AIDS in the early years of the epidemic. Researchers were puzzled at first because the symptoms of the disease were various, unrelated opportunistic diseases. As burglars find it easy to rob homes where the windows are unlocked and opened, opportunistic diseases easily strike victims whose immune systems are weakened and unable to fight off infections and cancers.

Another circumstance which delayed needed research was that AIDS disproportionately afflicted population subgroups discriminated against or perceived with disfavor by the general population.²⁰ Homosexuals, bisexuals,²¹ intravenous ("IV") drug users,²² African-Americans,²³ and hispanics²⁴ suffer from AIDS disproportionately to their

18. Charles Leerhsen et al., *Magic's Message*, NEWSWEEK, Nov. 18, 1991, at 58 (professional basketball player Ervin "Magic" Johnson announcing his retirement due to HIV infection).

19. See generally CDC, *Pneumocystis Pneumonia—Los Angeles*, 30 MORBIDITY & MORTALITY WEEKLY REP. 250-52 (1981); CDC, *Kaposi's Sarcoma and Pneumocystis Pneumonia Amongst Homosexual Men—New York City and California*, 30 MORBIDITY & MORTALITY WEEKLY REP. 305-08 (1981).

20. See generally RANDY SCHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC* (1988).

21. *Racial/Ethnic Distribution*, *supra* note 2, at 202. (Seventy-seven percent of men with AIDS, in 1988 in the U.S., were homosexual or bisexual).

22. *Id.* (The majority of women with AIDS, in 1988 in the U.S., were IV drug users or had sexual partners who were IV drug users.).

23. *Id.* at 201 (Twenty-six percent of AIDS patients, in 1988 in the U.S., were African-American compared to twelve percent African-Americans in the general population.).

24. *Id.* (Thirteen percent of AIDS patients, in 1988 in the U.S., were Hispanics compared to six percent Hispanics in the general population.).

percentage in the general population. Thus, social and moral factors were added to the picture which complicated public health policy.²⁵

Currently, research proceeds at full speed, largely due to media attention, public concern, and the lobbying efforts of activists.²⁶ In order to facilitate any promising treatments which are discovered, the Food and Drug Administration has expedited the procedure for making new drug therapies available.²⁷ Research also continues to develop better tests for detecting HIV²⁸ and effective HIV vaccines.²⁹

What is HIV?

Researchers believe that the human immunodeficiency virus causes AIDS by crippling the victim's immune system.³⁰ HIV cripples the immune system in two ways. First, HIV can impair the normal function of immune system cells. Second, HIV can destroy immune system cells. In both cases, the result is a progressively weakened immune system. Furthermore, HIV integrates its genetic material into the victim's own genetic material in HIV infected cells.³¹ Because the HIV becomes genetically part of these victimized cells, the victim's immune system is unable to recognize the infected cells as abnormal and dispose of them. Consequently, this makes HIV more difficult to detect and treat.

Ironically, a virus which is nasty and tenacious inside the victim's body is a relatively weak virus outside the victim's body. Outside the victim's body, HIV dies quickly. A weak solution of household bleach is sufficient to disinfect surfaces contaminated with HIV.³²

25. Health Omnibus Programs Extension Act, Pub. L. No. 100-607, § 300ee, 102 Stat. 3093 (1988). Senator Jesse Helms attempted to amend the Health Omnibus Programs Extension Act of 1988 to specify that no funds under the act would be used to provide education or information designed to promote or encourage homosexual or heterosexual sexual activity or intravenous substance abuse. The amendment failed. 134 CONG. REC. S5035 (daily ed. April 28, 1988) (Helms amendment No. 1992).

26. Robert M. Wachter, *AIDS, Activism and the Politics of Health*, 326 *NEW ENG. J. MED.* 128 (1992); William D. Goldsmith, *AIDS Drug Development, Availability Intensify*, 262 *JAMA* 452, 452 (1989) (Lag time always exists between the initiation of research and its successful culmination in FDA approved drug therapies).

27. See Frank E. Young et al., *The FDA's New Procedures for the Use of Investigational Drugs in Treatment*, 259 *JAMA* 2267, 2267 (1988); but see NATIONAL COMMISSION ON AIDS, REPORT NO. 3, RESEARCH, THE WORKFORCE AND THE HIV EPIDEMIC IN RURAL AMERICA 4-8 (1990), for criticism for the lack of results from the AIDS Clinical Trials Group Program.

28. JEAN-PIERRE ALLAIN, ABBOTT DIAGNOSTICS EDUCATIONAL SERVICES, *RETROVIRUS LEARNING GUIDE*, 22-23 (1990) [hereinafter *RETROVIRUS GUIDE*].

29. Marsha F. Goldsmith, *Can't Find One AIDS Vaccine? Try for a Few!*, 266 *JAMA* 763 (1991); but see generally Evan L. Rosenfeld, *The Strict Products Liability Crisis and Beyond: Is There Hope for an AIDS Vaccine?*, 31 *JURIMETRICS* 187 (1991), for legal impediments to vaccine development.

30. *RETROVIRUS GUIDE*, *supra* note 28, at 16.

31. *Id.* at 15.

32. ABBOTT DIAGNOSTICS EDUCATIONAL SERVICES, *PREVENTING HIV TRANSMISSION WITH TESTING AND COUNSELING* 12 (1989) [hereinafter *PREVENTING HIV*].

How is HIV Transmitted?

HIV is transmitted from an infected individual to another by means of body fluids,³³ particularly blood and semen.³⁴ These infected body fluids are transmitted to other individuals primarily through sexual contact³⁵ involving mucous membranes³⁶ and common sharing of contaminated, intravenous needles.³⁷ HIV may also be passed from an infected mother to her baby while the baby is in the womb or through breast-feeding.³⁸ Another route of transmission may occur when contaminated instruments accidentally cut or prick patients during invasive medical or dental procedures.³⁹ HIV may also be transmitted through infected blood or blood products used in transfusions.⁴⁰

However, medical research has shown no evidence⁴¹ of HIV being transmitted by means of saliva, tears, or sweat.⁴² Furthermore, no significant transmission of HIV has been demonstrated through casual contact.⁴³

How Does HIV Cause AIDS?

When HIV is transmitted to a person, the HIV infects and, ultimately, impairs his immune system. Normally, a person's immune system does not attack his own body cells.⁴⁴ Instead, the immune system protects the individual by attacking foreign or abnormal matter in his body. When the immune system recognizes that there is something foreign in the body, such as measles virus, the immune system is triggered to produce antibodies and white blood cells which seek out and

33. Body fluids has the same meaning as bodily fluids.

34. RETROVIRUS GUIDE, *supra* note 28, at 11.

35. Phillip Elmer-DeWitt, *How Safe is Sex?*, TIME, Nov. 25, 1991, at 72-73 (Transmission through heterosexual contact rose 40% in 1990 to 6% of total American AIDS cases to date, although male homosexual transmission and heterosexual IV drug transmission remain the predominant modes of transmission in the U.S.).

36. *Id.*

37. *Id.*

38. RETROVIRUS GUIDE, *supra* note 28, at 5.

39. J. Dorschner, *An AIDS Mystery*, THE SUNDAY DENVER POST, Jan. 19, 1992, at Contemporary-8. Kimberly Bergalis was a patient of an AIDS-infected dentist who is thought to have transmitted HIV to five patients, as evidenced by the similarity of HIV viral genetic material from the dentist and the patients. Ms. Bergalis advocated mandatory testing of health care workers which has not been supported on the basis of cost effectiveness and privacy rights. *Id.* Ms. Bergalis died from AIDS on December 8, 1991. *AIDS Victim Wills Aunt Red Porsche*, THE LARAMIE DAILY BOOMERANG, Jan. 15, 1992, at 18.

40. RETROVIRUS GUIDE, *supra* note 28, at 5.

41. Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1023-1026 (1989) [hereinafter *Politics of AIDS*].

42. James W. Curran et al., *Epidemiology of HIV Infection and AIDS in the United States*, 239 SCIENCE 610, 615 (1988).

43. RETROVIRUS GUIDE, *supra* note 28, at 5-6.

44. *Id.* at 9-10.

destroy the foreign matter.

HIV specifically affects the victim's immune system by targeting a class of white blood cells which are called T-helper lymphocytes.⁴⁵ HIV impairs or destroys these white blood cells. As a result, the victim's immune system is unable to fight disease effectively. Furthermore, some infected T4 cells are actually turned into virus factories that produce HIV which is carried in the victim's blood. Thus, blood becomes a vehicle for HIV transmission.⁴⁶

Due to HIV's impairment of the victim's immune system, opportunistic diseases are allowed to take hold. Opportunistic diseases associated with HIV infection⁴⁷ include: Kaposi's sarcoma, *Pneumocystis pneumonia*, various lymphomas, cryptococcal meningitis, herpes viruses, syphilis, toxoplasmosis, and tuberculosis.⁴⁸

When the victim's immune system is crippled to the point that it cannot effectively fight opportunistic diseases, the disease is called AIDS for acquired immunodeficiency syndrome.⁴⁹ AIDS victims were originally diagnosed as suffering from AIDS only when severely stricken with opportunistic diseases.⁵⁰ A new definition of AIDS couples HIV infection with a low count of the T-helper lymphocytes which HIV targets.⁵¹ Below a certain level of T-helper lymphocytes, the immune system is considered impaired and at imminent risk of opportunistic diseases.

Not all HIV-infected persons develop AIDS immediately. An HIV-infected person can carry on normal activities and remain healthy for years.⁵² Unlike AIDS victims, HIV-infected persons do not have noticeable symptoms. Nevertheless, like Typhoid Mary,⁵³ HIV-infected persons are asymptomatic carriers who are infectious.

45. *Id.* at 11.

46. *Id.*

47. *Supra* note 19 and accompanying text (Because researchers saw such different diseases, they experienced difficulty in recognizing that AIDS is one disease caused by one virus, HIV).

48. AMERICAN FDN. FOR AIDS RESEARCH, 4 AIDS/HIV TREATMENT DIRECTORY 54-73 (1991). AIDS can also damage the central nervous system, including the brain, to cause HIV-related dementia. PREVENTING HIV, *supra* note 32, at 14, 17.

49. RETROVIRUS GUIDE, *supra* note 28, at 27.

50. CDC, *Revision of the CDC Surveillance Case Definition for AIDS*, 36 MORBIDITY AND MORTALITY WEEKLY REP. 1S (1987).

51. *See generally* U.S. DEPT. OF HHS, 1992 REVISED CLASSIFICATION SYSTEM FOR HIV INFECTION AND EXPANDED AIDS SURVEILLANCE CASE DEFINITION FOR ADOLESCENTS AND ADULTS - DRAFT (1991).

52. *Id.*

53. 10 ENCYCLOPEDIA BRITANNICA MICROPAEDIA 220 (1984). Typhoid Mary was a carrier of typhoid fever, who did not herself suffer from the disease. She was blamed for having caused 51 cases, resulting in three deaths, when she worked as a cook. She eluded authorities for eight years before her apprehension and isolation. She died after 23 years of isolation in 1938. *Id.*

How to Test for HIV

HIV infection is detected indirectly. The presence of HIV triggers the body to produce antibodies to HIV. HIV seropositivity means that antibodies which fight HIV are present in an individual's blood.⁵⁴ Therefore, HIV seropositivity only indicates the presence of HIV antibodies, not HIV itself.⁵⁵

Usually, an initial test called the enzyme-linked immunoassay ("ELISA") test detects HIV seropositivity. If the first ELISA test is negative, generally no further testing is done. However, if the first ELISA test is positive,⁵⁶ the presence of the HIV antibodies will generally be confirmed by a second ELISA test. If the second ELISA test is positive, the results will be further confirmed by a Western Blot test,⁵⁷ an immunofluorescence assay ("IFA") test,⁵⁸ or other confirmatory test. The confirmatory tests are more sensitive and accurate than the ELISA test, but they are more difficult to process and, consequently, more expensive.⁵⁹

Only when this battery of initial and confirmatory tests indicate HIV seropositivity, should a tested individual be diagnosed HIV-positive.⁶⁰ Unfortunately, false positives and false negatives occur.⁶¹ Neither the ELISA nor the Western Blot test is 100 percent accurate.⁶² Research continues in developing more accurate tests and reducing testing costs.⁶³

Accurate diagnosis of HIV status is essential. HIV-positive individuals need to modify their behavior in order to prevent HIV transmission to others, as well as seek appropriate medical attention. However, a negative HIV test is no reason to avoid or stop the use of preventative measures because HIV can be present but undetectable by ELISA testing. A lag period occurs between HIV infection and the production of antibodies.⁶⁴ During this period, ELISA testing will result negative, since no antibodies will be present. Yet, throughout this

54. RETROVIRUS GUIDE, *supra* note 28, at 21. (The ELISA test is highly sensitive, meaning it will detect antibodies to HIV in very small concentrations. It is, however, not very specific, meaning there is a probability of false positives.).

55. *Id.* at 22.

56. *Id.*

57. *Id.* The Western Blot test detects the presence of proteins of a certain molecular weight associated with antibodies to HIV.

58. *Id.*

59. *Id.* at 21-22.

60. ROBERT C. RINALDI, AMA, HIV TEST COUNSELING: AMA PHYSICIAN GUIDELINES 2 (1988) [hereinafter AMA GUIDELINES].

61. RETROVIRUS GUIDE, *supra* note 28, at 22-23.

62. Martha A. Field, *Testing for AIDS: Uses and Abuses*, 16 AM. J. LAW & MED. 33, 72 (1990) (One study of a low risk population showed a 15% false positive rate after repeated ELISA testing.) [hereinafter *Testing for AIDS*].

63. RETROVIRUS GUIDE, *supra* note 28, at 22-24.

64. AMA GUIDELINES, *supra* note 60, at 6. Seropositivity usually occurs 4-12 weeks after HIV infection. High risk individuals should undergo repeat testing 3-6 months after an initial negative test. *Id.*

lag period, the individual is infected and can transmit the virus.⁶⁵

Although all 50 states require the reporting of AIDS cases,⁶⁶ not all states require the reporting of HIV seropositivity. Consequently, it is impossible to determine accurately the number of HIV-infected individuals. As AIDS victims can be likened to the tip of an iceberg, HIV-infected individuals are like the submerged portion of the iceberg and pose a great danger to public health if they do not act appropriately to prevent HIV transmission.

PUBLIC HEALTH POLICY

Names are her job at the Colorado Department of Health—names of people who have the human immunodeficiency virus, gonorrhea or syphilis, and names of their sex partners who may have been exposed. “If we can get to them, we can help them live longer.” The “sex police” are on life and death patrol every day.⁶⁷

The public health policy which underlies Wyoming public health law is intended to protect life and promote public health and safety. Wyoming STD law attempts to accomplish this goal by legal measures designed to prevent the spread of disease.⁶⁸

Disease prevention takes place more effectively with the cooperation of the public. Infected individuals must be identified and treated in order to prevent the transmission of disease. Voluntary testing provides an effective way to identify infected individuals and necessarily requires public cooperation. Once infected individuals are identified, their cooperation is necessary in order to identify others whom they may have infected.⁶⁹

Infected individuals are reported by HCPs to public health officers, whose mission is to control and prevent the spread of contagious diseases deemed harmful to the public health. These diseases include STDs⁷⁰ and HIV.⁷¹ The means used to break the chain of

65. PREVENTING HIV, *supra* note 32, at 26. Even when testing accurately indicates HIV-negative, the tested individual should still avoid at-risk behavior and use preventative measures to avoid infection. *Id.* at 28, 36-37.

66. HIV/AIDS SURVEILLANCE, *supra* note 3, at 17.

67. Michael Booth, “Sex Police” Are On Life, Death Patrol Every Day, *THE SUNDAY DENVER POST*, Jan. 26, 1992, at 1.

68. WYO. STAT. §§ 35-4-101 to -138 (Supp. 1991).

69. See JOHN HANNAN, REPORT OF THE NATIONAL COMMISSION ON AIDS, AMERICA LIVING WITH AIDS 19-31 (1991).

70. See ALLAN M. BRANDT, NO MAGIC BULLET (1985) for a history of STD in the U.S. since 1880. Other STDs include syphilis, gonorrhoea, and hepatitis B which are as debilitating and deadly as AIDs if untreated. Telephone Interview with Roger Burr, STD Prevention Officer, Wyo. Dept. of Health, Aug. 28, 1991. One commentator lists lessons from STD public health policy which can be applied to AIDS/HIV: (1) fear of disease will powerfully influence medical approaches and public health policy, (2) education will not control the AIDS epidemic, (3) compulsory public health measures will not control the epidemic, and (4) the development of effective treatments and vaccines

transmission have historically included containment and prevention through case finding,⁷² contact tracing,⁷³ isolation,⁷⁴ quarantine,⁷⁵ forced vaccination and immunization, compulsory examinations, closing of public places, and mandatory testing such as premarital blood testing.⁷⁶ Reporting, case finding, and contact tracing are possible only with the cooperation of HCPs and infected individuals.

Wyoming encourages cooperation by imposing legal requirements for medical privacy with limited disclosure.⁷⁷ Individuals must have confidence in medical privacy in order to cooperate with their HCPs and public health officers.

Public health policy also encompasses education of the general public. General education about AIDS/HIV is needed in order to encourage voluntary testing and promote preventative practices. Preventative practices result from behavioral changes which most effectively occur through voluntary action.⁷⁸

WYOMING LAW

Like much of urban America, rural communities are just beginning to confront the realities of HIV infection and AIDS. The fear of being "found out," . . . is almost as great as the fear of the disease itself.⁷⁹

Wyoming public health law, as it regards STD, contains disclosure requirements which discourage public cooperation in testing. Furthermore, Wyoming law neglects public education entirely in the AIDS/HIV context. Consequently, the public health policy cannot be fully and effectively carried out.

will not immediately or easily end the AIDS epidemic. Allan M. Brandt, *AIDS in Historical Perspective: Four Lessons from the History of [STDs]*, 78 AM. J. PUB. HEALTH 367-71 (1988).

71. Although HIV is listed as an STD, non-sexual modes of HIV transmission occur. See *supra* notes 37-40 and accompanying text.

72. Mary E. Clark, *AIDS Prevention: Legislative Options*, 16 AM. J.L. & MED. 107, 131 (1990) (Case finding is the identification of infected individuals.).

73. *Id.* (Contact tracing is the identification of contacts of an infected individual.).

74. *Id.* at 132. (Isolation is the segregation of infected individuals from the general populace.).

75. *Id.* (Quarantine is the segregation of an individual suspected of infection from the general populace in order to determine the individual's health status.).

76. Wendy A. Weber, *AIDS and Constitutional Issues*, 14 WM. MITCHELL L. REV. 574, 603 (1988).

77. WYO. STAT. § 35-4-132(d) (Supp. 1991) requires a HCP to keep STD information confidential except for statutory exceptions; WYO. STAT. § 1-12-101(a)(i) (Supp. 1991) requires a physician to keep communications made by his patient or advice to his client confidential; WYO. STAT. § 35-2-606(1) (Supp. 1991) requires a hospital and its agents/employees to keep hospital health care information about a patient confidential except with the patient's written permission.

78. HANNAN, *supra* note 69 at 19-20.

79. NATIONAL COMMISSION ON AIDS, REPORT NO. 3, RESEARCH, THE WORKFORCE AND THE HIV EPIDEMIC IN RURAL AMERICA 1 (1990).

Statutory Law

Public health policy calls for public health officers to take action to interrupt the transmission of contagious disease. In response, current general public health statutes require that physicians report to health officers any contagious and infectious disease "which the physician knows to exist."⁸⁰ Furthermore, this duty to report extends to "every person knowing of a case of contagious or infectious disease, not under the care of a physician. . . ."⁸¹ Specific STD statutes require HCPs and others to report any STD diagnosis, case or positive test result to public health officers.⁸² In addition, the STD statutes also impose a duty upon HCPs to warn third party health care workers ("HCWs") who are involved with patient treatment. HCPs:

shall notify any health care employee reasonably expected to be at risk of exposure to a dangerous or life-threatening [STD] and involved in the supervision, care and treatment of an individual infected or *reasonably suspected* of being infected with a dangerous or life-threatening [STD]⁸³ [where such warning is] necessary to protect life and health.⁸⁴

Although the statutes require that information personal to the infected individual be reported, the statutes also recognize the importance of confidentiality in handling such information. A statutory duty of confidentiality is imposed on all HCPs and others who are required to report AIDS cases.⁸⁵ The general public health reporting statutes state that "information . . . as to the name of any person suffering from any of the diseases [of which reporting is required] shall be communicated to no other person."⁸⁶ Similarly, the STD statutes state that "[i]nformation and records relating to a known or suspected case of [STD] which has been reported . . . are confidential and except as otherwise required by law, *shall not* be disclosed"⁸⁷

80. WYO. STAT. § 35-4-107 (Supp. 1991) states: "It shall be the duty of every practicing or licensed physician in the state of Wyoming to report immediately to the health officer of the county . . . every case of contagious or infectious disease known by him to exist."

81. *Id.* (emphasis added).

82. WYO. STAT. § 35-4-132(a) (Supp. 1991) states: "A physician or other [HCP] diagnosing or treating a case of [STD], the administrator of a hospital, dispensary, charitable or penal institution or any other health care facility in which there is a case of [STD] and the administrator or operator of a laboratory performing a positive laboratory test for [STD] *shall* report the diagnosis, case or positive test results to both the department of health and the appropriate health officer in a form and manner directed by the department. [HCPs] and facilities shall cooperate with and assist the department and health officers in preventing the spread of [STD]." (emphasis added).

83. WYO. STAT. § 35-4-132(c) (Supp. 1991) (emphasis added).

84. WYO. STAT. § 35-4-132(d) (Supp. 1991).

85. *Id.*

86. WYO. STAT. § 35-4-107 (Supp. 1991).

87. WYO. STAT. § 35-4-132(d) (Supp. 1991) (emphasis added). Disclosure is allowed under four circumstances: 1) for statistical purposes where personal identifying information is not included, 2) where necessary for administering and enforcing STD stat-

Additional statutory language imposes a general duty of confidentiality on physicians⁸⁸ and hospitals and their agents or employees⁸⁹ which can be applied to AIDS/HIV patients who obtain testing elsewhere but receive treatment from these entities.

In order to administer and enforce these statutes, the Wyoming Department of Health has been authorized to promulgate rules and regulations.⁹⁰ The Wyoming Department of Health regulations, however, essentially mirror the statutes and provide little further clarification. As an example, the regulatory STD reporting requirement is virtually identical to the statutory STD reporting requirement.⁹¹

Therefore, the current Wyoming STD statutes and the Wyoming Department of Health regulations are flawed and may actually impede public health policy. The following discussion identifies and discusses five major flaws. The first flaw is the requirement that a HCP warn any third party HCW at risk of STD infection, i.e., HIV.⁹² This mandatory warning constitutes a breach of confidentiality between the HCP and his patient which is not necessary in order to prevent HIV transmission to the HCW. The second flaw is the lack of procedural due process where Wyoming law does not provide for informed consent in HIV testing; specifically, there is no provision for notice to a patient of the risk to privacy. The third flaw is the lack of a requirement for HIV post-test counseling. The fourth flaw is the lack of uniform minimum standards for HIV testing. The fifth flaw is the lack of rules which specifically identify when and how third parties are to be warned of imminent danger of HIV infection. Finally, this comment proposes that the statutory requirement that a HCP warn a third party HCW at risk of STD infection be repealed and the rules

utes and regulations, 3) with the infected individual's written consent, and 4) to notify HCWs treating the infected individual as necessary to protect life and health. *Id.*

88. WYO. STAT. § 1-12-101(a)(i) (Supp. 1991) states that a physician shall not testify concerning communications made by his patient or advice to his client.

89. WYO. STAT. § 35-2-606(a) (Supp. 1991) states that "[e]xcept as [statutorily] authorized . . . , a hospital or an agent or employee of a hospital shall not disclose any hospital health care information about a patient to any other person without the patient's written authorization."

90. WYO. STAT. §§ 35-4-130, -132 (Supp. 1991).

91. Compare WYO. STAT. § 35-4-132(c) (Supp. 1991) with Wyo. AIDS/HIV Regs ch. II, § 3(d) (1991) which states:

Any physician or other [HCP] and any administrator or operator of a health care facility or laboratory or penal institution reporting a diagnosis or positive test result . . . shall notify any health care employee reasonably expected to be at risk of exposure to a dangerous or life-threatening [STD], e.g., HIV/AIDS, who is involved in the supervision, care, and treatment of an individual infected or reasonably suspected of being infected with a dangerous or life-threatening STD.

(i) Notification shall be verbal.

(ii) Notification shall take place within 24 hours or as soon as possible.

Id. (emphasis added).

Statutory language differs from the related regulatory language by the italicized portion. No further clarification is made.

92. WYO. STAT. § 35-4-132(c) (Supp. 1991); Wyo. AIDS/HIV Regs ch. II, § 3(d) (1991).

amended to eliminate these major flaws.

FLAW: Duty of Confidentiality versus Duty to Disclose

“Is it safe? Yes, it’s safe.”

“Is it safe? No, it’s not. It’s very dangerous. Be careful.”⁹³

Duty of Confidentiality

Confidentiality of medical information is based on practical and ethical considerations, as well as on constitutional law, statutory law, administrative law, and common law.

For the practical reason of gaining the trust and cooperation of patients, HCPs maintain confidentiality of patients’ medical records and personal medical information. Patients are encouraged to fully disclose personal information which is necessary for successful diagnosis and treatment. Over time, the practice of maintaining confidentiality has evolved into a basic tenet of medicine and an ethical obligation of HCPs, as well. The World Medical Association’s international code of ethics declares that “a physician shall owe his patients complete loyalty and all the resources of his science” and that “a physician shall preserve absolute confidentiality on all he knows about his patient even after the patient has died.”⁹⁴

Additionally, confidentiality arises from a constitutional interest in the right of privacy. The right of privacy is a right not explicitly stated in the Constitution⁹⁵ nor in the Bill of Rights.⁹⁶ Nevertheless, the United States Supreme Court has recognized various fundamental interests based on a right of privacy.⁹⁷ Thus, in *Whalen v. Roe*, the United States Supreme Court stated that the right of privacy included a right not to have personal medical information collected or disseminated without proper justifications and safeguards.⁹⁸

The constitutional right of privacy as it relates to AIDS/HIV status has been recognized. In *Hillman v. Columbia County*,⁹⁹ the fact of a county jail inmate’s HIV seropositivity was disseminated among jail employees and inmates, even though it was part of the inmate’s medi-

93. *Marathon Man*, Paramount Pictures (1976).

94. RAANAN GILLON, PHILOSOPHICAL MEDICAL ETHICS 10 (1986).

95. Weber, *supra* note 76, at 602-05.

96. The right to privacy has been theorized to arise from the liberty clause in the 14th Amendment. *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

97. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion in first trimester); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right of married couples to contraception); *Stanley v. Georgia*, 394 U.S. 557 (1969) (right to read pornographic materials in own home); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to birth control).

98. *Whalen v. Roe*, 429 U.S. 589 (1977).

99. *Hillman v. Columbia County*, 474 N.W.2d 913 (Wis. App. 1991).

cal record. The court found that the inmate had stated a claim for violation of his federal constitutional right of privacy.¹⁰⁰

In *Nolley v. County of Erie*, a state prison inmate's HIV seropositivity was publicized, among prison personnel and inmates in custodial positions, by red dots in her prison records.¹⁰¹ The inmate was confined in a cellblock reserved for prisoners with contagious diseases, which subjected her to greater risk of contracting opportunistic diseases, although she posed no threat to the general prison population. In *Nolley*, the court found that the red dot policy was developed directly in response to the hysteria over HIV and AIDS and upheld the inmate's due process claim that she was deprived of a significant liberty interest. The *Nolley* court noted that it was in accord with other courts which have found that prisoners have a privacy right against unwarranted disclosure of their HIV status.¹⁰²

Wyoming statutory law recognizes the right to privacy by requiring confidentiality in the reporting of STD's, including AIDS.¹⁰³ As the Wyoming Department of Health rules and regulations are promulgated pursuant to statutory directives, the regulations also require the maintenance of confidentiality.¹⁰⁴

The common law imposes a duty of confidentiality for personal medical information on HCPs, as well. In the AIDS/HIV context, confidentiality is vital. Any breach of confidentiality can devastate affected individuals. One court observed, "AIDS is the modern day equivalent of leprosy. AIDS, or a suspicion of AIDS, can lead to discrimination in employment, education, housing and even medical treatment."¹⁰⁵ Therefore, the common law provides tort remedies for those injured by the breach of the duty of confidentiality.

Estate of Behringer v. Medical Center at Princeton demonstrates the impact of an AIDS diagnosis where there is breach of confidentiality.¹⁰⁶ Behringer was a physician who was diagnosed as having AIDS. His AIDS status was placed in his hospital chart to which access was limited according to medical center regulations. In actuality, however, the center's personnel had access to the chart virtually without restriction.¹⁰⁷ Center personnel, including the treating physician, knew that they had a duty to keep such medical records confidential. Yet, they gossiped about the AIDS diagnosis and the victim.¹⁰⁸ The gossip

100. *Id.* at 922-23.

101. *Nolley v. County of Erie*, 776 F. Supp. 715 (W.D.N.Y. 1991).

102. *Id.* at 82.

103. WYO. STAT. §§ 35-4-132(c), (d), 35-6-107, -606(a), 1-12-101(a)(i) (Supp. 1991).

104. Wyo. AIDS/HIV Regs ch. I § 3 (1991).

105. *South Florida Blood Service v. Rasmussen*, 467 So.2d 798, 802 (Fla. Ct. App. 1985), *aff'd*, 500 So.2d 533 (Fla. 1987).

106. *Estate of Behringer v. Medical Ctr. at Princeton*, 592 A.2d 1251 (N.J. Super. L. 1991).

107. *Id.* at 1271.

108. *Id.* at 1273. The court observed that those who spread the news apparently found the "information too easily available, too titillating to disregard. All that was

rippled outward into the community which became aware of the AIDS diagnosis almost as soon as the victim was informed.¹⁰⁹

As a result of the AIDS disclosure, the victim lost his surgical privileges.¹¹⁰ Other adverse effects resulted. His practice declined precipitously,¹¹¹ and his personal relationships suffered.¹¹² Because of the injuries he suffered, the victim sued the treating physician, the laboratory supervisor, and the hospital for breach of confidentiality.

The treating physician and the hospital were found negligently liable for breach of confidentiality by failing to establish reasonable precautions to maintain confidentiality.¹¹³ Reasonable precautions required more than simply instructing HCWs that patient records and information were confidential.¹¹⁴

In sum, a duty of confidentiality by HCPs regarding patients' private medical information, including AIDS/HIV information, arises from various sources. Not only do practical and ethical concerns create a duty of confidentiality, but constitutional law, statutory law, administrative law, and common law also impose a duty of confidentiality.

Duty to Disclose (Which Breaches Confidentiality)

Notwithstanding law and policies imposing a duty of confidentiality, exceptions exist. Like confidentiality, permissible disclosure of medical information is based on practical and ethical considerations, as well as in constitutional law, statutory law, administrative law, and common law.

In practice, the physician is not solely responsible for providing treatment to her patient. The physician works in conjunction with other HCWs, so that she must disclose private medical information about her patient to other HCWs in order to adequately treat her patient.

It may also be necessary for the HCP to disclose private medical information to public health officers in order to effectuate the public health policy. Limited disclosure serves the state's compelling interest in ensuring public health and safety by controlling the spread of communicable disease. The power to ensure public health and safety is an

required was a glance at a chart, and the written words became whispers and the whispers became roars. And common sense told all that this would happen."

109. *Id.* at 1256.

110. *Id.* at 1257. The patient-physician sued for tortious interference of contract. However, the court determined that suspension of surgical privileges was proper in order to protect hospital patients' health concerns.

111. *Id.*

112. *Id.* at 1256.

113. *Id.* at 1255.

114. *Id.* at 1272.

exercise of the police power reserved to the states under the United States Constitution.¹¹⁵

The United States Supreme Court recognized that controlling the spread of disease is a compelling state interest in *Jacobson v. Massachusetts*.¹¹⁶ In *Jacobson*, a Massachusetts statute requiring smallpox vaccinations was held to be valid.¹¹⁷ The United States Supreme Court stated that, "it has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description'; indeed, all laws that . . . will protect the public health and the public safety."¹¹⁸

Traditionally, the task of protecting the public health falls to state public health departments which determine the means by promulgating regulations pursuant to state law. In *Jacobson*, the United States Supreme Court stated that:

According to settled principles the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. It is equally true that the State may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety.¹¹⁹

Wyoming statutory law charges the Wyoming Department of Health with the responsibility to protect Wyoming's public health from communicable diseases.¹²⁰ Consistent with that statutory charge, Wyoming statutory law also requires disclosure by HCPs¹²¹ under certain circumstances. Disclosure, by reporting specified contagious diseases to the Wyoming Department of Health, is designed to interdict the spread of disease. Accordingly, Wyoming law requires HCPs,¹²² health care facility administrators,¹²³ penal institution administrators,¹²⁴ and STD testing laboratory operators¹²⁵ to report listed STD infections¹²⁶ to the state department of health.

115. U.S.C.S. CONSTITUTION, AMENDMENT 10 (1984) (The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People. The exercise of state police powers to preserve and protect the public health, safety and welfare as public purposes is implied; U.S.C.S. CONSTITUTION, AMENDMENT 10 n.33 (Law Coop. 1984) (Reasonable regulations to protect public health and public safety are within the police powers.)).

116. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

117. *Id.* at 39.

118. *Id.* at 25.

119. *Id.*

120. WYO. STAT. § 35-4-101 (Supp. 1991).

121. WYO. STAT. §§ 35-4-107, -132(a) (Supp. 1991).

122. WYO. STAT. §§ 35-4-107, 132(a) (Supp. 1991).

123. WYO. STAT. § 35-4-132(a) (Supp. 1991).

124. *Id.*

125. *Id.*

126. *Id.*; WYO. STAT. § 35-4-130 (Supp. 1991) directs the Wyoming Dept. of Health

In addition to disclosure to state public health officers, HCPs have the statutory duty to warn third party HCWs¹²⁷ reasonably thought to be at risk of exposure to HIV.¹²⁸ This duty to warn third party HCWs is directed toward preventing HIV transmission by warning these HCWs to take precautions.¹²⁹

Wyoming Department of Health regulations mimic the statutory requirements. The regulations' only guidance on the HCPs' duty to warn HCWs is to state that HCPs face this duty when treating patients "reasonably suspected of being infected"¹³⁰ and that the duty to warn is required to take place "within 24 hours or as soon as possible."¹³¹

Furthermore, tort law may also require health care providers to warn third parties at risk of HIV infection.¹³² In *Lofton Johnson v. West Virginia University Hospitals, Inc.*, a police officer, who was called in to restrain a distraught emergency room patient, recovered \$1.9 million for negligent infliction of emotional distress when the hospital's personnel failed to warn him that the patient claimed to be HIV-positive.¹³³ The hospital's policy was that its personnel are to warn third parties of danger of HIV infection, where there is sufficient time to warn. In contravention of hospital policy, the emergency room personnel failed to inform the police officer of possible HIV infection even though they had known for thirty minutes of the patient's claim. The police officer did not use any precautions to prevent HIV infection.¹³⁴ He then endured emotional distress during the waiting period until testing showed that no HIV transmission had occurred.¹³⁵

The fear of tort liability may have played a part in *Application of M.S. Hershey Medical Center*, where a hospital successfully sought

to develop a list of reportable STDs.

127. WYO STAT. § 35-4-132(c) (Supp. 1991).

128. *But cf.* Larry Gostin, *CDC Guidelines on HIV or HBV-Positive Health Care Professionals Performing Exposure-Prone Invasive Procedures*, 19 LAW, MED. & HEALTH CARE 140 (1991), for discussion on HIV-positive HCPs and concerns with HIV transmission to patients.

129. WYO. STAT. § 35-4-132(c) (Supp. 1991) states that "[a]ny physician or other health care provider and any administrator or operator of a health care facility or laboratory reporting a diagnosis, case or positive test result pursuant to subsection (a) of this section (STD-positive individuals) shall notify any health care employee reasonably expected to be at risk of exposure to a dangerous or life-threatening sexually transmitted disease and involved in the supervision, care and treatment of an individual infected or reasonably suspected of being infected with a dangerous or life-threatening sexually transmitted disease." (emphasis added).

130. Wyo. AIDS/HIV Regs ch. II, § 3(d)(ii) (1991) (emphasis added).

131. *Id.*

132. See Donald H.J. Hermann, Rosalind D. Gagliano, *AIDS, Therapeutic Confidentiality, and Warning Third Parties*, 48 MD. L. REV. 55 (1989).

133. *Lofton Johnson v. W. Virginia Univ. Hosp., Inc.*, 413 S.E.2d 889 (W. Va., 1991).

134. *Id.* At the time of the exposure incident in *Lofton*, universal precautions were not procedures normally in place. See *supra* notes 175-181 and accompanying text.

135. *Id.*

court permission to disclose the identity of an HIV-positive doctor to certain members of his peers and clientele for health care purposes.¹³⁶ The doctor objected that the disclosure was a violation of his right of privacy. Nevertheless, the court allowed disclosure under a statutory provision where a compelling need for disclosure outweighs the privacy interest of the individual.¹³⁷ The court in *Hershey Medical Center* reasoned that disclosure was minimal because only HCPs, who needed to know in order to help others, were informed of the doctor's identity under a mandate to preclude further disclosure.¹³⁸ Furthermore, patients were only informed that an unnamed HIV-positive doctor had participated in their surgical procedures so that they should consider HIV testing.¹³⁹ The hospital was not under a statutory duty to disclose but, instead, chose to force disclosure under the "compelling needs" statutory exception. It may well have chosen to disclose mindful of potential tort liability.

The tort duty to warn and the public health policy duty to report are subsets of the duty of disclosure. As common law is a basis for a duty of disclosure, ethical and practical concerns, constitutional law, statutory law, and administrative law support, and may mandate, a duty of disclosure by HCPs under certain circumstances.

Tension Between Confidentiality and Disclosure

As discussed above, Wyoming law establishes a duty of confidentiality as well as a duty of disclosure. The law requires that HCPs must breach patient confidentiality in order to satisfy obligations to report disease and to warn third parties who provide patient-related services.¹⁴⁰ This unresolved conflict is the fatal flaw under the present statutory and common law scheme.

The private interest in confidentiality must be balanced against the public interest in disclosure. When the public interest in health and safety outweighs the private interest in confidentiality, disclosure is proper. Even so, proper safeguards on disclosure are necessary where a fundamental interest in privacy exists. This is necessary to protect the private interest to the extent possible while also protecting the public interest. As *Whalen v. Roe* demonstrates,¹⁴¹ proper safeguards, to maintain confidentiality as much as possible, are required to ensure that narrow means are utilized to achieve legitimate ends.

136. Application of M.S. Hershey Med. Ctr., 595 A.2d 1290 (Pa. Super. 1991).

137. *Id.* at 1297.

138. *Id.* at 1298.

139. *Id.* at 1301.

140. The following discussion focuses on the HCP's duty to warn third party service providers only. The HCP still has a statutory duty to report STD cases to the Dept. of Health. The Dept. of Health, in turn, has a statutory duty to warn contacts with significant exposure to the HIV-infected individual. Wyo. STAT. §§ 35-4-132(a), -133(b), -133(c) (Supp. 1991).

141. *Whalen v. Roe*, 429 U.S. 589 (1977).

Safeguards built into the Wyoming STD regulations include requiring the disclosure to be *necessary* to administer or enforce public health rules,¹⁴² or to be *necessary* to protect life and health,¹⁴³ or with the written consent of the infected individual.¹⁴⁴

However, the current regulatory scheme places the entire burden on the HCP to determine what *necessary* means in this context. The HCP alone must figure out how to resolve the dilemma of when and how necessary disclosure takes place so as to minimize the resultant breach of confidentiality. The regulatory language used is vague and provides little meaningful guidance to HCPs who must conform to the regulations. No examples or specific limiting language illustrate what might be considered necessary for enforcement or to protect life and health, or what might fall outside the pale of necessity. Inadequate guidance of HCPs, on whom the duty to warn third parties is imposed, causes confusion, inability to determine appropriate procedure to follow, and concern with the secondary issue of liability.

As an example, the regulations require health care providers who report STDs to public health agencies to warn HCWs¹⁴⁵ who might be exposed to AIDS/HIV while treating a patient "reasonably suspected of being infected."¹⁴⁶ This duty to warn is required to take place "within 24 hours or as soon as possible."¹⁴⁷

It is unclear what event must occur that would require mandatory notification within 24 hours.¹⁴⁸ Possible occurrences may be the moment when reasonable suspicion is formed, or when exposure to HIV occurs.¹⁴⁹ However, there is no definition or illustration of "reasonable suspicion."¹⁵⁰ If the event is exposure to HIV, notification after the fact of exposure occurs too late to prevent HIV transmission to the HCW. Moreover, the regulation may be read as requiring warning to

142. Wyo. AIDS/HIV Regs ch. I, § 3(a)(ii) (1991).

143. *Id.* § 3(a)(iv).

144. *Id.* § 3(a)(iii).

145. Wyo. AIDS/HIV Regs ch. II, § 2(a) (1991).

146. *Id.* § 3(d).

147. *Id.* § 3(d)(ii).

148. *Id.* § 3(d) states that health care providers or others reporting a HIV-positive diagnosis:

shall notify any health care employee reasonably expected to be at risk of exposure to a dangerous or sexually transmitted disease, e.g., HIV/AIDS, who is involved in the supervision, care, and treatment of an individual infected or *reasonably* suspected of being infected with a dangerous life-threatening STD.

(i) Notification *shall* be verbal.

(ii) Notification *shall* take place within 24 hours or as soon as possible. (emphasis added).

Id. The regulations make no further elaboration to explain when the HCP's duty to warn HCWs is invoked.

149. "Reasonable suspicion" is not explicitly defined as the equivalent of "significant exposure." Dept. of Health officers have a duty to warn third party contacts with significant exposure to HIV-infected individuals. Significant exposure in this context is defined. WYO. STAT. § 35-4-133(b) (Supp. 1991).

150. *Id.*

third party HCWs whenever *any* risk of exposure occurs, even if the risk is insignificant.¹⁵¹

Despite this lack of clarity, the HCP is required to comply with the duty to warn. In doing so, the HCP must risk breaching the duty of confidentiality, since to warn effectively, the HCP must necessarily involve a number of people. These include consulting physicians, nurses, nurse's aides, orderlies, phlebotomists,¹⁵² and laboratory technicians. The more people that are involved, the greater the likelihood that the breach of confidentiality will exceed the permissible exceptions. Since the warning is verbal,¹⁵³ a bystander could overhear an oral warning and then spread the news. Under the law, the notifier has negligently breached confidentiality if he could have foreseen the eavesdropper.¹⁵⁴ Because no privilege exists between the patient and the eavesdropping bystander, no cause of action exists against the bystander for his spreading of confidential information.

Another possibility of inadvertent, but potentially negligent, disclosure occurs when the patient's HIV status is posted in code on the patient's room chart. Anyone coming into the patient's room who reads the chart and recognizes the code could communicate its import to others¹⁵⁵ not under a duty of confidentiality.¹⁵⁶ In health care settings, numerous parties, from physicians to custodians, have knowledge about patients. Sometimes such knowledge is of confidential information. HCWs do discuss patients among themselves, thus, creating potential for breach of confidentiality.¹⁵⁷

Under current law, HCPs, who are trained in medicine and not in statutory construction, may be unable to interpret the extent of permissible disclosure. In fulfilling one duty, HCPs may violate another duty and become entrapped in a no-win situation.¹⁵⁸ Nevertheless, they must bear the risk of any breach of their statutory duties. A

151. *Id.*

152. THE AMERICAN HERITAGE DICTIONARY 515 (2d college ed. 1983) (A phlebotomist takes blood samples in the course of treating disease.).

153. Wyo. AIDS/HIV Regs ch. II, § 3(d)(i) (1991).

154. *Estate of Behringer v. Med. Ctr. at Princeton*, 592 A.2d 1251 (N.J. Super. L. 1991) (holding that reasonable precautions must be taken to prevent breach of confidentiality under foreseeable circumstances).

155. *Id.* (confidentiality breached despite regulations & trained personnel); *Hillman v. Columbia Jail*, 474 N.W.2d 913 (Wis. App. 1991) (inmate's medical information disseminated by jail personnel); *Due Process: Prison Can't Telegraph HIV Status*, A.B.A. J. 81 (1992) (scarlet dot on inmate's records publicized HIV status).

156. *Behringer*, 592 A.2d 1251 (holding that the duty of confidentiality extends to the informed third party HCW in New Jersey). The issue has not been decided in Wyoming.

157. Interview with Terri Barrows, R.N., M.S., Albany County Public Health Nurse, in Laramie, WY (Sept. 28, 1991).

158. Interview with Joyce Miller, R.N., Family Planning Nurse Practitioner, Albany County Family Planning Director, in Laramie, WY (Oct. 7, 1991). Some HCPs have a strong ethical duty of confidentiality in the AIDS/HIV context. They believe that the duty to warn is unnecessary and counterproductive to preventing HIV transmission.

breach may result in criminal sanctions of fines and/or incarceration.¹⁵⁹ In addition, civil liability in tort for breach of confidentiality with resultant damages is a real concern.¹⁶⁰ Counterimposed against the risk of civil and criminal liability for breach of confidentiality is civil liability in tort for breach of the duty to warn third parties.¹⁶¹ The legislature's intent regarding civil liability of HCPs is unclear.¹⁶² The inevitable result is a Pandora's box of potential lawsuits which will only impede the difficult tasks of HCPs to treat STD patients and aid in preventing the spread of AIDS/HIV.

The HCP has a duty of confidentiality as well as a duty of disclosure when dealing with STD in light of public health policy. Wyoming law, as expressed in statutes and regulations, created these duties. However, Wyoming law does not provide clear guidance for the HCP so that these opposing, but concomitant, duties may be reconciled. Consequently, the HCP is put at risk of civil and criminal sanctions each time he tests or treats an individual for STD. Yet, Wyoming STD law is intended to promote public health by providing for STD treatment and prevention, not to confuse the HCP and then sanction him for his confusion.

Recommendations

To further the public health policy to control and prevent the spread of health-endangering STDs, including HIV, the statutory duty to warn should be amended by the state legislature. This proposed amendment would eliminate the requirement that the HCP warn third party HCWs, in favor of allowing discretionary warning to third parties at significant risk of exposure. Such third parties may be HCWs, emergency service providers ("ESPs"),¹⁶³ or known contacts of STD-infected individuals. The proposal broadens the class of parties who may be warned. It also broadens the discretion of the HCP and allows him to exercise his professional judgment according to the situation.¹⁶⁴

159. WYO. STAT. § 35-4-130(c) (Supp. 1991) states that "[a]ny person violating W.S. 35-4-130 through 35-4-134 [STD statutes] or failing or refusing to comply with any order lawfully issued under W.S. 35-4-130 through 35-4-134 is guilty of a misdemeanor punishable by a fine of not more than seven hundred fifty dollars (\$750.00), imprisonment for not more than six (6) months, or both."

160. *Behringer*, 592 A.2d 1251.

161. Hermann, *supra* note 132.

162. Neither Wyoming statutes nor the state department of health regulations address civil liability of HCPs or others under a statutory duty to warn to third parties.

163. CDC, *Guidelines for Prevention of Transmission of HIV & HBV to Health-Care & Public Safety Workers*, 38 MORBIDITY & MORTALITY WEEKLY REP., 9-10 (1989) [hereinafter *HIV to HCWs & PSWs*] ESPs include emergency service providers, such as emergency medical technicians, and public safety workers, such as police and firemen.

164. In order to carry out the duty under the law, an objective standard of when it is necessary to warn must be defined, so that all HCPs can determine the standard of care to follow. However, current regulatory language does not establish an objective

Wyo. Stat. section 35-4-132(c) (Supp. 1991) should be amended as follows:

Any physician or other health care provider and any administrator or operator of a health care facility or laboratory reporting a diagnosis, case or positive test result pursuant to subsection (a) of this section shall may notify any health care employee *third party* reasonably expected to be at *significant* risk of exposure to a dangerous or life-threatening STD and involved in the supervision, care and treatment of an individual infected or reasonably suspected of being infected with a dangerous or life-threatening STD, *as necessary to protect life and health. The requirement of confidentiality shall be communicated to third parties so notified.*

Amending the statute in this manner eliminates statutory sanctions for the HCP who attempts, in good faith, to meet his statutory duties of confidentiality and disclosure. Furthermore, the HCP would be permitted leeway to exercise his professional judgment whether to breach confidentiality by warning third parties. If the HCP concluded that no significant risk of exposure of HIV infection to a third party existed, he would be permitted to maintain confidentiality by not being required to warn the third party.¹⁶⁶ Where the HCP had reasonable basis to believe, in his professional judgment, that there was significant risk of HIV infection, then no warning is necessary to protect life and health.¹⁶⁶

The kind of risk which should be addressed is *significant* risk—significant risk of HIV infection as determined by current medical and scientific standards.¹⁶⁷ The standard of significant risk of HIV infection may be established by reference to current Centers for Disease Control (“CDC”)¹⁶⁸ standards.¹⁶⁹ Focusing on significant risk, instead of any possible risk, is a better use of the finite resources which

standard. A discretionary duty would allow the HCP to use his best professional judgment which is a more subjective standard. There would still be the core of an objective standard, such as incidences of significant risk of infection according to the CDC, tempered by a subjective standard which allows for case-by-case field determinations.

165. See generally SHARON RENNERT, AMERICAN BAR ASSOC., AIDS/HIV AND CONFIDENTIALITY MODEL POLICY AND PROCEDURES (1991), for the ABA’s model policy on HIV and confidentiality. The model policy states that there is no action required if there is no significant risk. *Id.* at 11, 13.

166. STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS 40 (1991) This is similar to the Rules of Professional Conduct, Rule 1.6(b)(i) which apply to attorneys exercising professional judgment. Confidentiality is maintained unless disclosure is necessary to prevent imminent death or substantial bodily harm.

167. Significant exposure is the standard applied to invoke the Dept. of Health’s duty to warn third party contacts of reported HIV-infected individuals. WYO. STAT. § 35-4-133(b) (Supp. 1991).

168. The CDC is a federal agency established to provide public health surveillance and information.

169. *HIV to HCWs & PSWs*, *supra* note 163, at 3.

society has to apply to HIV infection.¹⁷⁰ As an example, while HIV has been found in minute amounts in an infected person's saliva, HIV transmission by saliva has not been medically or scientifically recognized as a significant, that is, probable means of becoming infected with HIV.¹⁷¹ Therefore, arresting an HIV-positive person who spits at someone is not likely to result in a criminal charge of felonious endangerment; so just as society should not expend its resources to prosecute the spitter on that charge, neither should society require HCPs to breach confidentiality to warn third parties who are not at significant risk of HIV infection. As another example, the state of Illinois at one time required premarital HIV screening for marriage licenses.¹⁷² Within two years, Illinois ceased such screening because it was not a cost effective way to prevent HIV transmission. The population being tested was not a high risk group.¹⁷³ As Illinois found out, public health law should focus on effective means to prevent HIV transmission.

The proposed amendment focuses attention on significant risk of HIV transmission, rather than on conflicts between legal duties. Adoption of the proposal may reduce the likelihood of civil liability for breach of confidentiality. The necessity of warning and, thus, of breaching confidentiality may be reduced. HCPs may not have to warn as often in order to comply with the law. Therefore, it may also reduce the likelihood of civil liability to third parties for failure to warn.

Consequently, the HCP would be able to concentrate on testing and treating STD patients as patients, rather than as potential sources of legal trouble. Where there is no significant risk of HIV infection, according to current health care standards,¹⁷⁴ public health is not imperiled or diminished when HCPs do not warn third parties of possible HIV-positive individuals. Thus, public health policy would be promoted by focusing on disease treatment and prevention of significant risks of HIV infection.

170. An investigation of patients of an HIV-infected physician cost \$130,000 in direct and indirect costs. The investigation of 336 patients resulted in 97% HIV-negative testing, 1% testing refused, 1% deaths due to unrelated causes, and 2% HIV-status unknown. This investigation demonstrates the cost of look-back investigations and the low risk of HIV transmission by HCPs in the workplace. Richard N. Danila, *A Look-back Investigation of Patients of an HIV-infected Physician*, 325 N. ENG. J. MED. 1406 (1991); see Christopher H. Fox, *Hazardous Health Care?*, HARVARD HEALTH LETTER, Nov. 1, 1991, for discussion of the degree of risk of HIV transmission from HCPs.

171. *HIV to HCWs & PSWs*, *supra* note 163, at 10. Precautions to prevent HIV transmission is recommended in dental settings, where there may be contamination of saliva with infected blood.

172. *Testing for AIDS*, note 62, at 73.

173. *Id.*

174. *HIV to HCWs & PSWs*, *supra* note 163, at 10.

Regulatory Changes

To carry through the statutory change which would promote public health policy, the Department of Health regulations should also be amended accordingly:¹⁷⁵

Wyo. AIDS/HIV Regulations ch. II section 3(d) (1991):

Any physician or other health care provider and any administrator or operator of a health care facility or laboratory or penal institution reporting a diagnosis or positive test result pursuant to W.S. 35-4-130 through 35-4-134 ~~shall may~~ notify any ~~health care employee third party~~ reasonably expected to be at risk of *significant* exposure to a dangerous or life-threatening [STD], ~~e.g. i.e., HIV/AIDS, hepatitis B, who is involved in the supervision, care, and treatment of an individual infected or reasonably suspected of being infected with a dangerous or life-threatening [STD], as necessary to protect life and health. The requirement of confidentiality shall be communicated to third parties so notified.~~

(i) ~~Notification shall be verbal.~~

(ii) ~~Notification shall take place within 24 hours or as soon as possible.~~

In concert with this proposed regulatory amendment, the need for warning third parties can be minimized by the mandatory use of already widespread universal precautions. Universal precautions are the use of latex gloves, masks, and sterile techniques by HCPs, HCWs, and ESPs when treating any patient.¹⁷⁶ The use of universal precautions is predicated on the notion that every transaction between an HCP, HCW, or ESP and a patient involves a risk of infection of HIV or other bloodborne disease,¹⁷⁷ either to or from the patient.¹⁷⁸ In other words, everyone is presumed to be HIV seropositive.

Universal precautions prevent disease transmission by minimizing exposure of HCPs, HCWs, and ESPs to bloodborne disease, like HIV, whenever they deal with a patient. Disease transmission from HCPs, HCWs, or ESPs to patients is similarly minimized.¹⁷⁹ Since both parties in a contact are protected from significant risk of HIV infection, the necessity of discovering the HIV status of either party in order to take precautions against HIV transmission is diminished. This

175. This amendment is only one recommended change to the STD regulations. Additional changes would be necessary to correct the flaws discussed and fully flesh out the regulations.

176. *HIV to HCWs & PSWs*, *supra* note 163, at 10.

177. *Id.*

178. The Wyoming Legislature considered a bill calling for mandatory HIV testing of patients who HCPs and HCWs think are HIV-positive is not needed in order to protect HCPs and HCWs, if universal precautions are used. *Committee Approves Measure on STDs*, THE CASPER STAR-TRIBUNE, Feb. 19, 1992, at A4.

179. *HIV to HCWs & PSWs*, *supra* note 163, at 6-7.

reduces the need for both a breach of confidentiality and a duty to warn. Because there is no significant risk of HIV infection when universal precautions are used, a party's HIV status may be kept confidential without endangering others. Thus, the conflict between confidentiality and disclosure is reduced by the use of universal precautions, while the danger of disease transmission is also reduced.

Due to these benefits, universal precautions should be included in the Wyoming STD regulations as a required practice by health care facilities. Including the requirement of universal precautions in these regulations is a formality. Universal precautions are now standard procedure in health care.¹⁸⁰ Furthermore, federal Occupational Safety and Health Administration ("OSHA") regulations on bloodborne disease organisms require the use of universal precautions and work practices to prevent exposure and transmission.¹⁸¹ In addition, Wyoming OSHA regulations are currently being amended to adopt the federal OSHA bloodborne disease guidelines on universal precautions and work practices.¹⁸² The OSHA regulations and CDC guidelines on universal precautions are substantively the same. The Wyoming STD regulations may easily incorporate either or both by reference.

Recommended amendments and additions to Wyoming statutes and health regulations will reduce the conflict between the duty of confidentiality and the duty of disclosure, while, concurrently reducing the risk of HIV transmission. It is recommended that the statutory duty to warn third party HCWs at risk of HIV exposure be amended to allow the HCP to use his discretion to warn any third party at significant risk. It is further recommended that universal precautions be formally required by STD statutes and regulations to minimize the occurrence of significant HIV transmission.

FLAW: Procedural Due Process - Informed Consent

Elements of General Informed Consent

Procedural due process, in the medical context, requires that patients be informed of the risks and benefits of treatment or testing. Procedural due process, in the AIDS/HIV context, requires that individuals considering HIV testing be informed that their right of privacy may be required to be breached under certain circumstances.

The policy behind adequate informed consent is to allow the patient autonomy in making decisions which affect her bodily integ-

180. *Id.*

181. Bloodborne Pathogens, 56 Fed. Reg. 64,175 (1991) (codified as amended at 29 C.F.R. § 1910.1030 (1991)).

182. *Legal Notice - State of Wyoming Department of Employment - OSHA, THE LARAMIE DAILY BOOMERANG*, Jan. 14, 1992, at 15; interview with Phyllis David, Wyo. Dept. of Employment - OSHA, in Cheyenne, WY, (Jan. 31, 1992).

rity.¹⁸³ The right to personal bodily integrity is based on the constitutional right of privacy.¹⁸⁴ Additionally, common law requires informed consent.¹⁸⁵

Informed consent discloses to a patient the risks and benefits of treatment so that the patient may make a rational decision. Elements of informed consent include: (1) the capacity of the patient to reason and make a judgment, (2) voluntary decision making, and (3) a clear understanding of the risks and benefits of the proposed treatment alternatives, or nontreatment.¹⁸⁶ Informed consent is a necessary component of medical treatment, the lack of which may result in tort liability for the HCP.¹⁸⁷ The duty to ensure informed consent is imposed upon treating physicians. By logical extension, informed consent also applies to other HCPs, including medical testing laboratories or their agents.

Applicable Law

Neither Wyoming statutes nor Wyoming AIDS/HIV regulations contain any reference to informed consent.¹⁸⁸ However, Wyoming tort law requires the extent of disclosure to a patient to be determined by the reasonable physician standard.¹⁸⁹ The physician is required to disclose only what a reasonable practitioner of like training would have disclosed under the same or similar circumstances.¹⁹⁰

Standard medical practice, in reference to informed consent for HIV testing, involves disclosing full information about the tests to be administered to the patient.¹⁹¹ This information includes test reliability, the meaning of test results, treatment following a positive diagnosis of HIV seropositivity,¹⁹² and a full disclosure of the risks involved in testing.¹⁹³

183. *Whalen v. Roe*, 429 U.S. 589 (1977).

184. *Id.*

185. *Roybal v. Bell*, 778 P.2d 108, 111 (Wyo. 1989).

186. *Matter of Conroy*, 486 A.2d 1209, 1222 (N.J. 1985).

187. Judge Cardozo stated that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body, . . ." Nonconsensual treatment, as opposed to uninformed treatment, results in battery. *Schloendorff v. Society of New York Hospital*, 105 N.E. 93, 94 (NY 1914).

188. See generally *Wyo. AIDS/HIV Regs (1991) & WYO. STAT. §§ 35-4-130 to -138 (Supp. 1991)*.

189. *Roybal*, 778 P.2d at 112.

190. *Id.*

191. *AMA GUIDELINES*, *supra* note 60, at 3-8.

192. *FLA. STAT. ANN. § 381.004 (West Supp. 1992)* Outlining the steps necessary prior to testing to include: meaning of test results; possible need for additional testing; measures for preventing HIV transmission; and availability of appropriate health care services, including mental health care, and appropriate social and support services.

193. *STATE DEPT. OF HEALTH, HIV COUNSELING AND TESTING PROTOCOLS FOR WYOMING 1-3 (1991)* [hereinafter *WYO. HIV PROTOCOL*], conforms with the *AMA guidelines*. However, this protocol only applies to state funded counseling and testing sites and does not apply to private health care providers or laboratories.

One of the risks of HIV testing is the risk of breach of confidentiality. Confidentiality is breached when an HIV-positive result is reported to the state health department as required by law. Although the breach is a statutory exception to the duty of confidentiality, it is nevertheless a breach of confidentiality where negative repercussions may result. Considering the social stigma which attaches to HIV seropositivity and the possible negative repercussions which affect medical treatment, insurance, employment, education, and personal relationships, the risks to confidentiality are certainly material to a positive HIV diagnosis.¹⁹⁴

Although Wyoming STD law does not address this risk to confidentiality, laws of other states do address confidentiality and disclosure in their informed consent requirements. Currently, New York law on informed consent to HIV testing requires that confidentiality protections and disclosure requirements be explained: "including the circumstances under which and classes of persons to whom disclosure of such information may be required, authorized or permitted under this article or in accordance with other provisions of law or regulation."¹⁹⁵ Colorado law, likewise, requires written informed consent to reveal to whom test results may be disclosed.¹⁹⁶ Other states including California,¹⁹⁷ Florida,¹⁹⁸ and Pennsylvania¹⁹⁹ require informed consent, generally in writing. Written informed consent is also required by Wyoming counseling and testing sites²⁰⁰ supported by federal grants.²⁰¹

The federal CDC informs members of the general public that "[y]ou have the right to refuse any medical procedure, to be fully informed about it, and to agree to it. You should be asked to read a statement saying that you have been informed about the HIV-antibody testing procedure, you understand it, and you consent to have it done."²⁰²

194. Interview with Joyce Miller, R.N., Family Planning Nurse Practitioner, Albany Family Planning Director, in Laramie, WY, (Oct. 7, 1991). Even negative HIV tests in a person's medical records may have negative repercussions. Although some persons seeking HIV testing are the "worried well" and are not truly at significant risk of HIV infection, insurance companies review their medical histories prior to approving coverage and may question whether the persons are involved in at-risk behavior. The insurance companies may deny coverage. Consequently, Wyoming HIV Counseling and Testing Centers keep HIV testing separate from their clients' general medical records. *Id.*

195. N.Y. PUBLIC HEALTH LAW § 2781(2) (McKinney Supp. 1992).

196. COLO. REV. STAT. ANN. §§ 10-3-1104.5(3), (4) (West 1990).

197. CAL. HEALTH & SAFETY CODE § 199.22(a) (West 1990).

198. FLA. STAT. ANN. §§ 381.004(3)(a), (b), (c) (West Supp. 1992).

199. 35 PA. CONS. STAT. ANN. § 7605(a) (Supp. 1991).

200. WYO. HIV PROTOCOL, *supra* note 193, at Appendix A. However, the suggested consent form does not discuss required disclosure of HIV-positive test results to the Department of Health. *Id.*

201. Health Omnibus Programs Extension Act, Pub. L. No. 100-607, 102 Stat. 3093 (1988).

202. CDC, VOLUNTARY HIV COUNSELING AND TESTING: FACTS, ISSUES, AND ANSWERS 15 (1991).

Thus, federal and many state laws, excluding Wyoming, require informed consent as a prerequisite to HIV testing. Informed consent is intended to inform the individual considering HIV testing of what testing involves and indicates. Such testing involves risk to the individual's confidentiality if the testing results indicate HIV seropositivity. Informed consent which informs the individual to be tested of this risk to confidentiality assures that procedural due process is met.

Recommended Informed Consent to HIV Testing

Informed consent should be required for all parties who request or are requested to take HIV testing. Informed consent should provide information about what constitutes testing that is adequate to support a diagnosis of HIV seropositivity by discussing the nature and reliability of the HIV tests to be used. It should also outline the process which will be followed to inform the person who is tested of the testing results and what they mean. Informed consent should clearly indicate the exceptions to confidentiality that are imposed by law, such as mandatory public health reporting of HIV-positive testing. Finally, the informed consent form should be in writing and separate.²⁰³

The informed consent form should include *at least* the following:

- (a) an explanation of the test, including its purpose, the meaning of its results, and the benefits of early diagnosis and medical intervention; and
- (b) an explanation of the procedures to be followed, including that the test is voluntary, that consent may be withdrawn at any time, and a statement advising the subject that anonymous testing²⁰⁴ is available; and
- (c) an explanation of the confidentiality protections afforded confidential HIV related information, including the circumstances under which and classes of persons to whom disclosure of such information may be required, authorized or permitted in accordance with other provisions of law or regulation.²⁰⁵

To this end, Wyoming regulations should be amended to include an informed consent provision which requires pre-test counseling and a written informed consent. Pre-test counseling would explain more than what can be included on a written form and would ensure that the person is adequately informed about what HIV testing involves, the risks, and the benefits of testing. Pre-test counseling would also

203. This precaution is recommended to preclude inadvertent consent by means of a general medical consent and allows the patient to realize to what consent clearly applies.

204. Anonymous testing is currently available in Casper and Cheyenne as six month test programs to determine if anonymous testing will increase HIV testing and detection. Interview with Terrance Foley, Wyoming AIDS Prevention Program Director, in Cheyenne, WY (Jan. 31, 1992).

205. N.Y. PUBLIC HEALTH LAW § 2781(2)(c) (McKinney Supp. 1992).

provide a prime opportunity to educate a person who thinks he or she may be at risk of HIV infection. Pre-test counseling could include:

- (1) measures for the prevention of exposure to and the transmission of HIV;
- (2) the accuracy and reliability of testing; and
- (3) the significance of test results, including the required disclosure of HIV-positive results to state public health officers and the potential for AIDS.²⁰⁶

Pre-test counseling and informed written consent are components of procedural due process which are not currently addressed by Wyoming STD law. Lack of procedural due process can result in tort liability of the HCP or others who test individuals for HIV infection without fully informing these individuals to allow them to make informed decisions about their bodies. Adequate informed consent apprises individuals who contemplate HIV testing of the benefits and risks of HIV testing so that they may make their decisions knowledgeably. Inadequate pre-test counseling and inadequate informed consent also educationally short-changes the person who seeks testing. This impedes public health policy since education is an effective tool in preventing the spread of disease. To avoid the pitfalls of inadequate procedural due process and to prevent the spread of disease, Wyoming needs to provide for adequate pre-test counseling and informed consent in its STD regulations.

FLAW: Test Procedures

Wyoming STD law does not provide for minimum standard testing procedures. This allows for varying testing schemes throughout the state which may produce unfortunate results.

Importance of Accurate Testing

In *Brogan v. Kimberly Service*, a private AIDS testing center was sued for inadequately informing a client of testing procedures and the meaning of test results.²⁰⁷ The testing center diagnosed the client as HIV-positive based upon an initial false positive test result²⁰⁸ and, thus, caused the client much anguish.

The consequences of a false diagnosis enormously impact the person who is tested.²⁰⁹ Additionally, false diagnoses can significantly affect public health. False positives inflate the perception of HIV and AIDS infection, arousing public anxiety which may result in measures

206. 42 U.S.C.S § 300dd-32(a) (Law. Coop. 1991).

207. *False Positive AIDS Test Suit Settled*, TLPJ Q. NEWSLETTER, Winter 1991, at 3 (case settled before trial).

208. *Id.*

209. *Id.*

that do not most effectively combat the spread of HIV. A prime example of this is the currently popular demand for mandatory HIV testing of HCPs and HCWs which is scientifically unsupported because it is too costly for the benefits derived.²¹⁰ On the other hand, false negatives understate the incidence of HIV and AIDS infection which prevents infectious individuals from being influenced by knowledge of their HIV seropositivity. Consequently, infected individuals may continue to engage in behavior which puts others at risk of HIV infection. As previously discussed, the tests currently available are not 100 percent accurate, nor do they test directly for HIV.²¹¹ Consequently, false diagnoses do occur.

STD law should take test accuracy into account and include measures to minimize the likelihood of false diagnoses which would lessen the negative impact of false diagnoses on individuals as well as the public. Such measures can be easily incorporated into regulatory law.

Wyoming Law

Currently, Wyoming STD law does not make any provision for defining test procedures for accurate diagnosis of HIV or AIDS. Statutory STD law does not address test procedures.²¹² Nor do Wyoming AIDS/HIV regulations provide any illustration of recommended procedures to define adequately an accurate positive HIV or AIDS diagnosis.²¹³

Regulatory provisions should be adopted to provide for minimum standard testing procedures. The provision for testing procedures should also provide for future changes in technology when more accurate tests are available.

Recommendation

The HIV test procedure to be used should be outlined in the Wyoming STD regulations and should provide for maximum accurate diagnosis. It is especially important that a complete and accurate testing scheme be undertaken and completed prior to informing an individual that he is HIV-positive and prior to reporting to public health officers that here is an HIV-positive case. Due to the evolving nature of technology, the test should be periodically updated to stay within current technology. As an illustration, the current standard involves testing a single blood sample drawn from a test subject. Two positive ELISA tests must be followed by a positive confirmatory test

210. See generally *Testing for AIDS*, *supra* note 62.

211. *Id.* at 39-43.

212. See generally WYO. STAT. §§ 35-4-101 to -138 (Supp. 1991).

213. Wyo. AIDS/HIV Regs ch. 1, § 2(y) (1991) defines "positive test result" to be "a test that concludes a person is infected with a sexually transmitted disease" without further elaboration.

(such as Western blot or IFA) on the same blood sample before an HIV-positive diagnosis can be made.²¹⁴ Another possibility is to incorporate current standard testing schemes by reference, such as the current AMA guidelines.²¹⁵ Then if the referenced testing scheme changes, the Wyoming testing scheme would also change.

Testing inaccuracies can impact individuals enormously and affect public health policy negatively. Inaccuracy is inherent in HIV tests currently used. However, regulatory law on STD can and should provide for minimum standard testing procedures to minimize false HIV diagnoses. Wyoming STD regulations currently do not provide for a minimum standard testing procedure and should be amended to make such a provision.

FLAW: Post-test Counseling

Importance of Post-test Counseling

Post-test counseling informs the patient of his test results, including test reliability and what the results mean. The post-test session also provides a prime opportunity for counseling the patient about AIDS/HIV and behavior modifications which may be indicated, regardless of how the test turned out.

Education of the public, especially that segment of the public which is at risk of HIV infection, is necessary to combat the spread of HIV.²¹⁶ HIV infection spreads when infected persons and their contacts engage in behavior which puts them at risk of transmitting HIV. Post-test counseling is an opportunity to educate individuals who are concerned enough about their HIV status to undergo testing and may induce them to avoid at-risk behavior.

Applicable Law

Wyoming law, statutory and regulatory, is silent as to post-test counseling, although federally funded Wyoming counseling and testing sites have regulations which require results to be given to patients face-to-face along with counseling.²¹⁷

This post-test conference provides for an opportunity for a private explanation of test results. It also permits HIV-positive persons to absorb the probability of their infectiousness to others and the importance of providing information to their contacts. Such counseling permits HIV-negative persons to understand test limitations and be counseled on ways of reducing risk of HIV transmission to

214. WYO. HIV PROTOCOL, *supra* note 193.

215. AMA GUIDELINES, *supra* note 60, at 8-10.

216. *Politics of AIDS*, *supra* note 41, at 1024.

217. WYO. HIV PROTOCOL, *supra* note 193, at 4; 42 U.S.C.S. §§ 300dd-32(b),(c) (Law. Coop. 1991).

themselves.²¹⁸

Some states have recognized the value of post-testing counseling and require it in their STD laws. As examples, Pennsylvania,²¹⁹ Florida,²²⁰ and New York²²¹ require post-test counseling.

Recommendations

In order to derive the benefits of post-test counseling in the HIV context, Wyoming regulations should be amended to require post-testing counseling. This would allow the tested individual to be informed of his test results adequately and be provided with appropriate information. Additionally, post-test counseling should be required in order to make full use of the opportunity to educate the tested individual on the importance of behavioral changes which minimize HIV transmission.

If the patient is diagnosed HIV-positive, the patient should be informed of the nature of the disease, referred to available physicians, and offered referral to mental health providers for psychological support and to social work providers and support resources. The patient should be reminded of the reporting requirements to public health agencies and advised to expect follow-up from public health officials for contact tracing. Additionally, the patient should be educated as to behavioral precautions to follow in order to prevent HIV transmission to others and counselled on the need to inform his contacts.

If the patient is diagnosed HIV-negative, the counselor should discuss the nature of the disease, what constitutes high risk behavior and whether later follow-through testing is recommended. The counselor should take this ideal educational opportunity to outline behavioral safeguards which should be followed to prevent HIV transmission.

Pennsylvania statutes provide a sample post-test counseling provision:

- (1) No positive or negative test result shall be revealed to the subject without affording the subject the immediate opportunity for individual, face-to-face counseling about:
 - (i) The significance of the test results;
 - (ii) Measures for the prevention of the HIV transmission;
 - (iii) The benefits of locating and counseling any individual by whom the subject may have been exposed to HIV and the availability of any services with respect to locating and counseling such individual;

218. 42 U.S.C.S. §§ 300dd-32(b), (c) (Law. Coop. 1991).

219. 35 PA. CONS. STAT. ANN. § 7605(e) (Supp. 1991).

220. FLA. STAT. ANN. § 381.004(3)(e) (West Supp. 1992).

221. N.Y. PUBLIC HEALTH LAW § 2781(5) (McKinney Supp. 1992).

(2) No positive test result shall be revealed to the subject without, in addition to meeting the requirements of paragraph (1), also affording the subject the immediate opportunity for individual, face-to-face counseling about:

- (i) The availability of any appropriate health care services, including mental health care, and appropriate social and support services;
- (ii) The benefits of locating and counseling any individual who the infected subject may have exposed to HIV and the availability of any services with respect to locating and counseling such individual.²²²

Post-test counseling in HIV testing is important to appropriately counsel the tested individual so that he may fully understand the test results and the disease and act accordingly. This is important regardless of whether the HIV test result is negative or positive. Wyoming STD regulations do not make provisions for post-test counseling and, therefore, allow tested individuals, as well as the general public, to miss the benefits of such counseling. Consequently, Wyoming STD regulations should be amended to require post-test counseling.

FLAW: Uniform Minimum Procedures

Currently, procedures for dealing with individuals seeking HIV testing are determined by each HCP or health care facility providing HIV testing in Wyoming. Even though the counseling and testing sites in the state, which are funded through federal grants, operate under a single set of procedures, this protocol has not been adopted by all facilities which provide for HIV testing. Consequently, a patchwork quilt of procedures may well exist statewide to guide HCPs, with the result that some individuals seeking HIV testing may be inadequately informed, tested, and counseled, simply because of whom they turn to for testing.

The lack of a standard protocol statewide may be addressed by amending the Wyoming Department of Health regulations on STD. The regulations should incorporate the recommendations suggested above on informed consent, pre-test counseling, test procedures, and post-test counseling. The Department of Health should also require that all health care facilities, which provide direct patient services and HIV testing, comply with the revised regulations. This would require HCPs or others performing HIV testing to be educated and trained in HIV testing and counseling. Such personnel would then be able to provide effective informed consent (including pre-test counseling) and post-test counseling. Only then can the counseling and educational opportunity associated with testing be used effectively.

222. 35 PA. CONS. STAT. ANN. § 7605(e) (Supp. 1991).

CONCLUSION

The evil that is in the world always comes of ignorance, and good intentions may do as much harm as malevolence, if they lack understanding. On the whole, men are more good than bad; that, however, isn't the real point, but they are more or less ignorant, and it is this that we call vice or virtue²²³

[N]ow that plague was among us, it was up to them to do whatever could be done to fight it. Since plague became in this way some men's duty, it revealed itself as what it really was; that is, the concern of all.²²⁴

The HIV epidemic is an alarming phenomenon, and indications are that the worst is yet to come.²²⁵ Wyoming is not immune from its ravages and will surely be affected more severely in the future.²²⁶ Public health laws must be amended to effectively promote the public health policies, to prevent the spread of disease, to protect life, and to promote health.

Wyoming law requires HCPs to operate under a duty of confidentiality, while concurrently requiring HCPs to operate under a duty of disclosure. While treating patients for STD, HCPs must maintain patient confidentiality. Yet, HCPs must also warn third party HCWs, whom they reasonably think to be at risk of HIV infection, about their STD patients. However, inadequate guidelines exist for determining when and to what extent the duty to warn exists, so that HCPs cannot determine how to reconcile the conflict between their legal duties. Furthermore, Wyoming STD law is flawed due to the lack of flesh on the regulatory skeleton as regards informed consent, pre-test counseling, testing procedures, post-test counseling, and uniform minimum STD procedures.

Consequently, Wyoming law should be amended to allow the duty to warn to be discretionary. The State Department of Health regulations should be amended to flesh out provisions and require: use of universal precautions by health care providers and emergency service providers; use of informed consent, including pre-test counseling; use

223. ALBERT CAMUS, *THE PLAGUE* 120 (Stuart Gilbert trans.) (1977).

224. *Id.* at 121.

225. It took nine years for the first 100,000 AIDS cases to develop. In only twenty-six months following that period, the second 100,000 cases have developed. It is estimated that there are 1.5 to 2 million HIV seropositive individuals in the U.S. population who have not yet manifested AIDS symptoms. HIV/AIDS SURVEILLANCE, *supra* note 3.

226. Sexually active teenagers are a potential reservoir of HIV seropositive individuals who may not be practicing "safe sex" and may increase the future number of AIDS cases through heterosexual and perinatal transmission. C. Kreck, *HIV Set to Spread Among Area Teens*, *THE DENVER POST*, Dec. 29, 1991, at 1; *Survey: Teens Worry About AIDS, But Don't Change Sexual Habits*, *THE CASPER STAR-TRIBUNE*, Feb. 19, 1992, at A2.

of post-test counseling; and compliance with Department of Health STD regulations as minimum uniform procedures for Wyoming health care facilities which provide HIV testing as part of their direct patient services.

Amending Wyoming law in this manner will promote the public health policy of preventing STD spread, while reducing the tension between the HCP's duty of confidentiality and duty of disclosure. The requirement of universal precautions will reduce the risk of HIV exposure during contacts between HCWs and patients to an insignificant degree, so that HCPs will not have much need to warn HCWs of significant risk to HIV infection. The requirement of a standard protocol of uniform, minimum procedures for informed consent, pre-test counseling, testing, and post-test counseling will standardize HIV testing statewide and also maximize the opportunity to educate individuals who undergo HIV testing to act accordingly and knowledgeably to reduce the risk of HIV transmission.

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